

The Mapuche people's battle for
indigenous land:
Possibilities for litigating on indigenous land rights

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Abstract

Land is the foundation for the economic sustenance of indigenous peoples and for the continued survival of their cultures. One of the major problems faced by indigenous peoples is the dispossession of their traditional lands and territories. The activities of business interests and economic development projects in indigenous territories – such as forest logging and infrastructure projects - and the environmental implications of such activities, often constitute a great threat to the livelihoods of indigenous peoples. Securing rights to land and natural resources therefore remains a priority issue.

The thesis examines the situation of the Mapuche people in Chile with respect to their rights to land, territories and resources, and discusses the role of litigation as a strategy to defend these rights. Litigation is seen as part of a broader strategy comprising political mobilisation and legal mobilisation, and the paper focuses on the interaction of these strategies in the Mapuche's struggle to defend their rights to land. The success of litigation depends on factors impacting on the *voicing* of land rights claims and courts' *responsiveness* to such claims. A major problem regarding the Mapuche's possibilities for redress through courts is the low status of international legal instruments on indigenous rights and the insufficiency of national legislation on indigenous peoples' land rights. The formalities of the legal system provide a disincentive towards pursuing a legal strategy. Lack of confidence in the judiciary and perceptions of racism are other barriers. Other problems relate to the legal culture, composition of the bench, conservatism and insensitivity towards the rights of indigenous people.

The focus of the thesis is a case involving the construction of a hydroelectric dam on the Bío Bío River in Southern Chile, causing the forced relocation of 500 people pertaining to Mapuche-Pehuenche communities and the flooding of their ancestral lands. This case is only one of many environmental conflicts in which the land rights of the Mapuche have been violated. In this case, litigation proved to be unsuccessful in the sense that the most of the lawsuits filed by the Mapuche litigants were ultimately lost, and construction on the dam was completed. However, the value of litigation as a strategy may be assessed in terms of the broader impact it had on Mapuche mobilisation and on public debate.

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1. INTRODUCTION

Land constitutes the basis for the livelihoods and cultures of indigenous peoples; they rely on access to their traditional lands and natural resources for their economic sustenance as well as for the continued survival of their cultural and spiritual identity. All over the world, indigenous peoples face major problems of dispossession of their ancestral lands and resources. Among the most severe threats to their livelihoods are the activities of business interests and economic development projects in indigenous territories, such as forest logging, large infrastructure projects and mineral exploration, and the consequences these projects have for the environment in their territories.

The deprivation of their land has consequences for the economic well-being and the living conditions of the indigenous: “Indigenous societies in a number of countries are in a state of rapid deterioration and change due in large part to the denial of the rights of the indigenous peoples to lands, territories and resources” (UN Economic and Social Council 2001: 38, par. 123). Indigenous communities are often among the poorest and most marginalised groups of society. Studies on indigenous peoples and poverty in Latin America conclude that “poverty among Latin America’s indigenous population is pervasive and severe [and] the living conditions of the indigenous people are generally abysmal, especially when compared to those of the non-indigenous population” (UN Economic and Social Council 2001: 13, par. 35).

Rights to land and natural resources are thus fundamental to indigenous peoples, and protecting these rights remains one of the central issues for indigenous peoples and organisations. Courts may constitute an arena for mobilising around indigenous land rights, and may play a role in altering the situation of the indigenous with respect to these rights. Indigenous peoples of Latin America increasingly turn to the legal system for the defence of their rights (Sieder 2005: 1). Litigation is one possible strategy to advance the land rights of indigenous peoples, but the possibilities for achieving significant results by means of litigation depend on the accessibility of the judicial system. There are numerous obstacles that may prevent poor and marginalised people from accessing justice, and in Latin America, access to justice is in many cases restricted for these groups. According to Méndez:

“[...] what is most sorely needed in Latin America today is a clear-eyed view of what it will take to make justice a reality for the marginalised, the underprivileged, and the excluded in our midst. The real

problem is that women, children, indigenous people, landless peasants, inmates, the institutionalised, and other similarly deprived sectors of our societies simply do not have access to justice” (1999: 225).

This thesis deals with the issue of indigenous peoples’ land rights and the possibilities for advancing these rights through the legal system. The central argument is that the success of litigation depends on the ability of the indigenous to *voice* their land rights claims into the judicial system, and courts’ *responsiveness* towards such claims. The thesis examines the case of the Mapuche people in Chile, and their possibilities for resolving their land conflicts in the Chilean courts. Specifically, it looks into a case involving the construction of a hydroelectric power dam in Ralco in Southern Chile, an incident that caused the forced resettlement of 500 members of Pehuenche-Mapuche communities and the subsequent flooding of their ancestral territory. I examine the factors impacting on the Mapuche’s ability to voice their claims, and the courts’ response to the legal actions brought in relation to the Ralco case. Litigation is seen as a part of a broader strategy comprising both political mobilisation and legal mobilisation, and I argue that the land rights situation of the Mapuche is influenced by these two mobilisation strategies.

Historical background

According to data from the 2002 census, indigenous peoples constitute 4, 4% of the total population in Chile. Chile’s indigenous population comprises several peoples: Mapuche, Aymara, Colla, Kawéskar, Likanantay (Atacameño), Diaguita, Quechua, Rapa Nui and Yámana. The Mapuche are the most numerous, with a population amounting to 604.349 people, equivalent to 87, 3% of the entire indigenous population (IFHR 2006: 5). As a result of migration generated by poverty and repression, the majority of the Mapuche live in the urban zones, but a significant part of the population also inhabits the people’s ancestral area, which comprises the eighth, ninth and tenth regions of Chile. The Mapuche people are grouped into five large territorial identities: Huenteche, Nagche, Lafkenche, Huilliche and Pehuenche.

Before colonisation, the Mapuche people occupied a vast area extending from the south of Chile to the central zone of the country and the southern part of Argentina. The arrival of the Spanish had severe consequences for the indigenous population, which suffered devastation as a result of territorial wars and diseases. In the area south of the Bío Bío River, the Mapuche resisted Spanish subjection, and for many years maintained political and territorial

independence from the Spanish crown. The autonomy of this area – Araucanía – was recognised through various agreements (*parlamentos*) with the colonial authorities (UFRO 2002: 1). However, in the period after the creation of the Chilean state, the Mapuche's lands, resources and sovereignty were gradually lost. As a result of the military occupation of Araucanía initiated in 1888, which became known as the “pacification of the Araucanía”, the region became integrated into the Chilean state (UN Economic and Social Council 2003: 6). The Mapuche were confined to reservations that all together covered about six percent of their original territory (UFRO 2002: 2). The remaining lands were seized by the Chilean state and distributed to national and European colonies.¹ Similar policies to seize Mapuche lands were pursued by the Argentine state.²

From 1920 and onwards, various laws were dictated that generated the division of Mapuche lands into individual parcels and their subsequent conveyance to non-indigenous people. As many as 832 of the 3.000 existing reservations were divided between 1931 and 1971, and it is estimated that a fifth of Mapuche lands were transferred to non-indigenous people during this period (Aylwin 2002: 6). The state began a process of assimilation, and the division of Mapuche communities served to integrate them into Chilean society. The people's traditional political and social structures were dissolved, and the assimilation policy became a state mechanism for complete control of the Mapuche people (COIT 2005: 2).

The administrations of Eduardo Frei M. (1964 – 1970) and Salvador Allende (1970 – 1973) introduced reforms that had important implications for the Mapuche. On the basis of the agrarian reform, much of the indigenous lands were returned to the communities. This was made possible by a 1966 law that opened for the expropriation of lands that were badly exploited or abandoned. In 1972, the Allende government approved law no. 17.729 establishing that the mechanism of expropriation introduced in the agrarian reform could be used to restore lands to the indigenous (Aylwin 2002: 7). The law also aimed at ending further division of indigenous lands by establishing that division was prohibited without the consent of the absolute majority of community members, or unless the division was grounded on technical reasons.³ As a direct effect of the agrarian reform, a large amount of properties were

¹ The distribution of indigenous land to national and foreign colonies was permitted by a law establishing state ownership of the lands in Araucanía (Aylwin 2002: 5)

² <http://www.hrusa.org/indig/reports/mapuche.htm> Accessed 7 April 2005.

³ The law also created the Institute for Indigenous Development with the purpose of promoting the economic, social and cultural development of the indigenous (Aylwin 2002: 7).

expropriated in the territory of the Mapuche.⁴ Due to pressure from the Mapuche movement and the support from some political sectors, many of these properties were transferred to the indigenous. On the basis of the agrarian reform, approximately 70.000 hectares were conveyed to the Mapuche during 1971 and 1972 (Aylwin 2002: 7).

During the military government under Augusto Pinochet (1973 – 1990), the reforms were reversed and the indigenous lands privatised (UN Economic and Social Council 2003: 7, par. 11). The privatisation of the lands was carried out through a process of regularisation of property, otherwise known as the “counter agrarian reform”, in which lands were parcelled and distributed to peasants, expropriations were annulled and properties were returned to their previous owners. A significant part of the properties were sold to forestry companies at extremely low prices (Aylwin 2002: 8). Laws approved in 1979 were intended to facilitate the transference of indigenous lands, and laid the foundations for the division of nearly all of the communities and reservations into individual plots.⁵ The parcels that were left for the Mapuche after the division of their lands each measured, on average, 6, 4 hectares (Aylwin 2002: 6).

The current situation

As a result of the reduction of their lands, many Mapuche were impoverished and migrated to the urban areas. Today, most of the Mapuche population lives in urban zones, while 20% still remain in the three southern regions that constitute their ancestral territory.⁶ The Mapuche are among the poorest and most marginalised groups in Chilean society, and the rural Mapuche population lives in conditions of extreme poverty. Generally, poverty is widespread among Chile’s indigenous peoples. Statistics from the year 1996 revealed that 35% of the indigenous population was considered poor, as compared to 22, 7% percent of the non-indigenous population. 10, 6% of the indigenous were considered to live in conditions of indigence (UDP 2003: 2).

Among the Mapuche population, 38, 4% are situated below the poverty line, and the incidence of poverty is highest in the eighth region (the Bío Bío region), where 52, 3% of the

⁴ In the provinces of Arauco, Malleco and Cautín, 584 properties were expropriated in the years between 1965 and 1972 (Aylwin 2002: 7).

⁵ Decrees 2568 and 2750 were aimed at ending the special status of the indigenous and their lands by integrating them into the common national legal framework (UFRO 2002: 2).

⁶ According to statistics from the 1992 census (Aylwin 2002: 6).

Mapuche are considered poor (UDP 2003: 2). The situation does not seem to be improving; on the contrary, figures from 2001 revealed a worsening of the Mapuche's economic situation, with the level of poverty amounting to 50% in some of those communes with the highest concentration of Mapuche (IWGIA 2002: 185). The human development index of the Mapuche population is one point lower than that of the non-indigenous population (0, 6 against 0, 7).⁷ Moreover, there is a significant difference between urban and rural Mapuche; the human development index among the urban Mapuche population is 0, 5, compared to 0, 4 among the rural population (UNDP 2003: 21). The average Mapuche income is less than half of that of non-indigenous persons. School attendance among Mapuche children is 2, 4 years less than among non-indigenous persons, and literacy is lower among the Mapuche as compared to the non-indigenous population (88, 6% against 95, 3%) (UNDP 2003: 14).

There is a direct relationship between the incidence of poverty among the Mapuche and the gradual loss of their lands and resources. First, the Mapuche were impoverished as a consequence of the reduction of their lands at the end of the 19th century and the beginning of the 20th century. Second, they have suffered a significant loss of resources, due to both the loss of lands and the degradation of natural resources. Third, globalisation and liberal market economy caused prices to drop on agricultural products traditionally produced by the Mapuche. This severely affected their traditional agriculture, thereby eroding their means of sustenance. Finally, the Mapuche are affected by the expansion of the forestry industry in Southern Chile, which has grave implications for the environment in these areas, such as the drying-up of water sources, permanent droughts, and difficult conditions for agriculture (IFHR 2006: 5 – 6). According to UN Special Rapporteur Stavenhagen, the forestry industry, and the grave consequences this has for the Mapuche's access to lands and resources and for the environment of the area is one of the main reasons for the impoverishment of the Mapuche (UN Economic and Social Council 2003: 10, par. 23).

Forest plantations have expanded rapidly in Mapuche territory during the last thirty years. The reasons for the enormous expansion of the forestry industry in this part of the country are the forestry companies' acquisition of large properties that were expropriated as a result of the counter agrarian reform in the 70's, as well as the subsidies granted by the state in the 1990's, covering about 75% of the costs of the plantations (Aylwin et al 2001: 7 – 8). By the year 2000, plantations of commercial pine and eucalyptus covered an estimated 1.5 million

⁷ The index comprises three dimensions: health, education and income (UNDP 2002: 14).

hectares of ancestral Mapuche territory (HRW/ IPRW 2004: 14). The expansion of plantations has caused many grave problems for the Mapuche communities living in these areas. The planting of exotic tree species has had a number of consequences for the local environment, such as erosion and the drying-up of sources of water. The substitution of native forest with exotic species has led to the decline or loss of woodland fauna and flora. Rivers and streams are contaminated because of the use of herbicides and pesticides, which also affects the health of community members. Access to the woods – and consequentially, access to their means of sustenance – has been reduced, because communal lands have gradually become cut off inside vast forest plantations that are fenced off (UN Economic and Social Council 2003: 10, par.22). At the same time, the companies give nothing back to the communities; they do not pay taxes to the municipalities, nor do they offer many possibilities for employment (Aylwin et al 2001: 8).

Other social conflicts are related to infrastructure projects that affect the human rights situation of the Mapuche, such as road constructions and dam constructions. The construction of a by-pass near Temuco in Araucanía affected numerous Mapuche communities, dividing community and family bonds in some areas (COIT 2005: 18). Similarly, the construction of a coastal highway on the Wapi Island directly affected many Mapuche communities of the Wenteche identity. The building of the Ralco hydroelectric dam on the Bío Bío River forced the resettlement of 500 Mapuche Pehuenche community members. In addition, refuse heaps and wastewater treatment plants located in Mapuche territory cause severe environmental damage and constitute a threat to nearby Mapuche residents (Tricot 2006: 11).

Mapuche protest accelerated during the 1990's, as the communities were increasingly affected by the expansion of road constructions, hydroelectric projects and the forestry industry. The communities have employed various methods in efforts to draw attention to their unjust situation and to exert pressure on the authorities for the protection of their ancestral lands. The activities have involved traditional forms of peaceful protest such as marches and hunger-strikes, but also illegal actions such as occupation of land, road blockings, and setting fire to plantations and forestry vehicles. Illegal actions are brutally struck down upon by the police and the *carabineros* (uniformed police), and Mapuche activists are often met with insulting and racist behavior. The police have been increasingly present in the communities, sometimes using violence and verbal attacks. The police often fail to distinguish non-violent actions of

protest from illegal actions that involve the use of force, and have responded equally hard to both (HRW/ IPRW 2004: 15).

There have been a number of cases of police abuse against Mapuche protesters. During a protest against the construction of the Ralco dam in March 2002, families from the community of Quepuca Ralco participated in a road block in a construction area. Carabineros violently broke up the protest, randomly hitting women, children and elder people. Around fifty protesters were arrested and subsequently presented to the military prosecutor in Chillán (HRW/ IPRW 2004: 15). In December 2001, a thirteen-year-old Mapuche girl was shot and wounded by carabineros returning from a land eviction. In November the following year, seventeen-year-old Alex Lemún died after clashes between Mapuche and carabineros. The young Mapuche boy had participated in an occupation of an estate owned by the forestry company Mininco when he was shot by a carabinero (HRW/ IPRW 2004: 50 – 52).

There have been important government initiatives aimed at improving the situation for the indigenous peoples of Chile. Three years after the return to democracy, law no. 19.253 was adopted, recognising rights that are specific to indigenous peoples. The law established a National Corporation of Indigenous Development, CONADI, and created priority “areas of indigenous development”. CONADI administers an “Indigenous Land and Water Fund” aimed at subsidising the purchase of land for communities with scarce lands, and to finance mechanisms for the solution of conflicts related to land and water (HRW/ IPRW 2004: 12). The Ministry of Development and Planning established the development programme “Origins” with the purpose of improving the conditions and encouraging the development of the Aymara, Atacameño and Mapuche peoples. The administration of Ricardo Lagos (1999 – 2006) launched the Historical Truth and New Deal Commission, with the aim of investigating historical events and making recommendations for new state policy. The commission, led by former president Patricio Aylwin and including various representatives of Chilean society and indigenous peoples, completed its report in October 2003, making proposals for a new deal between indigenous peoples and Chilean society (UN Economic and Social Council 2003: 8, paras. 12 – 15). These are important advances, but that does not overshadow the fact that there is a need for further action, as stressed by the UN Special Rapporteur on the situation of human rights and fundamental freedoms, Rodolfo Stavenhagen:

”The current situation of the indigenous peoples of Chile requires the urgent attention not only of the government but also of all political groups and society in general. Although significant progress has been made on indigenous questions in the country in the last 10 years, indigenous people continue to live in a situation of marginalization and denial that leaves them cut off in significant ways from the rest of the country” (UN Social and Economic Council 2003: par. 56, page 20).

The Ralco case

The perhaps most emblematic case with respect to economic development projects and the violation of the Mapuche’s human rights is the case concerning the construction of the Ralco dam. The Ralco dam was the second of a series of six dams planned to be constructed on the Bío Bío River to meet the electricity demands in the Southern part of Chile. The first dam, Pangué, had already been completed in 1996, despite the opposition from Mapuche organisations and environmentalists, who managed to have the project questioned by the members of the administration, by parliament members, as well as by the courts.⁸

The second dam, Ralco, would cause the flooding of 3.500 hectares of land, and would consequentially force the resettlement of 98 families of Mapuche Pehuenche communities, in all 500 persons (Tricot 2006: 10). In addition to the destruction of their habitat, the construction of the dam would also have implications such as the loss of religious sites and the loss of family and social bonds (Lillo 2002: 4). The dam would have the effect of destroying one of the areas with the highest levels of biodiversity in Chile, and the project therefore met strong resistance from the environmental movement. Pehuenche communities, Mapuche organisations and environmentalists mobilised to prevent the construction of the dam, making public statements and petitions, organising protest actions, such as marches and road blockings, and bringing legal actions. Through these mobilisations, they managed to slow down the process of construction (Aylwin et al 2001: 5).

The process which led to the approval of Ralco was full of irregularities, and the authorities responsible for approving the project, as well as the owner of the project, the private energy company ENDESA, have received harsh criticism for the manner in which they handled the process. The environmental impact study (EIS) required to authorise Ralco was initially rejected by the National Environment Commission, CONAMA (COIT 2005: 13 – 14). CONADI, charged with ensuring the fulfilment of the objectives of the indigenous law, was

⁸ The project was declared illegal by the Concepción Court of Appeals in 1994, but the decision was soon reversed by the Supreme Court (Aylwin et al 2001: 4).

also critical to the project, claiming that it would risk the Pehuenche culture and survival as a people. The government responded to this criticism by firing the two directors of CONADI, as well as two advisors working for the organisation (COIT 2005: 14). The project was initiated without the consent of all the Pehuenche landowners, and some of those who agreed on resettlement were manipulated or pressured to do so.⁹

Structure of thesis

The theoretical background for the study is presented in chapter 2. I provide an overview of relevant international human rights instruments, which constitute the normative background for the study of indigenous peoples' land rights. Furthermore, I discuss the theories that are relevant to the issues of the thesis, including indigenous land rights, access to justice and related aspects. Finally, the chapter presents the framework applied to the analysis and describes the variables that may impact on *voice* and *responsiveness*.

Chapter 3 examines the possibilities of the Mapuche to effectively articulate their concerns and voice them in courts as legal claims. *Voice* is dependent on numerous factors relating to the opportunity situation of the Mapuche, as well as to the nature of the legal system. I find that the Mapuche's ability to voice their land rights claims has primarily been restricted by features of the law and the legal system. The legal framework is insufficient for the protection of indigenous peoples' land rights, and the legal system is characterised by formalities that impede efficiency and the possibilities to achieve results. Practical barriers hamper the Mapuche's access to justice, for instance language creates an obstacle, because many Mapuche do not speak Spanish, and in addition the legal language is complex. Furthermore, the Mapuche's motivation to seek redress through the courts is effected by profound distrust towards the judicial system.

Chapter 4 discusses the *responsiveness* of Chilean courts to the claims raised by the Mapuche. I look into three separate legal actions that were brought by Mapuche communities in the context of the Ralco case and the manner in which the courts responded to these claims. I then

⁹ The director of CONADI, Domingo Namuncura, carried out interviews with the Pehuenche that would be affected by the dam, and concluded that many of the Pehuenche who had signed contracts for land exchange had found themselves in a situation of forced consent, and had no other possibilities than to leave. Others felt that there was no point in resisting, because in the end ENDESA and the government had the power to decide (Lillo 2002: 11 – 15). Interviews with some of those who signed land exchange contracts gave evidence that many of them did not understand the content of the contract. For instance, one interviewee said that: "I don't know how to read or how to write, and in the contract that I signed [...] I put my initials and my wife signed with her fingerprint..." (Lillo 2002: 11).

go on to examine the factors that might influence courts responsiveness to the land rights claims of the Mapuche and that might have affected the courts decision in the three cases brought in relation to Ralco. The formalism and the conservatism inherent in the judicial system might have been a disadvantage to Mapuche litigants. The legal framework for the protection of indigenous land rights is also insufficient at this stage of litigation, because it is rendered ineffective by various sectoral laws that take precedence in conflicts related to natural resources.

Chapter 5 concludes the thesis and sums up the central findings.

2. THEORETICAL BACKGROUND AND FRAMEWORK

This chapter presents the theoretical background and the framework for the analysis. The first section provides a normative background; it gives an overview of the international legal instruments that are relevant to the land rights of indigenous peoples, and examines related concepts and standards. The second part of the chapter presents the theoretical background for the thesis, discussing the aspects that are related to the study of indigenous peoples' land rights and legal mobilisation. The final section presents the framework that serves to structure the analysis and describes all the variables that are considered relevant for the topic of the thesis.

International instruments for the protection of indigenous land rights

On a general level, indigenous peoples' land rights are protected by principles set forth in international human rights conventions.¹⁰ The Universal Declaration on Human Rights, UDHR, is one of the international instruments containing provisions that are relevant for the land rights of indigenous peoples. The declaration asserts that “everyone has the right to own property alone as well as in association with others” and that “no one shall be arbitrarily deprived of his property”. Article 7 states that “all are equal before the law and are entitled without any discrimination to equal protection of the law” and that “all are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination”.

The International Covenant on Civil and Political Rights also applies to the protection of indigenous peoples' land rights:

“In those states in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language” (article 27).

This becomes relevant for indigenous peoples' land rights when general comment 23 on article 26 is added:

¹⁰ For an extensive compilation of legal standards and materials relevant to indigenous lands and resources, see UN Economic and Social Council 2001, E/CN.4/Sub.2/2001/21: 53 – 65.

“(…) one or other aspect of the rights of individuals protected under that article – for example, to enjoy a particular culture – may consist in a way of life which is closely associated with territory and use of its resources. This may particularly be true of members of indigenous communities constituting a minority.”

Apart from these legal standards, indigenous peoples’ land rights are protected by international instruments of a more specific nature. The most important of these are presented below.

ILO Convention no. 169

The ILO (International Labour Organization) Convention concerning Indigenous and Tribal Peoples in Independent Countries (otherwise known as Convention No.169) is among the international instruments containing provisions for the protection of the land right of indigenous peoples. Since its adoption in 1989, the convention has been ratified by 17 countries of which 12 are Latin American; Argentina, Bolivia, Brazil, Colombia, Costa Rica, Ecuador, Guatemala, Honduras, Mexico, Paraguay, Peru and Venezuela.

In ILO Convention no. 169, the term “lands” includes the concept of territory, which covers “the total environment of the areas which the peoples concerned occupy or otherwise use” (art.13.2). The convention addresses the recognition of indigenous peoples’ rights of ownership and possession over lands traditionally occupied by them, and also states that “measures shall be taken in appropriate cases to safeguard the right of the peoples concerned to use lands not exclusively occupied by them, but to which they have traditionally had access for their subsistence and traditional activities” (art. 14.1). It is further added that governments “shall take steps as necessary to identify the lands which the peoples concerned traditionally occupy, and to guarantee effective protection of their rights of ownership and possession” and that “adequate procedures shall be established within the national legal system to resolve land claims by the peoples concerned” (art. 14, no. 2 and 3).

The convention further contains provisions referring to both land rights and territorial rights. Article 15 asserts the protection of indigenous peoples’ rights to “the natural resources pertaining to their lands”, adding that “these rights include the right of these people to participate in the use, management and conservation of these resources” (art. 15.1). In the event that the State retains the ownership of mineral, sub-surface or other resources,

governments shall “establish or maintain procedures through which they shall consult these peoples, with a view to ascertaining whether and to what degree their interests would be prejudiced, before undertaking or permitting any programmes for the exploration or exploitation of such resources pertaining to their lands”, and the peoples shall “wherever possible participate in the benefits of such activities, and shall receive fair compensation for any damages which they may sustain as a result of such activities” (art. 15.2).

The convention establishes as a general principle that indigenous peoples “shall not be removed from the lands which they occupy” (art. 16.1). In exceptional cases in which relocation is considered necessary, “such relocation shall take place only within their free and informed consent”, and in cases in which consent is not obtained, “such relocation shall take place only following appropriate procedures established by national laws and regulations (...) which provide the opportunity for effective representation of the peoples concerned” (art. 16.2). Furthermore, in cases of relocation, the peoples concerned shall be “provided in all possible cases with lands of quality and legal status at least equal to that of the lands previously occupied by them” (art. 16.4).

Draft UN Declaration on the Rights of Indigenous Peoples

Work on a draft declaration on the rights of indigenous peoples began in 1985, and was adopted by the Sub-Commission on the Prevention of Discrimination and Protection of Minorities in 1994. In 1995, the UN Commission on Human Rights established an inter-sessional Working Group with the purpose of preparing the consideration and adoption of the declaration by the General Assembly. The Working Group on the draft declaration is composed by representatives of Member States, but NGOs and indigenous organizations also participate in the meetings.¹¹

Much like the principles laid down in article 16 of ILO Convention no. 169, the UN Draft Declaration establishes that “indigenous peoples shall not be forcibly removed from their lands and territories”, and that “no relocation shall take place without the free and informed consent of the indigenous peoples concerned (...)” (art. 10). The declaration recognizes indigenous peoples’ right to “maintain and strengthen their distinctive spiritual and material relationship

¹¹ <http://www.galdu.org/english/index.php?bajitvsladja=48&bajitvsladja=56> Accessed March 3 2006

with the lands, territories, waters and coastal seas and other resources which they have traditionally owned or otherwise occupied or used (...)" (art. 25).

Article 26 of the declaration contains provisions for the ownership and control of indigenous peoples' lands and territories: "Indigenous peoples have the right to own, develop, control and use the lands and territories, including the total environment of the lands, air, waters, coastal seas, sea-ice, flora and fauna and other resources which they have traditionally owned or otherwise occupied or used. This includes the right to full recognition of their laws, traditions and customs, land-tenure systems and institutions for the development and management of resources, and the right to effective measures by the State to prevent any interference with, alienation of or encroachment upon these rights".

Furthermore, the declaration asserts indigenous peoples' right to the "restitution of the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, occupied, used or damaged without their free and informed consent" and the right to just and fair compensation where restitution is not possible (art. 27). It also recognizes indigenous peoples' right to the "conservation, restoration and protection of the total environment and the productive capacity of their lands, territories and resources, as well as the assistance for this purpose from States and through international cooperation" (art. 28).

The rights to self-determination and autonomy are closely related to the issue of ownership and management of territories, and article 31 of the declaration states that "indigenous peoples, as a specific form of exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, including culture, religion, education, information, media, health, housing, employment, social welfare, economic activities, land and resource management, environment and entry by non-members, as well as ways and means for financing these autonomous functions".

If and when the UN Draft Declaration is adopted, it will probably be the most comprehensive international declaration on the rights of indigenous peoples. The declaration exceeds all other international legal instruments in terms of envisioning indigenous peoples' collective rights. It is an all-inclusive statement that recognizes these peoples' distinctive material and spiritual relationship with their lands, and covers the rights to land, territory and resources, as well as

the total environment within the territories of the peoples concerned. Once adopted, the declaration will serve as an important normative instrument that will have a strong impact on the debate.

Proposed Inter-American declaration on the rights of indigenous peoples

The Inter-American Commission on Human Rights of the Organisation of American States (OAS) has elaborated a proposed declaration on the rights of indigenous peoples. Concerning the right to ownership, the proposed Inter-American declaration maintains that they have the right to “the recognition of their property and ownership rights with the respect to lands, territories and resources they have historically occupied, as well as to the use of those to which they have historically had access for their traditional activities and livelihood” (art. 18. 2). In cases where indigenous peoples’ property and user rights “arise from rights existing prior to the creation of those States, the States shall recognize the titles of indigenous peoples relative thereto as permanent, exclusive, inalienable, imprescriptible and indefeasible” (art. 18. 3). The declaration adds that indigenous peoples have the right to “an effective legal framework for the protection of their rights with respect to the natural resources on their lands, including the ability to use, manage and conserve such resources; and with respect to traditional uses of their lands, interests in lands, and resources, such as subsistence” (art. 18. 4).

Indigenous peoples also have the right to “the restitution of the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, occupied, used or damaged”, or when restitution is not possible, “the right to compensation on a basis not less favourable than the standard of international law” (art. 18. 7). The declaration also stresses the right to environmental protection, stating that indigenous peoples have the right to be informed of measures which will affect their environment, including information that ensures their effective participation in actions and policies that might affect it” (art. 13. 2). On the issue of autonomy, the declaration states that indigenous peoples have the right to “freely determine their political status and freely pursue their economic, social, spiritual and cultural development, and are therefore entitled to autonomy or self-government (....)” (art. 15.1).

Even though the declarations of the UN and OAS have not yet been adopted, they have contributed immensely to the debate on indigenous peoples’ rights to land, territory, resources

and autonomy (Aylwin 2002: 23). The declarations present a significant advancement in the protection and promotion of indigenous peoples' rights, and have inspired transformations in national legal frameworks with respect to such rights.

Theoretical background

The topic of this thesis, the defence of indigenous peoples' land rights in the judicial system, relates to a wide range of interconnected subjects; indigenous rights to land, access to justice, and related aspects such as legal pluralism and public interest litigation. The possibilities for claiming one's rights in the legal system depend on factors impacting on access to justice. Indigenous people's access may be enhanced by legal pluralism and public interest litigation. These issues are outlined in the following sections.

Indigenous rights to land

ILO convention 169, the UN draft declaration and the proposed inter-American declaration all emphasize the distinctive nature of the relationship between indigenous peoples and their lands, territories and resources. Indigenous societies rely on access to their lands not only for their economic sustenance, but also for the continued survival of their cultural and spiritual traditions. Indeed, indigenous peoples' profound relationships to their ancestral territories constitute the basis for their cultural identities.¹² This has been stressed by, among others, former Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous peoples, José R. Martínez Cobo:

“It is essential to know and understand the deeply spiritual special relationship between indigenous peoples and their land as basic to their existence as such and to all their beliefs, customs, traditions and culture (.....) for such peoples, the land is not merely a possession and a means of production. The entire relationship between the spiritual life of indigenous peoples and Mother Earth, and their land, has a great many deep-seated implications. Their land is not a commodity which can be acquired, but a material element to be enjoyed freely” (Martinez Cobo 1986).

His successor, Special Rapporteur Erica-Irene Daes, outlined four elements unique to indigenous peoples: (1) A profound relationship to their lands, territories and resources, (2) the social, cultural, spiritual, economic and political dimensions and responsibilities of this relationship, (3) the collective dimension of the relationship, and (4) the importance of the

¹² See, for instance, Daes 2001.

intergenerational aspect of such a relationship for indigenous peoples' identity, survival and cultural viability (Daes 2001: 9).

For indigenous peoples, their lands, the resources within, the waters and the total environment are central to their culture and their way of life. The case of the Mapuche is emblematic in this respect. The name of the people itself gives an indication of their strong relationship with their lands: Mapuche means people (*che*) of the earth (*mapu*). Thus, this profound relationship constitutes the basis of their very *identity*.

Indigenous peoples all over the world have struggled against dispossession of their traditional lands and territories from the time of colonisation and continuing to this day. The consequences have in many places been the assimilation or the extinction of indigenous cultures (IWGIA 2004: 1). The activities of business interests and economic development projects in indigenous territories, and the environmental implications of such activities, often have severe consequences for the lives of indigenous peoples. Securing rights to land and natural resources therefore remains a priority issue, and in the past decades mobilisation has increased among indigenous communities around the world to secure their rights to land.

Access to justice

Legal mobilisation is one possible strategy for the defence of indigenous peoples' land rights, but the potential of this strategy depends on the accessibility of the justice system. Access to justice is an important issue with respect to disadvantaged groups, such as minorities or indigenous people, because "[a]ccess is not only central to the realisation of constitutionally guaranteed rights, but also to the broader goals of development and poverty reduction" (Anderson 2003: 1). However, justice is not as easily accessed for the disadvantaged as it is for the well-resourced. Poor and marginalised groups seeking justice often have to overcome multiple barriers.

According to Abregú (2001), some of the barriers that impede access to justice for disadvantaged groups are operational obstacles, which are problems relating to the efficiency and effectiveness of the judicial system (2001:4). Among these obstacles are the lack of coordination and planning in the administration of justice, and the insufficiencies of legal aid services, leading to a growing unprotected social sector. The legal aid services have a very specific approach, oriented towards protecting only some rights, and their offices are usually

located in downtown areas, less accessible to people living outside town. Access to, and the quality of legal assistance in many cases depends on the ability to pay lawyer's fees. Public defence has been directed at criminal cases and has thus been inefficient in dealing with other cases.

Other obstacles are structural and concern "the very basic forms of societal organisation" (2001: 5). Abregú mentions three major structural problems:

1) "Barricades" created by the judiciary, such as

- the location of courts (downtown locations),
- the design of judicial buildings and tribunals (unfamiliar and threatening to many),
- the "legal" language, which is complex and many times incomprehensible, and
- the reification of the users of the judicial system (clients are depersonalised in the sense that they are reduced to either "accused" or "victims").

2) The vulnerability of poor people. Since poor people are beneficiaries of social programmes, they are afraid to confront the State, because they feel this might cause them to lose their benefits.

3) The lack of awareness among vulnerable groups of the possibilities for claiming their rights. Some people may not even be aware of their basic civil and political rights, while others, as Abregú puts it, "consider social rights, generally speaking, as non-justiciable, political gifts" (2001: 8).

Gargarella (2002) examines some of the main problems faced by poor people when seeking access to justice. One of the major obstacles facing the poor is lack of information. Poor and marginalised groups usually lack information about their legal rights and the possibilities for claiming them. The economic costs related to court fees, legal representation and travelling to and from court constitute a barrier for many. Corruption is a widespread problem in many regions, and leads to the perception that justice is ineffective and less attainable for the disadvantaged, because it requires additional costs in form of bribes. Excessive formalism in the administration of justice constitutes a disincentive to seeking redress through courts, because bureaucratic procedures and the complexity of the legal language reinforce the impression that justice is not for all (2002: 4). Problems of corruption and formalism contribute to fear and mistrust towards the legal system among the poor. Fear and mistrust might also be grounded on a tendency among some poor and marginalised groups to fear different kinds of abuse of authority. Delays are common in court, and result from lack of

judges, heavy workloads, inadequate equipment and assistance, and in some cases lack of concern for the needs of poor people. The location of the courts was pointed out by Abregú as one of the problems facing poor people seeking justice. Similarly, Gargarella stresses the negative impact of geographical distance on access to justice. Courts are usually located in the large cities, and are thus less accessible for poor people living in rural areas. Not only do travel costs constitute a problem; the emotional costs of travelling to the unfamiliar environment of a large city may be a significant hindrance to some people (2002: 5).

In addition to the factors described above, Gargarella argues that one of the major obstacles to access for the underprivileged lies in the very nature of the legal system, and regards the social distance between the judges and the people. This distance has made poor people less confident in the legal system, and has made judges more insensitive to the concerns of the poor. Lack of pluralism has a negative impact on how the courts relate to the disadvantaged; the judicial system must reflect the diversity of society and include representatives from various social sectors in order to exercise impartiality and also give decisions that are fair with respect to the social minorities of the society. The result of judges' insensitivity towards the poor is a tendency to favour decisions that undermine social rights and social protest, thus aggravating the problem of access to justice. As will be explained in chapter three, this is particularly the case in Chile.

Anderson (2003) finds that some of the problems facing the poor in their attempts to access the court system are related to institutional obstacles to legal accountability.¹³ The legal system is generally more responsive to the concerns of poor people when courts are constitutionally protected (when constitutions contain provisions that regulate the exercise of government power), judiciaries are independent, and when laws are framed in favour of the poor. Furthermore, access to justice for the poor depends on various social and economic factors (2003: 16 – 20). The poor are often reluctant to use the law, because of mistrust towards the legal system. Many disadvantaged consider the legal system as a tool which the rich and powerful may use against them. Another reason for avoiding the law is related to

¹³ The accountability function of the judicial system is to constrain the power of the other branches of government. The judiciary is a key institution with respect to exercising the function of legal accountability, and its role lies in checking against excessive use of executive and legislative power. Accountability is according to Domingo “one aspect of rule of law, by which public officers are made answerable for their actions within a pre-established legal and constitutional framework that sets the limits and powers of state agencies and government organs” (1999). Domingo explains how rule of law refers both to the control mechanisms, embodied in a written constitution, that limit the action of the state and the power holders, and to the meaningful protection of certain rights (1999: 152 – 153).

language; the official law is often expressed in a language foreign to poor people. For instance, English is the official language of the law in India, Kenya and the Solomon Islands, despite the fact that only a small percentage of the population in these jurisdictions can speak English.

Other factors that may impact on poor people's access are lack of legal information and inadequate legal representation. Delays are common in the justice system, but constitute a severe problem to poor people, who usually turn to the courts in situations where their very livelihoods are at risk. Anderson suggests a number of legal reforms to enhance the effectiveness of judicial processes in the protection against abuse of power; eliminating laws that are anti-poor biased, modifying legal procedures in order to increase access for individuals and NGOs, and reducing legal technicalities and the complexity of legal language (2003: 23). Among the reforms of legal procedures, reforms that facilitate public interest and class action litigation may have a positive impact.

Public interest litigation

Public interest litigation is increasingly used as a strategy to improve conditions for disadvantaged groups and as an instrument for social change. According to Gloppen, the term refers to "various legal actions taken to establish a legal principle or right that is of public importance and aimed at social transformation" (2005: 2). The purpose of public interest litigation is to "use the courts to help produce systemic policy change in society on behalf of individuals who are members of groups that are underrepresented or disadvantaged – women, the poor, and ethnic and religious minorities" (Hershkoff et al 2000: 284). It is oriented towards group representation; legal actions are taken to vindicate the rights of not only the litigants, but all similarly situated (Gloppen 2005: 2).

Public interest litigation can serve to increase public awareness of human rights, educate the public on rights and legal possibilities and encourage victims of rights violations to seek redress through the judicial system. Litigation based on international law may produce norms and principles for national courts to follow. It has great potential as a strategy for furthering the cause of poor and marginalised groups, and is seen as "a channel through which the voice of the poor can be articulated into the legal-political system, and as a mechanism to make the state more responsive and accountable to their rights" (Gloppen 2005:1).

Legal pluralism

Minorities and indigenous peoples have traditionally had their own normative systems that comprise rules for the social interaction in their societies. These sets of norms or normative systems constitute a legal system in the sense that they serve as a basis for resolving conflicts and organising the internal order of the society (Riquelme 2001: 52). Legal pluralism is the coexistence of various normative systems in a multicultural state, and it requires the legal recognition of cultural diversity. Most Latin-American countries recognise (to varying degrees) indigenous customary law in their constitutions or laws.

Some states recognise customary law as a basis for a valid legal system. Others disregard customary systems, and recognise only the formal legal system of the state. Where this is the case, indigenous people and minorities seeking justice are often faced with a system that is unfamiliar, complicated and sometimes incomprehensible. Customary legal systems are usually more accessible to minorities and indigenous people; they are closer, they are commonly oral, operate in the indigenous people's own language, and they reflect their norms and values. Indigenous people and minorities usually have greater confidence in traditional legal systems than in state systems.

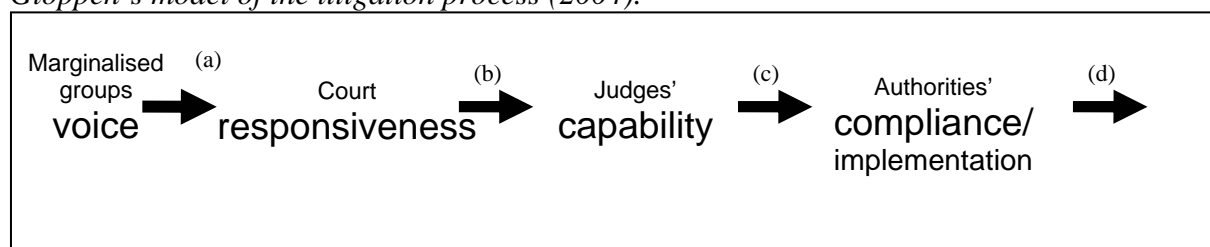
According to Chirayath, state systems lack legitimacy, because they are often seen as “vehicles for elite political or economic interests, with fragile institutions and lack of an empowered citizenry in many developing countries leaving institutions open to corruption and elite capture” (2005: 5). Lack of legitimacy constitutes a disincentive towards seeking redress through the formal legal system, as explained by Gloppen: “When the law and the legal system lack legitimacy – because it is perceived as a tool of domination, or at odds with socially entrenched customary law – it affects the motivation for turning to the state for support” (2005: 5). Elements of customary law and customary systems are sometimes integrated into the state system, but it is more common that where traditional systems are recognized, they operate independently of the formal system (Chirayath 2005: 3). Legal pluralism may reduce some of the barriers facing minorities or marginalized groups – practical barriers, but also motivational barriers, because the recognition of customary law and traditional normative systems increases their confidence in the judicial system and the motivation to turn to this system for the defence of their rights.

Framework

The theoretical framework applied to structure the analysis is the framework summarized in Siri Gloppen's article "Courts and Social Transformation: an Analytical Framework".¹⁴ The framework serves both as a basis for broad case comparisons and more narrow in-depth case-studies. It is used to explore the role of courts in enforcing the social rights of poor and marginalised groups, and to explain the differences in courts' responsiveness to the concerns of these groups. It is also relevant here to explore the dynamics of legal mobilisation.

Four crucial aspects or stages of the litigation process are explored to analyse the role of the courts in social transformation: a) *voice*; the ability of marginalised groups to voice their claims, b) *responsiveness*; the willingness of courts to respond to their claims, c) judges' *capability*; their ability to give legal effect to social rights, and finally d) *compliance*; whether judgements are authoritative and implemented. Here, the framework will be employed to analyse the role of the courts in enforcing the land rights of the Mapuche people. The analysis draws from the variables in the framework as well as the theoretical background presented above. However, I will only focus on the *voicing* of Mapuche land rights claims and courts *responsiveness* to such claims. The variables *capability* and *compliance* are not included in the analysis, because, as will be explained in the following chapters, very few cases have been decided in favour of the Mapuche in Chile. Hence, there is little basis for analysing judges' capabilities and authorities' compliance with judgements. The figure below illustrates the litigation process.

Gloppen's model of the litigation process (2004).



a) social rights cases brought to court; **(b)** cases accepted by the courts; **(c)** judgements giving effect to social rights; **(d)** transformation effect (impact on provision of social rights/inclusion of marginalised groups)

¹⁴ The framework is also presented in Gloppen 2003, and a similar version in Gloppen 2005. For discussions on the challenges related to the articulation of rights claims, see Gargarella 2002.

The dependent variable

Gloppen's framework analyses the impact of courts on social transformation. Social transformation is defined as "the altering of structured inequalities and power relations in society in ways that reduce the weight of morally irrelevant circumstances, such as socioeconomic status/class, gender, race, religion or sexual orientation".¹⁵ The dependent variable, courts' "transformation potential", can be defined as "the contribution to the altering of such structured inequalities and power relations" (Gloppen 2004: 4). The concept refers to courts' role in the social inclusion of vulnerable groups, and in many cases indigenous peoples are among the most vulnerable.

The framework will be operationalised in accordance with the purpose of this analysis, which is to study the Mapuche peoples' possibilities for litigation in cases related to land rights, and Chilean courts' responses to such litigation. Hence, the operational definition of 'transformation potential' in this analysis will be somewhat narrower, relating to a more specific set of rights: indigenous peoples' land rights. 'Transformation potential' as cited above referred to the courts' impact on social transformation. Here, the dependent variable will refer to the courts' impact on the Mapuches' land rights situation. The primary indicators will be the occurrence and significance of judgements related to land rights.

The litigation process

Voice and *responsiveness* are the first two stages of the litigation process. Variations at these stages have an impact on the courts' transformation performance. However, both stages are the result of a number of other factors, and can therefore be regarded as intermediary variables or nexuses. For both of the nexuses, there is a sub-set of factors that condition the overall 'score'; factors that affect indigenous people's ability to voice their claims and factors that affect courts' responsiveness. These factors combine to determine the outcome at both stages, and constitute the independent variables in the framework. In the next sections, I will give an outline of the first two stages of the litigation process and the conditioning factors for both of them.

¹⁵ Defined by Roberto Gargarella, cited in Gloppen 2004: 4.

Voice

The first stage of the litigation process regards the ability of indigenous groups to articulate their concerns and effectively voice their claims in court. The voicing of legal claims by, or on behalf of the people whose rights are violated depends on a whole range of factors.

Awareness is a precondition for poor people to be able to effectively voice their claims. Abregú pointed at the fact that victims of rights violations sometimes are not aware of their rights and the possibilities for redress through courts. A number of factors may increase their awareness, such as legal literacy and rights awareness programmes and the existence of organisations mobilising around social rights issues. Furthermore, human rights education and a general focus on the rights of indigenous people in the media are factors that contribute to knowledge and awareness.

To be able to claim their rights through litigation, indigenous groups must overcome a number of barriers. Some of these barriers are practical, such as the economic costs of taking a case to court. As explained by Gargarella above, the geographical distance may be a discouraging factor. Courts are usually located in the capital or in the large cities, while indigenous people often live in remote rural areas. To them, travelling costs may be a barrier to seeking redress through courts. Lawsuits are also usually time-consuming, and a related aspect is whether one can afford the loss of income. Other practical barriers are language and lack of information. Indigenous people are often not fluent in the national language and in addition the legal language is complex, sometimes incomprehensible. Together with the lack of knowledge about the legal system, this contributes to making the justice system less accessible for the disadvantaged.

Other barriers to seeking justice are motivational. Social and cultural distance between the victims and the judges causes fear and mistrust of the justice system. As pointed out by Gargarella (2002: 4), the victims may abstain from pursuing legal action out of fear of humiliation or prejudice, or fear of judges ruling on class position. In some countries, indigenous people regard statutory law and the courts administering it as an instrument for the rich and powerful against the disadvantaged. In some cases this also leads to a demand by indigenous people for recognition of their customary legal norms and legal pluralism. The recognition of customary law increases indigenous people's confidence in the judicial system. If they regard the norms of the state system as unjust, and their own legal norms are not

recognised, their motivation to claim their rights through the formal system is significantly reduced.

Negative prior experience with, or negative perceptions about the judicial system may also prevent poor people from claiming their rights in court. Delays are common in court due to a lack of judges, heavy workloads, administration inefficiencies and bureaucratic court procedures. Corruption in the legal system leads not only to perceptions of ineffectiveness, but also generates a belief that justice is only attainable for wealthy people, because a successful outcome often is guaranteed by paying bribes. The motivation to take a case to court also depends on the degree to which people find the courts legitimate and whether or not they believe the decision will have any relevance.

Access to the justice system further depends on the nature of the legal system. The legal basis for litigating indigenous land rights claims- whether international norms on indigenous rights have a status as justiciable rights- is of particular importance. The degree of bureaucracy and formalism influences the ability to voice ones rights-claims in court; a slow judicial system and detailed formal procedures create a disincentive to pursue a legal strategy. Another important matter is the criteria for *locus standi*, (who is qualified to take a case to court), particularly the possibilities for class action and whether an individual or an organization can litigate on behalf of others (Gloppen 2004: 12).

Access to various resources may help indigenous groups to overcome the multiple barriers facing them, and enable them to effectively articulate their claims. Associative capacity is an important variable in this respect. By forming associations that can create a common identity and solidarity, effectively mobilize around indigenous land rights claims and generate expertise and financial resources, indigenous groups are better prepared to voice their claims through the judiciary. In the sections above, Abregú stressed the importance that legal aid had for access to justice for disadvantaged groups. The availability and quality of legal aid is a particularly relevant factor. The extent to which poor people can receive free or affordable legal assistance, either through public legal aid schemes, or by legal organizations, is critical.

Responsiveness

Successful litigation on indigenous rights requires the willingness and ability of courts to respond to the claims that are voiced. The responsiveness of the judicial system depends, first

of all, on the output of the first stage of the litigation process- the strength of “voice”. Thus, responsiveness depends on how effectively the legal claims are articulated. There are also a number of other conditioning factors. As with the first stage (voice), the nature of the legal system plays a significant role, in particular the formal position of indigenous rights in the legal framework (including the status of international conventions). Standing rules, structure, courts’ jurisdiction and legal formalities are also relevant factors.

Responsiveness also depends on the legal culture. Norms of appropriateness and judges’ perceptions of their own role in enforcing human rights influence the manner in which courts respond to the claims voiced. Judges will be more responsive to indigenous people’s land rights claims when they are generally committed to human rights and consider it part of their mandate to advance them. The ability to innovate and move away from conservative, formalistic and rigid concepts is critical.

Another important variable in explaining variations in courts’ responsiveness is the judges’ sensitivity to human rights issues, which can be related to their social and ideological background as well as their legal education and experience, and thus depends on the composition of the bench (which is a function of appointment procedures and criteria). Lack of diversity on the bench often creates distance between the judges and the people, and makes it harder for judges to relate to the concerns of various groups of society. Sensitivity training, or training towards human rights, could help the judges become more responsive to the concerns of marginalized groups.

The broader impact of litigation

Litigation has an impact when judgements are complied with by the authorities and the implementation of a judgement creates a basis for policy change on indigenous issues. However, apart from the direct effects, litigation may also have an indirect impact on policies.¹⁶ Litigation may raise awareness of indigenous peoples’ land rights issues, draw media attention to these issues and stimulate social mobilisation. The mobilisation efforts induced by litigation, such as demonstrations and political pressure, may have the effect of influencing public discourse on indigenous land rights. Hence, litigation may have an

¹⁶ See Gloppen 2005: 13 – 18.

important impact on indigenous policies, regardless of the outcome of a case. The relationship between litigation and social mobilisation runs both ways:

“In some cases litigation seems to enhance the ability of marginalised people to organise around their grievances and contribute towards broader mobilisation and the building of community spirit. From the perspective of litigation, community involvement seems to increase chances of success. And the more involved the affected communities are in driving the litigation process, the more likely they are to profit in terms of mobilisation and consolidation around the cause” (Gloppen 2005: 17).

I maintain that litigation may be part of a broader mobilisation strategy aimed at producing changes in policy related to indigenous land rights. The potential of litigation must be assessed in terms of the broader impact it may have on policies by creating awareness, inducing social mobilisation and influencing public discourse. Investment projects have

Summary

Indigenous peoples maintain a special relationship to their lands, territories and resources, and they have strong cultural and religious ties to their ancestral lands. Indigenous peoples all over the world have suffered from the dispossession of their land and are affected by large scale investment projects in their territories, and in recent years, there has been an increase in indigenous mobilisation to defend land rights. Indigenous peoples’ land rights may be advanced by means of legal mobilisation, but this requires that the indigenous have access to justice. Access is commonly restricted for disadvantaged groups, converting the judicial system into a tool for those that are “well-off”.

The impact of courts depends on the ability of the Mapuche to effectively articulate their concerns and turn them into legal claims, as well as courts’ responsiveness to Mapuche land rights claims. The Mapuche’s ability to voice their claims depends on the level of awareness with respect to land rights and it depends on resources such as associative capacity and legal aid. Furthermore, they may be faced by a number of obstacles; practical barriers such as language and economic costs, but also motivational barriers such as fear and distrust. Lastly, access to justice depends on the law and the legal system, and in particular the legal basis for litigating on indigenous land rights. The willingness of courts to respond to the Mapuche’s land rights claims is also influenced by the law and the legal system, in addition to factors like the legal culture and sensitivity towards human rights issues. Judges sensitivity depends on

their social and ideological background, and is thus partly a function of the composition of the bench and appointment procedures.

3. THE VOICING OF LAND RIGHTS CLAIMS

As can be recalled from the previous chapter, successful land rights litigation requires that claims over land rights are voiced properly – that the litigants are able to articulate their needs and demands and claim their rights before a court of law. *Voice* is thus the first stage of the litigation process, and the outcome at this stage depends on numerous factors. First of all, the group whose rights have been violated must be aware of what their rights are, and awareness can be enhanced by legal literacy programs, the media and indigenous rights organisations. Furthermore, litigants are dependent on resources to articulate and mobilise. Important resources include associative capacity and legal service organisations. The nature of the legal system influences the manner in which claims are voiced before the courts, and factors such as formalism and bureaucracy have a great impact on *voice*. The formal position of collective land rights is particularly important. Finally, there are practical barriers (costs, distance, language, lack of information) and motivational barriers (distrust, fear, past experience, social distance, and lack of legitimacy due to low legal pluralism) that may impede the ability of vulnerable groups to voice their claims.

This chapter analyses the possibilities for the Mapuche people to voice their land rights claims in the Chilean judicial system, exploring each of the factors relevant to explaining “voice”; awareness, resources, barriers to access (practical and motivational) and the nature of the law and the legal system. Although the thesis focuses on the possibilities for litigating on land rights, litigation is seen as one of several possible strategies that can be used alone or in combination with other strategies. The choice of legal mobilisation as a strategy to advance indigenous land rights depends on the costs of this compared to other options, such as political mobilisation. If other strategies – such as demonstrations, media campaigns or pressuring political bodies – are considered more effective or advantageous, this may affect the motivation for pursuing legal action (Gloppen 2004: 12). However, litigation may also be part of a broader mobilisation strategy. Political strategies – both legal and illegal – may also complement litigation and strengthen the voice of the Mapuche. Furthermore, litigation may have an impact even if cases are lost. By providing a platform for voicing grievances related to indigenous land rights, litigation may stimulate social mobilisation, which raises awareness, draws media attention and influences public discourse, and litigation may in this manner have an important systemic impact on indigenous policies. Thus, the value of

litigation as a strategy may be assessed in terms of the broader impact it may have on policies related to indigenous land rights.

Awareness

The articulation and effective voicing of claims in court requires that the victims of a rights violation are aware of their rights and the possibilities for seeking redress through the courts. The level of rights awareness depends on the extent to which there is a focus on human rights in the media and whether there are rights awareness programmes or similar initiatives that may enhance people's knowledge about their rights.

The role of the media

The media may strongly influence the level of rights awareness, and it is therefore important that the media have a focus on human rights in general, and indigenous' rights in particular in the case of Chile. According to UN Special Rapporteur Stavenhagen, the Chilean media pays little attention to indigenous people's human rights. Mapuche organisations argue that their rights to information are violated, because they are not given the same coverage in the media as the authorities or the forestry and energy companies. The Special Rapporteur concludes that it is the duty of the media to "put forward an objective and balanced view of such important issues as the struggle for the human rights of indigenous peoples" (Un Economic and Social Council 2003: par. 55, page 20). This duty has not been fulfilled by the Chilean media, which on the contrary have played a significant role in the stigmatisation of the Mapuche. This is evident in the 2004 report of Human Rights Watch and Indigenous Peoples' Rights Watch, according to which the press has advanced a view of the Mapuche as inciters:

"In coverage of the land conflicts in leading newspapers and journals, writers continue to emphasize the "infiltration" of Mapuche communities, reinforcing a view of the Mapuche as subversives and terrorists" (HRW/ IPRW 2004: 15).

The press does not hesitate to stress the violent character of the activities of Mapuche activists, and phrases like "rural terrorism", "racial conflict" and "spiral of violence" are frequently seen in the newspapers. Many news reporters have requested firmer government action against "the terrorists", by for instance encouraging the application of the anti-terrorism law.

The media often portray the “Mapuche conflict” as a conflict between order and reason on the one hand, and the “rebellious” Mapuche culture on the other. The right-wing newspaper *El Mercurio* has been particularly one-sided in its coverage of the so-called Mapuche conflict, and has been eager to criminalise the Mapuche organisations and their aspirations. For instance, the paper published a report in December 2002 entitled “Internet terrorism”, where several web pages were denounced for furthering the Mapuche cause as terrorist. The article’s aim was to provoke a reaction from the authorities and a subsequent censorship of media presenting a different version of events (IWGIA 2002 – 2003: 179).

The importance of access to the media is stressed by the UN Special Rapporteur, who makes the following recommendations:

“Indigenous communities and peoples should have the facilities and support they need if they are to have full access to the mass media (the press, radio, television and Internet); it is therefore recommended that the country’s main media organizations, together with the university faculties concerned, should offer courses and seminars with a view to finding new means of access to the media for indigenous communities” (UN Economic and Social Council 2003: 2, par. 85).

Stavenhagen further adds:

“It is also recommended that the existing media should redouble their efforts to give broad, balanced and fair coverage of the needs and situation of indigenous peoples and of the social conflict in indigenous regions” (UN Economic and Social Council: 24, par. 86).

CONADI’s rights awareness programme

Another relevant factor is the presence of rights awareness programmes that may enhance the Mapuche’s awareness about their collective rights, including land rights. The National Corporation of Indigenous Development, CONADI, has established a Programme of Promotion and Information on Indigenous Rights, PIDI, with the aim of promoting indigenous rights, extending information and aiding indigenous persons, families, communities, associations and organisations in effectively accessing the benefits of the public and private social network.¹⁷ PIDI was initiated a few years ago and started out with eight regional offices. Today, there are 21 regional offices across the country, most of them located

¹⁷ <http://www.conadi.cl/pidi.htm> Accessed 10 March 2006.

in the regions inhabited by Mapuche (16 in the IX region, one in the X region. There is also an office located in Santiago, with its attention directed towards urban indigenous people).

The specific aims of the programme are to:

- provide information and advice on various topics, such as housing, health, legal issues and education, and encourage the participation of communities in meetings focused on themes of group interest, for instance the development of projects, orientation and coordination to access public and private services; and to
- maintain a multidisciplinary team by means of capacity building, workshops, coordination and delivery of updated information through all sorts of printed material.

Over the last few years, PIDI has aided many indigenous individuals and organisations.

Among the activities organised by the programme are “closer government”, workshops on indigenous participation, gender focus (rights and the role of indigenous women), the strengthening of identity, and coordination between indigenous organisations and local and regional organs. Each of the offices delivers monthly reports on its activities for their subsequent evaluation by the national direction.

NGOs and institutes

It is important to underline the impact of NGOs and institutes specialising in indigenous issues on the awareness-raising of indigenous rights. Here, the role of Indigenous Peoples’ Rights Watch (*Observatorio de derechos Indígenas*) must be stressed. Indigenous Peoples’ Rights Watch is a nongovernmental organisation, whose purpose is the promotion, documentation and defence of indigenous peoples’ rights. The organisation was established in Temuco in 2004, and is comprised by a multidisciplinary team in charge of various working areas. Its main objectives are:

- to increase the awareness within Chilean society and the state, with respect to the situation of Chile’s indigenous peoples and the need for recognition and respect of the individual and collective rights of the indigenous
- to enhance the knowledge and capacity of the indigenous and their organisations, in order for them to claim their rights, and

- to make known the current state of indigenous rights to the national and international opinion, the means of communication and the organisations concerned with this issue, with the aim of an effective protection of these rights.¹⁸

The Institute of Indigenous Studies at the University of the Frontier, Temuco, is an academic and interdisciplinary research unit which aims at promoting indigenous people's rights through intercultural investigation. The institute's fundamental principles are to contribute to greater knowledge about the indigenous peoples of Chile within society and in students' education, as well as to search for ways to improve the living standard of indigenous people and strengthen their position in Chilean society.¹⁹ Another aim is to serve as a training centre for indigenous organisations (and also for state officials), and the institute is open to participation for all those concerned with indigenous issues.

There are currently 22 researchers at the institute working in diverse fields, such as law, sociology, anthropology, history, education, information technology and social work. The institute is responsible for numerous publications related to issues concerning Chile's indigenous peoples, and has a specialised Centre for Indigenous Documentation containing over 8.000 publications, of easy access and open to everyone. The purpose of the investigations is ultimately to search for solutions to the problems affecting the indigenous peoples of Chile. The institute also organises workshops and seminars on various issues related to indigenous peoples, and the events have been attended by researchers and representatives of indigenous organisations from Chile and from other countries in the Americas.

A great deal of information about indigenous peoples' rights is provided by Mapuche organisations and documentation centres, both in Chile and abroad. Among the most important ones are the Arauco Malleco Coordinator, Mapuche International Link, the Rehue Foundation, the FOLIL Foundation, Ñuke Mapu Documentation Centre, the organisation Meli Wixan Mapu and Mapuexpress documentation centre. All of these offer a large amount of documents, news and publications on-line, thereby contributing to a greater knowledge of the rights of the Mapuche people within society, as well as increased awareness among the Mapuche.

¹⁸ <http://www.observatorioderechosindigenas.cl/> Accessed 10 March 2006.

¹⁹ <http://www.estudiosindigenas.cl/> Accessed 10 March 2006.

Resources

Access to important resources may enable the Mapuche to effectively articulate their land rights claims. In this respect, associative capacity – the ability to form associations with the capacity to mobilise around indigenous land rights issues – is an important factor. The Mapuche may benefit from their common identity and community solidarity to mobilise and sustain collective action. Associative capacity also refers to what strategies are chosen to mobilise, and to the extent of international support in mobilisation efforts. The availability and quality of public legal aid or other legal assistance is crucial, because the vast majority of the Mapuche have limited resources and cannot afford to pay for the services of a lawyer.

Associative capacity

The Mapuche people have been struggling to defend their territories for centuries. The occupation of their lands continues to this day in form of forestry companies and energy companies exploiting their territories and the resources within for economic profit. In the wake of this unjust situation, Mapuches in Chile and Argentina mobilise to claim their rights, fight for the recovery of their ancestral lands, and defend their territories against further usurpation. Increased mobilisation may be seen in relation to the recent resurgence of Mapuche culture and identity, the ability to communicate and spread information using modern means of communication, such as the internet, as well as the increase in international attention and support. This has contributed to the Mapuches' strengthened capacity to join forces and form associations that can make their voice heard.

Over the last few years, there has been a revitalisation of the Mapuche culture. More and more Mapuche are becoming aware of their tribal identity, and it is becoming increasingly popular to learn their native language, Mapudungun. Because it used to be considered a sign of backwardness to speak Spanish with a Mapuche accent, parents wouldn't let their children speak Mapudungun. Today, however, young people form study circles where they practice the language (LA Times 14 March 2003: 2). There are numerous Mapuche organisations at local, regional and national levels, and in the Temuco region alone, there are over 100 local and regional organisations. Tribal councils have been formed in some regions by impoverished farmers with the aim of drafting town constitutions and pressing local authorities for the return of communal lands. For the first time, the Mapuche are winning mayoral and city council elections (LA Times 14 March 2003: 2).

The Mapuche increasingly mobilise to articulate their needs and demands in various fields. Concern for a more pluralistic legal system in Chile has been expressed by the Mapuche movement, with support from experts and academics. The Konapewman organisation, a group of Mapuche specialists, has maintained the need to incorporate legal pluralism into the new procedural system, with the purpose of enhancing the role of customary or traditional law. Chile's legal system contrasts with that of other Latin-American countries, of which the majority include at least some degree of pluralism. The acceptance of the Az Mapu, the Mapuche's customary law, might enhance access to justice, and would probably increase the judicial system's legitimacy among the Mapuche. However, proposals for increased legal pluralism have been rejected by right-wing politicians as well as members of the judiciary (IWGIA 2002: 184).

When the Chilean State began its military occupation of Mapuche territory, the communities were divided into reservations, and the traditional organisational structure of the Mapuche was lost. According to law no.19.253, the indigenous law, the state only recognises as interlocutors those communities and associations that have their own internal statutes and are registered with the National Corporation for Indigenous Development, CONADI (IWGIA 2004: 190). The associations recognized by law 19.253 comprise those that are created to obtain economic assistance by the authorities, as well as those associations that develop educational and cultural activities. There are approximately 20 associations with an economic interest in the province of Arauco alone who benefit from the Origins-programme, established by the Chilean government to aid the development of indigenous communities in Chile. The financial contributions offered by this program, however, cannot be used to purchase land. The programme is financed by a 13 million US\$ loan from the Inter-American Development Bank (IDB) and the loan agreement explicitly specifies that the money may not be used for this purpose. Consequently, many find the assistance offered by this programme inadequate (IWGIA 2004: 190 – 191).

Mapuche organisations

Currently, there are three important political organisations that seem to have a strong voice with respect to effectively articulating the political and territorial claims of the Mapuche communities and associations: The Council of All Lands, the Arauco Lafkenche Identity and the Arauco Malleco Coordinator (IWGIA 2004: 191). The oldest organization, The Council of All Lands, CTT, was formed in 1991, and is present in the Mapuche communities of Valdivia,

Temuco and Santiago. CTT is influential in various sectors, has the ability to question public policies, and has played a significant role in negotiating over land issues. The organisation was deeply engaged in the struggle against the projects on the Bío Bío River, and met with other organisations in Upper Bío Bío to coordinate support for the Pehuenche affected by the project.

The Arauco Lafkenche Identity, ILA, works for institutional action and territorial autonomy – demanding territorial restitution and the subsequent valorisation of their lands. The Lagos government drew from some of the suggestions presented by the ILA in their 2000 Lafkenche proposal, and the creation of the Commission of Truth and New Deal for Indigenous Peoples was based on these proposals. The Arauco Malleco Coordinator, CAM, carries out activity for territorial recovery in the Province of Arauco, and played an active role between 1995 and 2002 in the struggle for recovery of land. Its purpose is working for territorial recuperation and autonomy, and its activity is based on a strategy the organisation calls “territorial control”.²⁰ Many of CAMs leaders have been prosecuted in Chilean courts for alleged terrorism activity, after carrying out protest actions for the recovery of their lands, and it has been the Mapuche group that has suffered the most repression (IWGIA 2004: 192).

Mapuche communities have organised themselves and mobilised around land rights issues, actively opposing the large-scale investment projects that affect their situation. The communities have carried out different kinds of protest actions such as demonstrations, hunger strikes and road blockings, and have also presented judicial initiatives. During the planning of the Ralco dam, Mapuche-Pehuenche leaders and members of other communities joined together to manifest their objection toward the project, and through their mobilisation, they managed to slow down the construction of the dam. The Ralco project met strong resistance from the organisation Mapu Domuche Newen (Women with the force of the Earth), a group of Pehuenche women resisting negotiations with ENDESA (*Empresa Nacional de Electricidad*) and relocation from their lands in the Upper Bío Bío. This organisation played a significant role in fighting for the Pehuenche families who refused relocation (Aylwin et al 2001: 5). Some of the members of the organisation brought several actions against ENDESA and the authority responsible for approving it, the National Commission on Environment, CONAMA. The Quintreman sisters, members of Mapu Domuche Newen, managed to ensure

²⁰ <http://www.nodo50.org/weftun/> Accessed 9 December 2005.

an indefinite halt to the construction on the hydroelectric dam through a legal action accepted by the Sixth Civil Court in Santiago.

The Action Group for Bío Bío (GABB) played a crucial role in opposing the Ralco project, and contributed significantly to drawing attention to the negative implications of the dam. One of the tasks undertaken by GABB was to provide, through their journal *Bío Bío Update (Bío Bío al Día)*, detailed up-to-date information about the process, the implications of the project and the latest developments. GABB also participated in protest actions and led meetings with other organisations to coordinate support for the Pehuenche.²¹ The coordination of support in the Ralco case was impressive. The organisations managed to join forces in the resistance against the project, and the Pehuenche received support not only from Mapuche leaders and communities from other areas, but also from other indigenous peoples, such as the Aymara.²²

The ability to join forces in mobilisation efforts has also been strong among Mapuche communities in other cases of territorial conflicts. Mapuche communities of Xuf Xuf opposed the planned construction of a highway that would run through the area which they inhabited, documenting the social and cultural implications of the project and expressing their opposition towards it. Although the highway was eventually approved, the communities managed, through negotiation with the local government and the Ministry of Public Constructions, to reduce the total amount of directly affected communities from 30 to 10 (Aylwin et al 2001: 5 – 6). In 1995, construction began on a coastal road that would affect Mapuche Lafkenche and Huilliche communities inhabiting the area between Concepción and Puerto Montt. Numerous organizations and community leaders protested against the project, and as a result of their protest, the government committed itself in 2000 to submit an environmental and cultural impact study (Aylwin et al 2001: 6 – 7).

²¹ See, for instance, *Bío Bío Update* no. 19, 2000.

²² In March 2000, a meeting was organised in Santiago by Arcis University, GABB and parliamentarian Alejandro Navarro to analyse the legal and political consequences of the recent granting of the final concession for Ralco. Among the participants in the meeting were Aymara leaders and leaders of the Mapuche-Huilliche of Chiloé, representatives from the Mapuche-Wenteche of Temuco, the Mapuche-Lafkenche from the coast, important Mapuche NGOs and a delegation of 16 Pehuenche from Upper Bío Bío (*Bío Bío Update* no. 19, 2000: 4).

International support

International organisations have in recent years drawn increased attention to the repression of indigenous people all around the world, and information about the violations of the Mapuche people's rights can be found on the web pages of Amnesty International, Human Rights Watch, the Unrepresented Nations and Peoples Organisation and UN organizations. Increased international attention has strengthened the Mapuches' motivation and hopes about the possibilities for protecting their ancestral territories. Over the internet, Mapuche activists are able to communicate with other groups or individuals that share an interest in their situation, and form allies in other countries. One of the most important organisations to spread news and information about the Mapuche people, Mapuche Foundation FOLIL, is based in the Netherlands. Another, Mapuche International Link, was formed in Bristol, UK. Mapuche International Link aims at developing contacts between Mapuche organisations and European organisations, developing links between indigenous schools in Chile and Argentina, and schools in other countries, and generally encouraging European people to get involved in the activities of Mapuche communities. Both FOLIL Foundation and Mapuche International Link offer information in several languages, which makes information about the Mapuche people easily available. Building networks abroad and cooperating with other organisations with similar aims helps generate international support, which is extremely important to the Mapuche in their struggle for justice.

Legal aid

CONADI's Legal Defence Programme (PDJ) provides legal aid for Mapuche individuals and communities involved in land conflicts. The indigenous law establishes as one of the functions of CONADI to undertake the legal defence of the indigenous and their communities in conflicts concerning land and waters, in addition to exercising the functions of arbitration and conciliation (article 39, section d) of law 19.253). CONADI receives support and technical assistance from the International Organization for Migration (IOM) in the management of the Legal Defence Programme (IOM 2004). IOM has a mission in Chile, which is based in Santiago and provides support for programmes related to humanitarian activities, migration and development.²³ The specific functions of the Legal Defence Programme are:

²³ <http://www.oimchile.cl> Accessed 10 March 2006.

- The management and coordination of legal service offices in regions I, II, III, V, MR (Metropolitan Region), VII, IX, X and XII.
- Guidance and legal assistance for indigenous persons, communities and organisations.
- Provide legal defence in lawsuits and representation in administrative and extrajudicial processes for the defence of indigenous rights.
- Direct the alternative resolution of conflicts by means of mediation and conciliation.

Concerning the mechanism of conciliation, the indigenous law establishes that “[i]n order to avoid or end a lawsuit concerning lands, in which an indigenous person is involved, the parties may voluntarily direct themselves to CONADI with the aim of reaching an extrajudicial solution”(article 55 of law 19.253). It should be mentioned that the function of conciliation has resolved numerous cases, but is primarily employed in disputes between indigenous persons (Aylwin 2000: 49, 51). The regional offices in Cañete, Temuco and Osorno are responsible for the administration of the program in the VII, IX and X regions (Bío Bío, Araucanía and Los Lagos). There are legal advice centres in Cañete and Santa Bárbara in the Bío Bío region; in Temuco, Nueva Imperial, Carahue, Villarrica, Pitrufquen, Collipulli and Traiguén in Araucanía; and Osorno, Panguipulli and Chiloé in the Los Lagos region. The Temuco regional office is staffed by seven lawyers, who divide their work between the region’s legal advice centres. The centres in the two other regions all have one lawyer each.²⁴

The programme deals exclusively with civil matters, primarily with cases related to lands and waters, as referred to in law 19.253. Other matters, such as family and labour, are attended to by the Legal Assistance Corporations (PDJ Management report 2004: 10). These are publicly subsidised non-profit organisations that operate on a national level to provide legal aid for people who are unable to pay for the costs of litigation (UDP 2004).²⁵ The Legal Defence Programme provides assistance in cases such as the fixing of boundaries, petitions, transference, illegal occupations and usurpation of land, the restoration of terrain and writs of protection (Aylwin 2000: 48). There has been a considerable increase in the amount of cases over the last few years. In 1996, the total number of cases handled by the legal unit in all three regions was 200 (Aylwin 2000: 48). During 2004, the two Bío Bío offices received 179

²⁴ www.conadi.cl/djuridica.htm Accessed February 25 2006.

²⁵ On a national level, the organisations manage 156 consultant offices, 72 legal service offices and 19 mobile consultant offices (UDP 2004: 19).

consultations. 110 cases were handled, out of which none were settled. The number of consultations in the Araucanía offices, seven in all, amounted to a total of 3.314. The offices handled 359 cases. Of these, 30 were settled, and 329 were still pending. There were 1.321 consultations in the offices of the Los Lagos region, and 212 cases were handled. 53 of them were closed and 159 cases still pending (PDJ 2004).

Despite the efforts of CONADI, it has been difficult to satisfy the legal needs of the Mapuche, at least in the first few years of the legal program's functioning (Aylwin 2000: 49). The reason for this is that the demand for legal aid has generally surpassed the capacity of the staff to respond adequately to the people who seek their assistance. The programme has simply not had enough personnel and financial resources. Not all Mapuches have had a legal assistance office for territorial conflicts in their neighbouring areas, and some of those in need of legal assistance have had to travel a long distance in order to obtain it. This is costly for people with limited resources, and may create a disincentive to seeking assistance. According to Aylwin, the lack of personnel in the offices of Cañete and Osorno has made it difficult to respond to the demand in the vast areas to which they belong (Aylwin 2000: 51). For instance, geographical distance was a huge barrier to legal assistance for the Mapuche Pehuenche in Upper Bío Bío in their territorial conflicts. Until 1997, CONADI only had one lawyer for the whole Bío Bío-region, with the office situated in Cañete, about 300 kilometres away from Ralco, where the most serious conflicts took place (Aylwin 2000: 51). The problems related to CONADI's legal assistance at the time are documented in a 1998 report on the dam projects on the Bío Bío River:

“CONADI lacks the institutional capacity to defend the interests of the Pehuenche communities. Its single lawyer does not have a staff and receives a gasoline allowance of only 150 dollars for the entire fiscal year; his regional office is 300 km from Pehuenche territory. The Pehuenche do not have travel funds to meet with him. CONADI has been ineffective in dealing with small conflicts and is already overwhelmed by the negotiations with ENDESA over the issue of land exchange in Ralco-Lepoy, which is only one part of the overall resettlement planning problem” (Johnston et al 1998: 28, endnote 3).

However, this situation changed in 1997, when CONADI decided to add a lawyer to the Upper Bío Bío region to attend to the defence of its communities (Aylwin 2000: 51).

At the Catholic University of Temuco (UCT), students at the Law School participate in a course comprising two legal programmes: an institutional programme and a litigation

programme. In the litigation programme, students spend 11 months attending to legal consults and take on cases which they, under the supervision of a professor, bring before the courts. Among the programme's four legal clinics is the Lonko Quilapán clinic, oriented towards assisting people of Mapuche descent.²⁶ The program at UCT is part of a Latin American network of similar programs within the same theme. It is coordinated by the Diego Portales University in Santiago and comprises universities and institutes in Argentina, Chile, Colombia, Ecuador, Mexico and Peru. The network organises international seminars, where selected cases are collectively analysed, and matters of human rights and public interest, as well as institutional and methodological questions, are debated. The seminars serve to educate in terms of comparing experiences and developing common strategies, thereby contributing to heightened knowledge and increased capacity.²⁷

During the Ralco-conflict, additional programmes were initiated to offer legal assistance to the Pehuenche communities. From 1997 and onwards, CONADI financed a legal aid programme that was managed by the Arcis University of Santiago. The programme's lawyers brought actions for the annulment of the resolution that had approved the Ralco-project. In September the same year, CONADI set up to auction a legal assistance program that was appropriated by the Indigenous Institute Foundation in Temuco. During 1998, the public interest litigation programme at the Temuco Catholic University law school offered legal counselling to Pehuenche who opposed the construction of the Ralco hydroelectric plant (Lillo 2002: 11).

Barriers to access

A number of barriers may prevent the Mapuche from pursuing a legal strategy. Some of these are practical, and primarily relate to the costs of litigation and language.

Practical barriers

The costs of litigation constitute a barrier to access to justice for the Mapuche people, who are among the poorest in Chile. Most Mapuche cannot afford to pay for the services of a lawyer, and are thus dependent on free legal assistance in order to obtain access to justice. As discussed in the above sections, there have been several possibilities for free legal assistance. Public legal aid for Mapuche individuals and communities has been provided by CONADI's

²⁶ <http://www.derecho.uct.cl/2clinicas.htm> Accessed February 23 2006

²⁷ <http://www.udp.cl/derecho/derechoshumanos/redlatclinicas.htm> Accessed December 12 2005

Legal Defence Programme. However, as mentioned above, the Legal Defence Programme suffered from lack of financial and human resources in the 1990's, and this reduced its capacity to aid the Mapuche. Free legal assistance has also been offered the Mapuche by the legal programmes of the Temuco Catholic University, Arcis University, and the Indigenous Institute Foundation in Temuco. Hence, there have been possibilities for receiving free legal assistance, and whether litigation costs constitute a barrier or not depends on the Mapuche's access to this assistance. The opponents of the Mapuche in their territorial conflicts are usually the authorities or large companies with considerable resources to hire lawyers. Mapuche litigants' possibilities for success in court thus depend heavily on the availability of free legal assistance.

The whole operation of the legal system is in Spanish, something that could constitute a barrier for many indigenous people who seek legal aid (Davinson 2000: 185). Spanish is not the native language of the Mapuche, and in addition, there are also problems of illiteracy (Opsvik 1998: 3). Adding the specifics of the legal language, which is complicated for the common citizen, one can easily understand that the legal process may be confusing and incomprehensible for the indigenous. According to Davinson (2000: 186), another problem relates to cultural differences. Chilean legislation, the application of laws and the structure of the legal system are often unfamiliar to indigenous cultures. For instance, procedures are strictly written, while indigenous customary legal practices usually include oral and informal procedures. This results in legal procedures that are sometimes incomprehensible for the indigenous. Davinson maintains that the legal system fails to take into consideration the cultural particularities of indigenous peoples, and that this causes problems for the indigenous, who enter into an unfamiliar environment when dealing with the system (2002: 186).

Motivational barriers

Other barriers to access are motivational, and it seems these barriers constitute one of the most decisive factors preventing access for the Mapuche. Fear and distrust due to social and cultural distance between them and judges discourages litigation. Lack of legitimacy and perceptions of discrimination also has a negative impact on their motivation to defend their land rights through the legal system.

Distrust

In studies carried out among Chile's poor urban sectors in the beginning of the 1990's, the results showed that the majority of the respondents were under the impression that the legal system was discriminatory and corrupt, and that justice depended on one's wealth. 63,5 % thought that judges behaved differently with regard to rich people and poor people, and 88,7% shared the opinion that in Chile, there is one kind of justice for the rich, and another for the poor. 77,8% meant that lawyers were corrupt (Correa Sutil 1999: 2). This gives evidence of a profound distrust towards the Chilean judiciary in some poor groups of society.

In the case of the Mapuche, the perhaps most decisive factors limiting their motivation for pursuing legal strategies are fear and distrust towards, and their past experience with the Chilean judicial apparatus. A very important reason for the Mapuche's distrust towards the judicial system is the rough manner in which the judiciary has responded to the Mapuche's social protest. Protest actions for the defence of indigenous land rights have included peaceful demonstrations, but also illegal actions such as the occupation of land or setting fire to property or forestry machinery and vehicles.

Anti-terrorism trials

The judiciary has been brutal in its response to the illegal actions that are carried out by the Mapuche in the struggle for protection of their lands. The legal remedies the courts have employed have been grounded on anti-terrorist laws that were passed during the Pinochet-era. The employment of anti-terrorist legislation permits the courts to measure out unusually severe sentences. Many Mapuche leaders and activists have been charged with illicit terrorist action after carrying out acts of social protest such as incendiary fire or the occupation of land. Some of them have been given extremely severe sentences, sentences which are disproportionate to the severity of the crime committed. For instance, in the *Poluco-Pidenco* case, five Mapuche individuals were sentenced to ten years of prison for arson committed against the two estates Poluco and Pidenco, owned by the forestry company MININCO (IFHR 2006: 41). The sentence was met with protest from human rights organisations, among them Human Rights Watch, who maintained that "it is a tremendously exaggerated response to the agitation in Southern Chile" and that "by using the most possible rigid legal rule against the Mapuches, the Chilean government is unjustly comparing them to persons responsible for cruel crimes such as homicide" (UDP 2005: 305).

Chile's new criminal justice system, in force since December 2000, offers several guarantees to the defendant in a criminal case. Under the new system, hearings are oral and public, the fairness of the criminal investigation is supervised by a *juez de garantía* (a judge responsible for the pre-trial hearings), and the defendant is provided with professional legal counsel by the Public Defender's Office. Defendants may have their pre-trial detention periodically reviewed (HRW/ IPRW 2004: 20). Mapuches charged with illicit terrorist action are in part denied the guarantees available to criminal defendants in the new criminal justice system. The employment of the anti-terrorism law entails a much stricter criminal prosecution, in which the rights of the defendants are limited (UDP 2005: 303). Under the anti-terrorism law, criminal investigations are conducted in secret for long periods of time (up to six months); the names of many of the accusers are kept secret from the defendants, and prosecutors may to a greater extent than in ordinary criminal proceedings intercept the defendants' correspondence and tap their phones. There are limitations with regard to visits, and release pending trial is usually denied for months (UDP 2005: 303, HRW/ IPRW: 2004: 20).

A noteworthy element in the *Poluco-Pidenco* case was the use of evidence given by so called "faceless witnesses" (*testigos sin rostro*). In practice, this means that during a court session, witnesses give their testimony from behind a folding screen, with microphones distorting their voice. The identity of the witnesses is only known to the public prosecutor, which inhibits both the defence and the defendant to raise questions about the credibility of the evidence given by the witness (UDP 2005: 307, HRW/ IPRW 2004: 30). José Aylwin at the Indigenous Peoples' Rights Watch (*Observatorio de Derechos Indígenas*) in Temuco has expressed concern about the use of silent witnesses:

"Their form of testimony contravenes procedural norms contained in prevailing international treaties ratified by Chile, such as the International Covenant of Civil and Political Rights and the American Convention on Human Rights" (UDP 2005: 308).

The Chilean government has generally been supportive to the application of the anti-terrorism law. The governments of both Eduardo Frei (1994 – 2000) and Ricardo Lagos (2000 – 2006) met pressure for firmer government action against Mapuche protesters from the opposition in Congress, southern landowners and forestry companies (HRW/ IPRW 2004: 16). During the Frei government, dozens of Mapuche were prosecuted on charges like theft, arson or land seizure. Three separate proceedings were opened under the Law of State Security. The

application of this law entails proceedings that are speedier than ordinary criminal proceedings. The prosecution is initiated by the minister of the interior or a local government official. The investigation and trial are conducted by an appeals court judge, under special rules that are applicable in military courts in peacetime. Under these rules, time limits are fixed for each stage of the trial; judges are given greater discretion in evaluating evidence, and appeal rights are limited (HRW/ IPRW 2004: 16). The Lagos government, instead of applying the Law of State Security, preferred the strategy of prosecuting those it considered as inciters of violent acts on charges of terrorist actions.

Perceptions of discrimination

The application of anti-terrorist legislation in the context of Mapuche social protest is discriminatory, and constitutes a violation of the principle of equality before the law, to which Chile is committed through the Covenant on Civil and Political Rights. The UN Special Rapporteur on indigenous rights has expressed concern about the criminalisation of the Mapuche's social protest. In the report that followed after his visit to Chile in 2003, Stavenhagen said that

“[u]nder no circumstances should legitimate protest activities or social demands by indigenous organizations and communities be outlawed or penalized [c]harges for offences in other contexts (‘terrorist threat’, ‘criminal association’) should not be applied to acts related to the social struggle for land and legitimate indigenous complaints” (UN Economic and Social Council 2003: 22, paras 69 and 70).

Similarly, the UN Committee on Economic, Social and Cultural Rights states that

“it is profoundly preoccupied with the application of special laws, such as the Law of State Security and the Anti-terrorism Law in the context of the ongoing tensions relative to ancestral lands in Mapuche areas” (UDP 2005: 310).

From the Mapuche's point of view, the state uses the criminal justice system as a means of control of the communities' protest. Against this background, it is understandable that many Mapuche lack confidence in the Chilean judiciary. The application of anti-terrorist legislation in the prosecution of the Mapuche and the implications this has for the legal process and the sentences measured has caused a profound distrust toward the judiciary. The Mapuche have little faith in the judicial system, and they conceive the system as discriminatory and racist.

The Chilean legal system's discrimination of the indigenous is confirmed by the UN Special Rapporteur, who maintains that the indigenous in Chile are discriminated and disproportionately represented in the criminal justice system.²⁸ As pointed out by Jaime Madariaga, a lawyer and defender of many Mapuche, it is reasonable that the Mapuche lack confidence in a justice system which in the past has stolen their lands, and which currently prosecutes them as terrorists.²⁹

The law and the legal system

Access to justice for the Mapuche also depends on the nature of the law and the legal system. There must be a clear legal basis for indigenous rights to lands, territories and resources in Chile's constitutional or legal framework. The degree of formalism and bureaucracy influences the ability to voice land rights claims, because legal formalities and complex procedures discourage litigation.

A formalistic legal system

The Chilean legal system is a bureaucratic system which fails to deliver a speedy and efficient protection. The formalistic culture and processes, together with a hierarchical structure, constitute obstacles to the citizens' possibilities for claiming their rights in court (UDP 2004b: 14). The judicial process generally involves numerous formalities that slow down the process and obstruct the possibilities for obtaining results. A number of formalistic procedures create a disincentive to seeking justice. Practically all claims before jurisdictional entities require the services of a lawyer. Hence, there is a significant gap with regard to access to justice between those who are in possession of the resources to hire a lawyer, and those who are not (UDP 2004b: 16).

Beyond the quality of legal aid, the constitutional actions established for the protection of fundamental rights are designed and implemented by the judicial apparatus in a manner which impedes an effective protection. The two main mechanisms that protect basic human rights in Chile are the *recurso de protección* (writ of protection³⁰) and the *recurso de amparo* (similar

²⁸ UN News Centre 8 April 2004. <http://www.un.org/News/> accessed 10 may 2006.

²⁹ Interview with Madariaga by Cor Doeswijk, Radio Nederland Werelomroep, June 2004, Amsterdam. <http://www.rnw.nl/distrib/realaudio/> .

³⁰ A writ is "a formal written order issued by a body with administrative or judicial jurisdiction" (<http://en.wikipedia.org/wiki/Writ> Accessed 20 April 2006).

to what is internationally known as the *habeus corpus*³¹). They are procedures for the protection of constitutional rights, or mechanisms to initiate legal actions for the defence of one's rights (UDP 2004b: 25 – 26). The writ of protection “allows individuals to seek relief from a court of appeals when their constitutional rights are violated or put in danger [...] (Couso 2004: 73). However, it is a judicial tool that is increasingly used for lawsuits that are not related to constitutional litigation (Couso 2004: 74). The two mechanisms should in principle facilitate access for citizens who wish to claim their rights before a court, but despite their apparent advantages, there are a number of problems related to the employment of the actions. In accordance with the writ of protection dictated by the Supreme Court, persons affected by a violation must present their claims before the courts within 15 days from the act of violation or from the point of time when they become aware of the violation (UDP 2004b: 31). This time limit is contrary to the norms of international human rights instruments.³² In many situations the time frame of 15 days is insufficient for a person to seek legal protection of their rights. The victim of a violation may not be aware that what has occurred is actually a violation of a constitutional right, and it may take some time before the person realises, or is made aware of this. By the time the person consults with a lawyer, who has only limited time to prepare the case, it might be too late. The situation is even more problematic if the litigant is a person with scarce resources and little knowledge of the legal mechanisms (UDPb 2004: 30).

Another obstacle is the possibility that the lawsuit be declared inadmissible. The “examination of admissibility” was supposedly invented by the Supreme Court as a response to the high increase in writs of protection presented during the last decade, with the aim of rejecting actions presented outside of the time limit as well as those that have “an obvious lack of foundation”.³³ According to a study on the subject, the number of lawsuits declared inadmissible amounts to 40 to 45% of the total number of actions that reach the appellate courts (UDPb 2004: 33). One of the advantages related to the writ of protection is that it does not require the defence of a lawyer, which means that the citizens can personally call on a judge to intervene in a particular matter concerning a possible violation of a fundamental right. A person pursuing legal action may file a form at the office of a court of appeals, from

³¹ *Habeus corpus* refers to “a prerogative writ ordering that a prisoner be brought to the court so it can be determined whether or not the prisoner is being imprisoned lawfully” (http://en.wikipedia.org/wiki/Habeus_corpus Accessed 20 April 2006).

³² For instance, the American Convention on Human Rights stresses that “[e]veryone has the right to simple and prompt recourse [...]” (article 25.1).

³³ Without specifying what exactly constitutes a lawsuit with an “obvious lack of foundation” (UDP 2004b: 33).

which their case may evolve. However, this solution offers only limited possibilities for success, as demonstrated by the study described above:

“[...] almost 10% [of the lawsuits that reach the Court of Appeals of Santiago] are presented by means of letters and the like [not specified] through forms prepared by officials at the court [a]ll of the lawsuits that were presented in this manner were declared inadmissible” (UDP 2004b :35).

One of the important factors determining the degree of access to justice concerns the rules of standing, that is, who is qualified to take a case to court. The writ of protection can be brought by any person, without requirements for a lawyer, or even by collective social units (of a non-legal nature). Litigation on behalf of others is also permitted (UDP 2004b: 27). However, even if it is permitted to bring a case before a court without the assistance of a lawyer, the ones who do so generally do not have the same possibilities for success as the ones that are represented by a lawyer. According to the 2004 report from the Diego Portales University, it is not entirely true that one can appear in court without a lawyer, because there are so many hindrances and requirements that those who do so almost invariably end up losing their case (UDP 2004b: 39).

Regarding the Chilean version of the *habeus corpus*, the *recurso de amparo*, this is a type of action intended to protect the rights of any individual that is detained, arrested or imprisoned (UDP 2004b: 38, footnote 41). The norms on the *recurso de amparo* contained in the Constitution present a few problems, though, particularly with regard to guaranteeing the personal integrity of persons detained by the police.³⁴ According to international norms, the *habeus corpus* requires that the person deprived of his or her liberty is presented before the judge. This is important, because the judge's possibilities to meet with and enter into dialogue with the person affected is decisive for the assessment of the conditions for detention. The Chilean constitution establishes that the judge *may* arrange for the individual to be brought before his or her presence (article 21 of the constitution). The ambiguity of this phrase has led to the judges conceiving personal presentation as necessary only in special circumstances, and not as an essential characteristic of the *recurso de amparo*. In effect, the *recurso de amparo* is turned into a formalistic type of action, in which the legitimacy of the detention is based on written information (UDP 2004b: 40).

³⁴ UDP 2004b: 39. This situation is somewhat improving, however, by the implementation of the new criminal justice system, which involves an action to protect this right.

The legal framework

In the existing international norms, one can distinguish between two concepts that are different and at the same time complementary: indigenous *land* and *territory*. While the notion of *land* refers to the classic idea of the possession of land and property guarantees, *territory* is a broader concept that also refers to natural resources. In addition, the concept covers a jurisdictional space, in other words, an area in which the indigenous exercise their influence or their self-determination. The concept of territory incorporates “all the elements that constitute the *indigenous habitat*; soil, subsoil, water, forest, animals, etc” (Lillo 2002: 29). In ILO Convention no 169, the term “lands” includes the concept of territory, which covers “the total environment of the areas which the peoples concerned occupy or otherwise use” (art.13.2). Chile is one of the few countries in Latin America that have not yet ratified convention no. 169 of the ILO.

Latin American experiences

Over the last three decades, the majority of Latin American states have reformed their constitutions and recognised indigenous peoples’ individual and collective rights. The reforms have included not only land rights, but also norms concerning cultural rights, indigenous customs and customary law and recognition of the state’s multiethnic character. Indigenous peoples’ rights to land, territory and resources have been given special attention and are incorporated into the constitutions of, among others, Argentina, Brazil, Colombia, Mexico, Guatemala, Paraguay and Peru (Aylwin 2002: 30).

Apart from the constitutional reforms, most of the states in Latin America have developed legislation for the regulation of indigenous peoples’ rights to land, territory or resources. In some countries, such as Bolivia, Brazil, Colombia, Costa Rica and Mexico, the legislation that regulates natural resources or concerns the protection of the environment establishes principles especially aimed at protecting indigenous peoples’ rights (Aylwin 2002: 31). Bolivia and Brazil stand out as interesting cases with respect to matters of territory. In Bolivia, indigenous peoples’ “original communal lands” are recognised in the Bolivian Constitution of 1994 and the agrarian legislation, which both guarantee them the use and benefits of the natural resources pertaining to these lands. The Federal Constitution of Brazil (1988) guarantees the indigenous the permanent ownership and the exclusive exploitation of the ground, rivers and lakes within the lands traditionally occupied by them. In Bolivia, the

legal norms concerning these rights have been conducive to the entitlement in the year 2000 of more than a million hectares of land in favour of indigenous communities and demands for more than a total of 20 million hectares. In Brazil, more than 100 million hectares (equivalent to 12 % of Brazilian territory) have been demarcated or are in the process of demarcation in favour of indigenous communities (Aylwin 2002: 31).

Nicaragua (1986) and Colombia (1991) have recognized the rights of the indigenous to autonomy in their internal affairs (Aylwin 2002: 30 – 32). In Nicaragua, two autonomous regions were established by the Atlantic Coast following the 1986 Constitution. These regions are governed by democratically elected regional councils, and the indigenous peoples' rights include the participation in the design and implementation of development programmes, the management of social services and the establishment of taxes, as well as rights concerning the natural resources within the territories. Among the rights recognized by the Colombian Constitution are the rights of the indigenous to self-government, the administration of resources and the establishment of taxes (Aylwin 2002: 32).

Chilean legislation

The main Chilean legislation that protects the rights of the indigenous is the Law no. 19.253 on Protection, Support and Development of the Indigenous, otherwise known as the Indigenous Law. The central elements of the law are the following:

- The recognition of the indigenous and their various ethnic groups, and the State's and society's duty to respect, protect and promote the development of the indigenous, their cultures, families and communities, as well as protect indigenous lands (art.1).
- The recognition of indigenous lands and the establishment of various norms oriented towards their protection, as well as the establishment of a Land and Water fund for their expansion (arts. 12 – 22).
- The establishment of a Fund for Indigenous Development to finance special programmes aimed at the development of indigenous people and communities (arts. 23 – 25).
- The establishment of Areas of Indigenous Development, territorial spaces in which public action is concentrated around the "harmonic development of the indigenous and their communities" (art. 26 – 27).
- The recognition, respect and protection of the indigenous cultures and languages, and the promotion of intercultural, bilingual and educational programmes (arts. 28 – 33).

- The promotion of the participation of the indigenous, and the duty of the State and territorial organisations to hear and consider the opinion of the indigenous organisations recognised by the law in matters that affect them, and the recognition of indigenous associations (art. 34 – 37).
- The creation of the National Corporation on Indigenous Development (CONADI), in charge of coordinating and executing the state’s indigenous policies (arts. 38 – 53).
- The establishment of a special legal procedure in cases involving issues related to land, in which an indigenous person is involved, promoting conciliation as a mechanism to resolve land conflicts (arts. 54 – 57).

Law no. 19.253: norms relative to indigenous lands

Concerning lands, law no. 19.253 recognises the lands traditionally owned or occupied by the indigenous, and contains norms aimed at preventing these lands from being conveyed to non-indigenous persons, as well as norms intended to forestall any further division of those lands. It also opens for the possibility of expansion of indigenous lands, by facilitating acquisition through subsidies. The main contents of law no. 19.253 are the following:

- The state recognises that for the indigenous, “land is the principal fundament of their existence and culture”, and that the state should “protect the indigenous lands, see to their adequate exploitation, their ecological equilibrium and be inclined to their expansion” (art 1).
- The law identifies the indigenous lands, defining them as those that indigenous persons or communities “currently occupy in property or ownership” stemming from titles recognised by the state, those they have “historically occupied and possess” and are inscribed in the Register of Indigenous Lands, those that in the future will be declared by the courts as lands belonging to indigenous communities, and those that in the future are gratuitously granted the indigenous and their communities by the state (art. 12).
- The lands referred to “cannot be transferred, seized, taxed, or acquired through prescriptive titles, except between indigenous communities or persons from the same ethnic group” (art. 13). Lands belonging to indigenous communities cannot be leased, and in the case of individual property, tenancy is permitted only within a period no longer than five years. Moreover, those considered indigenous lands may only be

exchanged for non-indigenous lands with similar value with the authorisation of CONADI.

- All the lands referred to in article 12 will be inscribed in a Public Register of Indigenous Lands, which will be opened and maintained by CONADI (art. 15).
- The law establishes that “the division of indigenous lands stemming from titles of mercy must be formally solicited before a competent judge by the absolute majority of the proprietors of the hereditary rights resident in them”, and that the lands resulting from the division of communities “are indivisible even in the case of succession caused by death” (arts. 16 – 17).
- The law establishes the Fund for Indigenous Lands and Waters administrated by CONADI with the following objectives: a) grant subsidies for the acquisition of lands by indigenous persons or communities in cases where the surface of their lands are insufficient, b) finance mechanisms for the solution of problems related to land, and c) finance the fixing, regulation or purchase of water rights, or projects aimed at obtaining this resource (art. 20). The non-indigenous lands and the water rights acquired with the resources of this fund for the benefit of indigenous lands cannot be transferred for a period of 25 years (art. 22).
- Finally, the law establishes as the responsibilities of CONADI to ensure the protection of indigenous lands through the mechanisms established by the law, and make possible for the indigenous and their communities the access and expansion of their lands and waters through the Fund for Indigenous Lands and Waters, promote the adequate exploitation of indigenous lands, as well as undertake the legal defence of the indigenous and their communities in conflicts related to lands and waters and execute the functions of conciliation (art. 39).

Although law no. 19.253 represents an important advancement, it also presents some limitations in relation to prevailing international norms and to the proposed text that was considered by Congress prior to the law’s approval. The proposed text embraced the concept of territory, and intended to give the indigenous greater degrees of self-government through the Areas of Indigenous Development. This was left out in the text approved by Congress, which only refers to the Areas of Indigenous Development as areas for the focalisation of public action for the benefit of the indigenous and their communities (Aylwin 2002: 15). The proposed text established the right of not being resettled and the right to be consulted in cases where resettlement is considered necessary. These rights were not recognised in the final text

of the indigenous law. The text also left out the right to natural resources, even though the proposed text established preferential rights for owners of indigenous lands over water, mining resources and forest resources (Aylwin 2002: 15).

Law 19.253 is the first to guarantee the protection of indigenous lands in terms of prohibiting the transference of these lands to persons who do not belong to the same ethnicity. It also contains provisions that protect the lands from seizure, taxation and leasing. In this sense, the new law establishes a vigorous right to property for the indigenous. However, the legal protection of indigenous lands has been inefficient in the context of some of the economic development projects carried out over the last few years. It did not prevent indigenous communities from being deprived of their lands due to the construction of the Ralco dam.

Most importantly, law 19.253 leaves out the term “peoples”, a term which is internationally recognised for denominating the indigenous entities of the world. The law only recognises the existence of various *ethnicities*. The recognition of the indigenous as a people is crucial to secure collective rights such as the right to self-determination; hence the non-recognition of indigenous peoples in the Chilean Constitution has a number of consequences for the Mapuche and for the other indigenous peoples.³⁵ The right to self-determination guarantees the indigenous sovereign management of their territories and natural resources. Furthermore, constitutional recognition of indigenous peoples is a prerequisite for the development of a more pluralistic legal system where the customary law of the indigenous peoples is valid and accepted.

The fact that Chile still has not recognised the country’s indigenous peoples in its legal framework sets Chile apart from the other Latin American countries, most of which recognise cultural diversity in their constitutions. During the last three decades, the majority of the states in the region have constitutionally recognised the multicultural or multiethnic character of their nations: Guatemala in 1985; Brazil 1988; Colombia 1991; Mexico and Paraguay in 1992; Peru 1993; Argentina, Bolivia and Panama in 1994; Nicaragua 1995; and Ecuador in 1998.³⁶ One of the prime examples is the Constitution of Colombia, which asserts that the state “recognises and protects the ethnic and cultural diversity of the Colombian nation” (art.

³⁵ Article 1.1 of the International Covenant on Civil and Political Rights establishes that: “All **peoples** have the right to **self-determination**”.

³⁶ Estay et al 2005, Riquelme 2001, <http://www.prodiversitas.bioetica.org/doc7.htm> Accessed March 15 2006.

7). The Bolivian Constitution defines its nation as “free, independent, sovereign, multiethnic and multicultural (...)” (art 1). The Nicaraguan Constitution recognises “the existence of indigenous peoples, which enjoy the rights, duties and guarantees consigned in the Constitution (...)” (art. 5.3) and states that “the people of Nicaragua is of a multiethnic nature (...)” (art. 8).

In sum, while law 19.253 represents a step forward in the recognition and protection of indigenous lands, it leaves out important elements that are present in the international legal instruments on indigenous peoples and land rights. As expressed by José Aylwin,

“Despite the advances that the legislation introduces, it appears insufficient in relation to the demands that in matters of lands and natural resources were raised by the Mapuche movement during the discussions on the law. It also appears insufficient in relation to the norms on the matter included in Convention 169 of the ILO” (Aylwin 2002: 14).

Summary

The aim of chapter was to examine the Mapuche’s ability to articulate their concerns and claim their rights in the legal system. The findings suggest that the prospects for voicing land rights claims have been good with respect to some aspects. Mapuche’s voice may be affected by the Chilean NGO’s and institutes focusing on indigenous issues, as well as CONADI’s information programme on indigenous rights, PIDI. These play an important role in raising the Mapuche’s awareness of their rights. The Mapuche movement has a strong associative capacity, and has had the ability to join forces, form associations and collectively mobilise around issues relating to their land rights. There are numerous organisations that work for the Mapuche cause, and many of them have been active in opposing policies that negatively affect them, particularly in relation to lands and resources. This constitutes a significant resource for the Mapuche people in their struggle for justice. Public legal aid is provided by CONADI’s Legal Defence Programme, which has several legal advice centres in all regions inhabited by the Mapuche. However, CONADI has experienced difficulties in responding to the increasing demands for legal aid because of shortages in financial resources and personnel, as was explained by Aylwin. During the Ralco case, the Pehuenche who were affected by the planned dam construction received important legal assistance from university legal programmes.

On the other hand, Mapuche individuals or communities seeking redress through the judicial system face numerous obstacles. The Mapuche's motivation to defend their rights through the legal system is affected by their distrust towards the system, which they find discriminatory and racist. This is due to the manner in which Chilean courts have responded to their acts of social protest; the stigmatisation of the Mapuche and the prosecution of their leaders as terrorists (based on the application of the anti-terrorist law). Apart from the motivational barriers, there are also a few practical barriers impeding access, such as the costs of litigation and language. Because most Mapuche are poor, they are heavily dependant on legal aid to be able to claim their rights in court. Since Spanish is not their native language, the Mapuche face problems in the judicial apparatus, because the whole system operates in Spanish. The legal system is bureaucratic, and a number of formalistic and complex procedures impede a speedy and efficient process. Perhaps most importantly, the legal framework for the protection of indigenous peoples' rights is insufficient in relation to international standards. The indigenous law represents an important step forward, but excludes the concepts of territory and resources. There must be a strong legal base for litigating on indigenous rights to lands, territories and resources, and in this respect, the Chilean legal framework is clearly insufficient.

4. COURTS' RESPONSIVENESS TOWARDS MAPUCHE CLAIMS

In the case concerning the Ralco power plant in the Mapuche-Pehuenche communities' ancestral territory in Upper Bío Bío, several actions were brought against the authorities and against the owner of the hydroelectric project, the private energy company ENDESA. In the following, three cases will be discussed; one that was won by the Pehuenche litigants, and two that were lost. The two cases that were lost are important because they drew attention to the Mapuche people's situation from the media as well as from national and international indigenous rights organisations, and because they shed light on some of the factors that may determine courts' responsiveness to Mapuche claims.

As mentioned earlier, the Quintreman sisters of the female Pehuenche organisation Mapu Domuche Newen were to a great extent engaged in the opposition against the construction of the Ralco dam, and the sisters were involved in all of the three lawsuits that are discussed here. The Quintreman sisters and another member of the organisation, Mercedes Huenteao, filed a lawsuit to the Sixth Civil Court in Santiago, demanding the annulment of the Environmental Impact Study (EIS) that had led to the approval of the Ralco project.³⁷ The suit was brought against ENDESA and the National Environment Commission, CONAMA, for violating the indigenous law and the environmental law.

In an unexpected decision on 8 September, 1999, the court accepted a legal motion filed by the Pehuenche litigants to suspend works on Ralco while the case was being resolved, and ordered an indefinite halt to the construction (Bío Bío Update no. 16, 1999: 1). When the ruling was appealed by CONAMA and ENDESA a few days later, the court upheld its previous decision and rejected the appeal, thereby further postponing construction on Ralco (Mapuche International Link 23 September, 1999: 1). However, the decision was ultimately reversed following an injunction ruled by the Court of Appeals of Santiago, and the works in Upper Bío Bío were allowed to continue (Bío Bío Update no. 17, 1999: 1).

³⁷The litigants contended that the EIS was invalid, because the procedure applied to the evaluation did not legally exist on the date of its initiation. The System of Environmental Impact Evaluation only came into force on 3 April 1997 (article 13 of law 19.300); therefore the procedure initiated by CONAMA and ENDESA prior to this date was illegal. Furthermore, CONAMA's actions had violated the mandate established for the state institutions in article 1 of law 19.253. Thus, on the basis of provisions contained in, among others, the constitution, in the Indigenous Law, and in law no. 19.300 on the environment, the litigants demanded that the court declare the EIS as well as the environmental authorisation granted by CONAMA null and void. *Source: text of the legal action presented, available at <http://www.xs4all.nl/~rehue/ralco/ral028b.html> Accessed 8 May 2006.*

In March 2000, the Quintreman sisters and other Pehuenche families brought two writs of protection before the Court of Appeals in Santiago (El Sur, 1 April, 2000). Both lawsuits were aimed at reversing the final electric licence authorising the Ralco project. The first of these actions was filed against the Minister of Economy for violations of the Waters Code, on the grounds that ENDESA did not have the sufficient water rights to construct the dam (El Sur, 1 April, 2000: 1).³⁸ The second writ of protection was brought against the President of the Republic and the Minister of Economy for violating the indigenous law by granting ENDESA the electric license without having acquired all the necessary land exchange contracts from Pehuenche residents (El Sur 2000: 1).³⁹ The indigenous law establishes that indigenous lands can be traded for land of a similar value only with the free consent of the owners. The authorities, on the other hand, claimed that the electricity law of 1981 permitted expropriation of private property to provide energy for the public good.⁴⁰ The lawyers argued that relocation violated the 1997 CONAMA resolution granting the project environmental authorisation on the condition that relocation of the Pehuenche residents was carried out under the terms of the indigenous law. As explained by one of the lawyers:

“(...) ENDESA must complete the process of relocation by means of the system of land exchange considered in the indigenous law, which requires the consent of the Pehuenche landowner and the approval of CONADI. The process of relocation cannot be completed by other legal means than the one specifically pointed at in the environmental approval. The relocation cannot be completed by means of the electricity law”, and added that “clearly, the indigenous law takes precedence over the electricity law” (El Sur, 1 April, 2000).

Both cases were rejected in November 2001, in a decision which established the effectiveness of the licence based on the electricity law (El Mercurio, 22 November, 2001). The court recognised that ENDESA had fulfilled its obligations with respect to the environmental authorisations, such as the relocation plan for the Pehuenche affected by Ralco. The ruling also established that ENDESA did have the sufficient water rights to carry through the

³⁸ The case was brought by Berta Quintreman, two parliamentarians and the president of the Bío Bío Action Group, GABB (El Sur 2000: 1).

³⁹ This case was filed by nine Pehuenches, among others, the Quintreman family and the leader of the Ralco Lepoy community, one of the communities that would be most seriously affected by the Ralco dam (EL Sur 2000: 1).

⁴⁰ Not all authorities agreed with the electricity law taking precedence over the indigenous law. Former director of CONAMA, Vivianne Blanlot, who at the time was director of the national Energy Commission, said that “if these people were not Pehuenches, then we could expropriate. But because they are Pehuenches, Endesa must negotiate so that these people leave voluntarily” (Washington Times, 11 February, 2003).

construction (El Mercurio, 17 December, 2001). The decision was confirmed by the Supreme Court in January 2002 (El Mercurio, 29 January, 2002).

In May 2003, the Sixth Civil Court in Santiago finally accepted the legal action brought in 1997, and nullified the EIS and the decision that had given approval for Ralco (El Mercurio 16 May, 2003). The court ruling was based mainly on the fact that the process of the environmental impact evaluation was based on an agreement between CONAMA and ENDESA that lacked legal foundation, because at the time the agreement was signed, the legal norms regulating the system of environmental impact evaluation (law 19.300 of 1994) had not yet come into existence (Aylwin 2003a: 1). Thus, the construction of the dam on the Bío Bío River was in fact illegal (Mapuexpress 16 May, 2003). But although the court nullified the authorisation for Ralco, it did not order a suspension of the works on the dam. Therefore, construction (of which 82% was already completed), was allowed to continue. CONAMA immediately expressed its intention to appeal the court's decision. However, the parties entered into negotiations not long after the Inter-American Commission on Human Rights had accepted a legal action by the Quintreman sisters against the Chilean state (Mapuexpress 16 May, 2003).

In September 2003, an agreement was reached between the government, ENDESA and the remaining four Pehuenche landowners refusing to exchange their lands in Upper Bío Bío (Aylwin 2003b: 1). The agreement established that ENDESA was to give economic compensation to the Pehuenche women, as well as 77 hectares of terrain in exchange for their lands. The company would also contribute economically to indigenous development programmes. The Pehuenche, on the other hand, were bound to renounce the legal and administrative actions taken against the Ralco project. The government undertook to acquire 1.200 hectares of the neighbouring landed property "El Porvenir" and transfer these lands to the families of the Pehuenche women, and to grant the families living subsidies, electricity lines, pensions and study scholarships (Aylwin 2003b:1).

The 2003 agreement between the Pehuenche, ENDESA and the government put an end to the conflict, and the Pehuenche renounced the legal actions they had filed. The agreement was described in the media as successful, but the supporters of the Pehuenche found the agreement deficient considering the court rulings that went against the project; the Santiago Sixth Civil Court decision of May 2003 that nullified the EIS and the environmental authorisation, and

the order of the same court to suspend the construction of Ralco (Aylwin 2003b: 1). The agreement was also considered deficient considering the acceptance of a legal action in the Inter-American Commission on Human Rights, and the subsequent court ruling ordering the Chilean government to suspend all acts causing the expropriation of the Pehuenche from their ancestral lands (Aylwin 2003b: 2). Moreover, the agreement was regarded as substandard in relation to the commitments assumed by the government in the negotiations that took place before the agreement was signed.⁴¹

To sum up, the Santiago Sixth Civil Court showed a notable willingness to acknowledge the land rights of the Pehuenche, more specifically their right not to be relocated from their lands. The court ordered the suspension of the construction of Ralco, and upheld its decision when CONAMA and ENDESA appealed. It was not until it reached the Court of Appeals in Santiago that the decision was reversed. The civil court further annulled the environmental authorisation for Ralco, thereby declaring the illegality of the project. In the other two cases, the Santiago Court of Appeal and the Supreme Court demonstrated a reluctance to give effect to the Pehuenche's land rights claims, allowing the electricity law to take precedence over the indigenous law.

What are the reasons for the courts' reluctance to accept the land rights claims of the Pehuenche in the Ralco case and of the Mapuche people in general? And why are some courts more responsive than others? According to the framework, courts' response to indigenous land rights claims is partly a function of the voicing of such claims (the first stage of the litigation process); the manner in which their concerns are articulated, and the choice of legal strategy. Courts' responsiveness further depends on factors relating to the law and the legal system, the legal culture and judges' sensitivity towards human rights issues.

The law and the legal system

The previous chapter described the insufficiencies of the legal framework for the protection indigenous land rights, as well as the problems related to the low status of international conventions on indigenous rights. This is also relevant in relation to courts' response to

⁴¹ Among these commitments were the adoption of measures to improve the country's legal framework for the protection of indigenous rights (such as constitutional reform and the ratification of convention no. 169), measures to strengthen the Pehuenche cultural and territorial identity (by creating an Upper Bío Bío commune and strengthening the already existing Area of Indigenous Development there), as well as measures regarding the prosecution of Mapuche leaders for protest actions related to the construction of Ralco (Aylwin 2003b: 2).

Mapuche claims, because whether a court accepts claims related to their land rights depends on the legal basis for their claims, including the protection of land rights in the legal framework and the status of international indigenous rights instruments. In addition to the insufficiencies of the indigenous law, one must add the problems related to the application of sectoral laws in conflicts over indigenous land. In many conflicts, various concession laws are given precedence over the indigenous law, thereby restraining the effect of the latter:

“(…) the agents of the administration have reiterated the argument that the concession laws (mining, hydroelectricity, forestry, Waters Code, etc.) have a constitutional subsistence (the concept of social function of property recognised in article 19, no. 24 of the Constitution) that the indigenous law does not have, of which it is derived that in the case of a conflict of norms, they take priority over this law” (UDP 2003: 10).

In the Ralco case, the indigenous law turned out to be ineffective in terms of protecting the indigenous lands that were threatened by the construction of the dam. The government forced the expropriation of the Pehuenche’s lands by applying the electricity law of 1981, which imposed obligations on the indigenous, without considering the regulations of the indigenous law. In the cases regarding the final electric licence for Ralco, the electricity law took precedence over the indigenous law. The electric licence severely affected the property rights of the Pehuenche litigants, because it was based on the electricity law, which allowed expropriation of their lands as long as it served the purpose of providing energy for the public good (UDP 2003: 17). The case illustrates how the legal framework for the protection of indigenous rights is rendered ineffective when sectoral laws are ranked higher in the legislative hierarchy.

Sectoral laws have also taken precedence over the indigenous law in other cases related to land conflict. For the Mapuche-Lafkenche communities living on Southern Chile’s coast, access to coastal resources and fisheries was restricted when vast coastal areas were registered in the name of non-indigenous persons, in conformity with the provisions of the Fisheries Act. (UN Economic and Social Council 2003: 12). Other indigenous peoples have also been affected by sectoral regulations. For instance, access to waters has become restricted for the Aymara, Quechua and Atacameño peoples, due to the application of the Water Code, which takes precedence over the indigenous law and facilitates the registration of private property rights over their traditional resources (UN Economic and Social Council 2003: 12). On the issue, UN Special Rapporteur Rodolfo Stavenhagen said in the 2003 report on the mission to

Chile the application of certain sectoral laws had weakened the expected impact of the indigenous law (2003: 20), and gave the following recommendation:

“The sectoral legislation on land, water, mines and other sectors that may be in conflict with the provisions of the Indigenous Peoples Act should be revised, and the principle of the protection of the human rights of indigenous peoples should take precedence over private commercial and economic interests” (UN Economic and Social Council 2003: 21).

The legal culture

The formal characteristics of the legal system are important for explaining how courts respond to legal claims, but equally important is how judges interpret the law, which is influenced by the legal culture. Moreover, courts interpret laws differently, which may explain why some courts are responsive to Mapuche claims while others are not. The legal culture influences judges' understanding of what is the appropriate manner to handle human rights issues, and has an impact on judges' perceptions of the justiciability of human rights norms. The willingness to apply international legal standards to judicial decisions has a positive impact on judges' responsiveness. I argue that courts are more likely to acknowledge indigenous rights and be responsive to claims related to such rights if they are generally committed to human rights. I maintain that a conservative and formalistic legal culture may have a negative impact on judges' courts response to claims related to indigenous peoples' land rights.

Formalism and conservatism

The Chilean legal system has been described as a conservative system with a bias towards conservative values and interests, particularly in the area of human rights (Hilbink 2003: 87). Various studies of the Chilean legal system have documented its corporatist and formalistic character.⁴² According to Morales (2003), crucial decisions have been left to political actors, and judges have avoided adopting decisions that challenge these actors. This cautiousness has resulted in a rather scarce jurisprudence with regard to declarations of unconstitutionality. The corporatist features of the system were strengthened by Chile's economic system, which for many decades was concentrated on import substitution. Crucial decisions on economic issues were taken by political actors, and the majority of conflicts were resolved outside the judicial sphere (2003: 3).

⁴² See, for instance, Vargas y Duce 2000; Morales 2003; UDP 2004.

The formalistic perspective prevalent in the judicial system has been expressed by a lack of attention towards the principles of the juridical system and particularly towards fundamental rights (Morales 2003: 4). Human rights make up the core of constitutional principles, and the connection between fundamental rights and such principles is discernible in democratic regimes. This perspective, however, has not been fully embraced by the Chilean judicial system; on the contrary, the prevailing view accentuates the role of legal norms and disregards the importance of principles. Judges' decisions are exclusively based on the application of legal norms, or on the "mechanic" application of the law. Principles, on the other hand, are regarded as vague and supplementary, resorted to only in the absence of clearly applicable norms. Hence, constitutional principles have to a very limited extent been applied to the courts' decisions (Morales 2003: 4 – 5).

The insufficient development of constitutional principles in courts' decisions generates certain deficiencies in the Chilean legal system. First, it affects the courts' function to deliver information about their practices, as well as the contents of citizens' rights and how these are realised. Second, the lack of a significant jurisprudence negatively affects the motivation to carry out case-based research in the country's law schools (Morales 2003: 5). Morales describes the situation as a vicious circle: the lack of innovative national jurisprudence reduces the integration of new concepts and perspectives into the education in law schools; lawyers base their argumentations in court on rigid and formalistic concepts taught them in law schools, and the lack of progressive arguments by lawyers is one of the factors explaining the insufficient development of constitutional principles in courts' decisions.

Some advances – on the institutional level the establishment of a constitutional court, and on the process-level the writ of protection – might have contributed to reduce the degree of formalism in the judicial culture. The creation of the Constitutional Court was directed at achieving greater control of constitutionality and a more effective protection of basic rights. However, efforts to move in that direction have been obstructed by serious obstacles. The first Constitutional Court of 1971 ceased to exist after the military coup in 1973, and the legitimacy of the new court, established by the 1980 Constitution, was constantly questioned, mainly because of the intervention of the armed forces (Morales 2003: 6). Moreover, the Chilean court has not had full authority of the control of the constitutionality of laws and administrative acts. This is due to Chile's mixed system of judicial review, in which constitutional jurisdiction has been shared between the Constitutional Court and the regular

judiciary (the Supreme Court and the Courts of Appeals), as well as a special body responsible for controlling the constitutionality of administrative acts, the *Contraloría General de la República* (Couso 2004: 72 – 73). This system, however, was modified by the 2004 reform on constitutional jurisdiction, which extended the Constitutional Court's review powers (CEJA 2005: 126). Prior to 2004, the Constitutional Court was responsible for reviewing the constitutionality of *proposed* legislation, in other words, its main task was the *preventive* control of the constitutionality of laws. The review of already existing laws and executive decrees violating constitutional rights was performed by the regular judiciary, with jurisdiction over the writ of protection and the writ of non-applicability. The 2004 reform introduced a new system concentrating control in the Constitutional Court, and expanding its responsibilities (CEJA 2005: 126). As for the possible impact of the writ of protection, this is aimed at making constitutional rights effective, but the Supreme Court resolutions that regulate it have limited its potential.⁴³ According to Morales, the jurisprudence that has evolved around the writ of protection has also demonstrated severe inconsistencies (2003: 7). Hence, neither of the modifications – the Constitutional Court or the writ of protection – have had significant effects on the judicial culture.

International human rights standards

The application of international human rights instruments in the Chilean justice system is another factor that might make constitutional guarantees more effective. The application of international standards on human rights introduces new elements to national law, and might therefore contribute to reduce the degree of formalism. Chilean courts have generally been reluctant to apply the standards contained in international instruments on human rights (Vargas and Duce 2000: 23). Chile ratified the International Covenant on Civil and Political Rights in 1989 and the American Convention on Human Rights in 1991, but their application in judicial decisions has not been extensive. The 1989 Constitution contains provisions referring to the recognition of the norms of the international treaties ratified by Chile (article 5), but these provisions have only been applied sporadically (Morales 2000: 7). When they have been applied, they have often been so in a merely declarative manner, without having much influence over the final judicial decision. Courts sometimes resort to international jurisprudence, but fail to make reference to it. This is a major drawback, since reference to

⁴³ Morales maintains that politicians are partly to blame for this, since they have failed to dictate the necessary norms for the implementation of the writ of protection (2000: 7).

international jurisprudence on human rights issues would enhance the strength of lawyers' arguments.

Even though application of international standards on human rights has traditionally been uncommon in Chile, courts now become increasingly inclined to resort to international standards, and some significant jurisprudence has been developed as a consequence of this (Vargas and Duce 2000: 23). An example worth mentioning is a sentence issued by the Court of Appeals in Santiago regarding the Amnesty Act of 1978. The court declared the impossibility of applying the law to a case involving the disappearance of persons during the military regime from 1973 to 1989, on the grounds that its application was contrary to international norms on human rights and humanitarian law. The court referred to norms contained in the American Convention on Human Rights, the Covenant on Civil and Political Rights, as well as the Geneva conventions in its final sentence. The sentence was reversed by the Supreme Court, but even so it is a good example of how the application of international norms may generate progressive national jurisprudence (Vargas and Duce 2000: 24).

Positive developments

While none of the above mentioned measures have been successful in terms of reducing the degree of formalism in the judicial culture, there are two quite recent initiatives that are likely to have a positive impact. One of them is the reform of the criminal justice system, which began to operate in 2000 and has gradually been implemented in all regions of the country. The reform has contributed to reducing the formalistic and ritualistic nature of the criminal justice system, by introducing a number of changes to the prosecution and the judgement of crimes (Morales 2003: 8). The most important modification is the replacement of the traditional written proceedings with oral proceedings. The new criminal procedure code also to a greater extent than the old one refers to the adoption of constitutional principles and international human rights norms (Morales 2003: 8). The criminal justice reform is relevant because it might have a significant impact by generating modifications in terms of reducing formalism in other fields of the judicial system. I consider it an important example of how measures can be taken to reduce formalism in the legal culture and enhance adherence to international human rights norms.

The second initiative is the establishment of the Judicial Academy in 1995. Various countries in Latin America have created judicial schools for the purpose of improving judges'

training.⁴⁴ In order to access a judicial career in Chile, one must first be accepted to the Judicial Academy and complete all of its courses. Furthermore, all judges, except Supreme Court judges, are required to take courses throughout their judicial career. According to Morales, the academy should have a positive effect on the judicial culture in terms of diminishing the formalistic and ritualistic patterns still prevalent in the system (2003: 14). Although the reduction of formalism requires additional measures⁴⁵, the Judicial Academy and the criminal justice reform are both important initiatives that may contribute to positive alterations in the mentality and conduct of judges.

An aspect worth noticing is that both the elaboration of the criminal justice reform and the creation of the Academy were badly received by some sectors of the Judicial Branch. Regarding the first, Morales explains how judges were critical to the reform:

“..[I]n the germinal stages of the reform, the predominant vision among judges was that there existed no significant crisis, and that the solution to the problems basically consisted of a significant increase in resources and of introducing partial amendments to the existing system (...).” (2003: 14).

Hence, the opinions of judges articulated through the media expressed multiple objections to an extensive reform of the criminal justice system. The prevailing notions of formalism and ritualism in the existing criminal justice system, and the consequences for the effective protection of fundamental rights, did not appear to be an issue for the majority of judges.

Sensitisation to human rights issues

How judges interpret the law depends on their sensitivity to human right issues. In this context, judges' sensitivity to the concerns of the Mapuche is crucial to how they respond to their claims. Judges' sensitivity is influenced by their social and ideological background, but also by education and training. Ongoing training may educate and sensitise judges towards human rights in general and indigenous rights in particular. As mentioned above, training programmes are provided by Chile's Judicial Academy.

⁴⁴ Costa Rica established its Judicial School as early as 1964; El Salvador and Honduras in 1991; Guatemala in 1992 and Panama in 1993. The Paraguayan Judicial Academy was mandated by the 1992 constitution. In Peru, judicial education is provided by the *Academia de la Magistratura*, established in 1996. Similar initiatives have been created elsewhere in Latin America: In Uruguay the *Centro de Estudios Judiciales*; in Colombia, the *Rodrigo Lara Bonilla Escuela Judicial*, and in Bolivia, the *Instituto de Capacitación de la Judicatura y el Ministerio Público* (although its functioning has been irregular) (Correa Sutil 1999b: 273, endnote 5).

⁴⁵ Morales stresses the need for introducing general transformations into the teaching at law schools (2003: 15).

Training programmes of the Judicial Academy

The Judicial Academy was established in 1995 for the purpose of creating an institution dedicated to the training of the members of the Judicial Branch and concerned with “the achievement and broadening of knowledge, abilities, skills and basic criteria for the adequate exercise of the judicial function”.⁴⁶ The Academy’s training programme (*Programa de Formación*) is directed at lawyers wishing to commence a judicial career. The programme is based on practical education, involving two kinds of activities: court internships and theoretical activities. During the court internships, the students are instructed by a “judge-mentor” and gain knowledge about judges’ daily work, as well as the jurisdictional and administrative features of a court (Morales 2003: 10). The theoretical activities mostly consist of workshops and seminars providing opportunities for analysis and revision of the practical experience acquired during the court internships. The workshops focus on various topics, such as judicial ethics, evaluation of evidence, judicial reasoning, interpretation of the law, and conflict resolution systems. One of the objects of the programme is to make the students aware of the impact that laws have on society. For this purpose, the programme incorporates organised visits to places associated with the role of judges, such as visits to the Legal Assistance Corporation. The Judicial Academy aims at reflecting a broad range of perspectives in its training programme, and has therefore incorporated a diverse group of people into its organisation, Judicial Branch officials, academics, private sector attorneys and professionals from other fields (Morales 2003: 11).

A study of the Academy’s graduates in the initial phase of the training programme, based on interviews with the graduates, revealed positive opinions about the programme. The workshops were considered an important part of the shaping of legal standards, and the court internships were much appreciated because they enabled the students to gain first-hand experience of the work inside a courtroom. The graduates highly regarded the practical activities of both the court internships and the workshops, and considered the activities to provide them with the critical reasoning required for a judicial position (Morales 2003: 12).

The Judicial Academy also offers continuous training to those who are already members of the judiciary. The continuing education programme (*Programa de Perfeccionamiento*) is aimed at updating and enhancing the abilities and knowledge of judges and judicial

⁴⁶ http://www.academiajudicial.cl/quienes_somos.php Accessed 2 May 2006.

functionaries. It is distinguished among judicial schools in Latin America, because it is open to all members of the Judicial Branch, including judicial employees at all levels (CEJA 2005: 124). Training is based on active participation, and the programme consists of annual courses that go deeper into key issues related to judicial work.⁴⁷ There are several incentives for the functionaries to enrol in the workshops offered by the Academy. In addition to the educational utility of the workshops and the social activities that they involve, there is also a strong incentive in the sense that the enrolment serves as a basis for the evaluation of merits (Vargas and Duce 2000: 10). In order to be placed on the annual honour roll, functionaries must have participated in at least one of these courses. The placement on the annual honour roll is an important factor for promotions, and this strengthens the motivation to participate in the courses (USAID 2002: 119). Evaluations of the programme in 1998 revealed that the impact of the courses was considered positive by the majority of the participants. The most important effect pointed out by the participants was that it made them more open to changes in the judicial system (Morales 2003: 13).

In addition to the two programmes described above, the Academy offers a capacity-building programme for judges aiming at the offices of minister or judicial prosecutor in the courts of appeal. The programme provides training in relevant substantive and procedural law, and informs participants about the knowledge and skills required to fulfil the functions of minister in a court of appeals.⁴⁸ Finally, the Judicial Academy extends educational activities on the Criminal Procedure Reform to both functionaries at the primary level and other employees (CEJA 2005: 123).

Composition of the bench

Latin American countries have generally been characterised by a significant social and cultural distance between the judges and the people. Roberto Gargarella explains how a constructed distance has had a negative impact on poor people's confidence in the judiciary and made judges more insensitive towards poor and marginalised groups. This distance originates in the framing of the American constitutional system, in which institutional instruments were designed to detach the judges from the people, in particular from the lower

⁴⁷ Courses vary in content, methodology, materials, and academic level of the instructors, depending on the different entities that acquire the workshops after a process of bids (Vargas and Duce 2000: 10).

⁴⁸ <http://www.academiajudicial.cl/habilitacion.php>

classes.⁴⁹ The intention was to protect the judicial institutions from popular controls, and the judicial positions were designed to make them available to an elite. This reduced poor people's access to the judges, by placing the judiciary "too far removed from the people".⁵⁰

The legacy of the constitutional framers is reflected in the lack of social diversity in Latin American courts. Pluralism in the legal system is critical to the ability to relate to the concerns of a broad range of various social groups. It is important that the judiciary include representatives from disadvantaged groups such as poor, women and ethnic minorities, because this increases the chances of ruling fairly with regard to those groups. For instance, in Chile, women have mostly been excluded from superior judicial positions. Concerning indigenous groups, their representation in the Chilean judicial system is practically non-existent. In 1998, only one out of 188 officials at the superior levels, and four out of 643 officials at the lower levels, had a Mapuche surname (Correa Sutil 1999:3). The Chilean justice system has traditionally been profoundly marked by a class bias; in fact, its judiciary has according to Gargarella been "more class biased than those of most other countries in the region" (2002: 11, footnote 11). This is relevant here, because a system that is highly class biased may have implications for the responsiveness of courts to the Mapuche, who constitute one of the poorest and most marginalised groups in Chile.

Appointment procedures

At the first stage of the process of nominating Supreme Court justices, the court prepares a list of five candidates. The Minister of Justice is responsible for the appointment of justices, and selects one of the candidates nominated by the Supreme Court. The appointment must be confirmed by a two-thirds majority in the Senate (USAID 2002: 107). The final stage of the appointment process, the ratification of justices by the Senate, was introduced as a consequence of a constitutional reform in the late 1990's. The reform also brought about an increase in the number of judges (from 17 to 21) and a requirement that at least five members of the Supreme Court must come from outside the judicial career. According to Vargas and Duce, the reform has been undermined because the Supreme Court itself is responsible for the nomination of justices, and is thus in a position to select candidates with profiles similar or for that matter identical to that of the existing court (2000: 9). This is counteractive to the aim of

⁴⁹ The instruments include life tenure, economic independence and selection through indirect mechanisms (Gargarella 2002: 7).

⁵⁰ The expression is from Gargarella 2002.

the reform, which was to bring new perspectives and opinions into the court. It may contribute to strengthening conservatism, because it prevents obstructs the introduction of new perspectives and values to the legal system. This may in turn affect courts' responsiveness to Mapuche land rights claims, because conservatism is usually associated with a lack of adherence to human rights.

Lower court judges are recruited through the Judicial Academy. The process begins with a recruitment campaign aimed at encouraging petitions. The next stage consists of evaluations of applicants' background, knowledge and qualifications, as well as psychological tests, and finally personal interviews. Candidates who complete this stage successfully proceed to take part in the training programme described in the above sections, the *Programa de Formación*. The candidates receive scholarships for the programme, which lasts for six months. In the final stage, new judges are selected among the graduates of the Academy. A list of three candidates is prepared by the immediate superior tribunal in the judicial hierarchy, and the Ministry of Justice is responsible for appointing the judges (USAID 2002: 110).

The results of the selection system have according to Vargas and Duce been positive. They maintain that the system has operated with an unprecedented degree of transparency (2000: 9). The selection process has attracted many candidates, and the ones selected seem objectively to be the ones best suited for the position. The graduates themselves feel more independent, because they understand that their nomination was achieved through a competitive process, and was not based on connections or friends, but on their own merits.

The changes in the Supreme Court, however, have not been that positive. Vargas and Duce consider the modifications introduced to the system of selection of Supreme Court justices as inadequate solutions in terms of gaining long term effects:

“This is about one of those modifications that give the false idea that the problems of the Judicial Branch are about persons and that by changing some of them, the system, because of this merit alone, can improve, forgetting the institutional defects that the system suffers from, that brings anyone to behave, sooner or later, in a more or less similar manner” (Vargas and Duce 2000: 9).

Moreover, the high quorum demanded for the ratification of Supreme Court justices reduces the possibility that original and disobliging judges assume positions in the Supreme Court.

Political groups may object to the ascent of a justice because they feel they might be affected by his or her conduct (Vargas and Duce 2000: 9).

Summary

Among the three lawsuits described above, the one presented to the Santiago Sixth Civil Court is the most noteworthy example of how courts may defend indigenous land rights. The court acknowledged the land rights of the Pehuenche, and ordered the suspension of the construction on the Ralco dam. Later, the court annulled the environmental authorisation for Ralco. The Court of Appeals of Santiago and the Supreme Court were less responsive to Mapuche claims, and rejected their legal actions, in a decision that permitted the electricity law to take precedence over the indigenous law.

The legal basis for litigating on indigenous land rights has been an important variable in explaining courts' response to Mapuche claims. The insufficiencies of the legal framework on the protection of indigenous rights to land are strengthened when one adds the problems posed by the application of sectoral laws. Sectoral laws such as the electricity law and the water code in some cases take precedence over the indigenous law, rendering the latter ineffective. The Santiago appeals court decision illustrates this. In addition to the nature of the law and the legal system, the legal culture is formalistic and conservative. I consider this to have an impact on courts' responsiveness towards Mapuche claims, because the legal culture influences judges' perceptions of norms of appropriateness on how to handle human rights issues, and conservatism may make them less committed to human rights. Judges rarely apply international human rights standards to their decisions, and I maintain that this has a negative impact on courts' response to indigenous rights claims.

Although I find no information on courses specifically related to human rights or indigenous rights, I consider the training programmes offered by the Judicial Academy relevant to explaining judges' sensitivity towards human rights issues, as well as indigenous rights issues, because the programmes serve to reduce conservatism and formalism, and make judges more liberal and more open to changes in the judicial system. This may in turn influence their attitudes towards human rights and indigenous rights. Composition of the bench and appointment procedures influence judges' sensitisation, and the Chilean judiciary is generally characterised by lack of diversity on the bench, in particular with respect to the representation of indigenous peoples. In addition, the system is highly class biased. These factors combine to

make judges less sensitive to indigenous rights issues, which in turn make courts less responsive to Mapuche claim. The selection mechanisms for lower court judges are given positive evaluations; they are transparent, and are considered to strengthen judicial independence. The appointment procedures for Supreme Court justices, on the other hand, entail a system which allows the court to nominate candidates that have the most affinity to the existing court. This system favours conservatism, and may to some extent explain why the higher courts seem less responsive to indigenous land rights claims than the lower courts.

Although some of the lawsuits that have been filed by the Mapuche have been lost, such as the two writs of protection described above, litigation as a strategy cannot be considered unsuccessful. Even if cases are lost, litigation still provides a platform to mobilise around indigenous land rights, to create awareness, to attract media attention and to influence the political and social discourse on indigenous land rights.

5. CONCLUSION

The purpose of this thesis was to examine the Mapuche people's possibilities for litigation for the defence of their rights to land, territories and resources. Possibilities to litigate on land rights were assessed by analysing the Mapuche's ability to *voice* their land rights claims in court and Chilean courts' *responsiveness* to their claims. The voice of the Mapuche and the responsiveness of the courts combine to determine the role of the Chilean judicial system in advancing the Mapuche people's land rights. As explained in chapter 2, these two aspects are conditioned by a whole range of factors, some relating to access to justice, others to the nature and culture of the legal system. The focus of the thesis was the case involving the construction of the Ralco dam in the territory of the Mapuche-Pehuenche in Upper Bío Bío, and some of the lawsuits presented in relation to this case.

The findings suggest that the Chilean courts have had a limited role in protecting the land rights of the Mapuche. There are a number of reasons for this. Some of them have to do with the basis for voicing indigenous land rights claims, and others relate to the manner in which courts respond to Mapuche claims. Regarding the ability to voice one's claims, at first glance, it seems the Mapuche have a good starting point, considering some aspects – mainly related to rights awareness and associative capacity. These and other factors impacting on “voice” were dealt with in chapter 3. The media has not contributed to raising the awareness of the Mapuche. On the contrary, the Chilean press stigmatises the Mapuche and their social protest, and have presented a very one-sided view of the so-called “Mapuche conflict”.

However, the presence of rights awareness programmes and indigenous rights organisations may compensate for the media's insufficiencies with regard to awareness-raising. CONADI's Programme of promotion and Information on Indigenous Rights, PIDI, has been important in this respect, and has aided many Mapuche individuals and organisations in issues concerning their rights. Indigenous NGO's have played a significant role in raising the Mapuche's awareness of and knowledge about their rights. The work of these organisations is also extremely valuable in terms of motivating the Mapuche and other indigenous peoples to mobilise and demand the protection of their rights. This brings us to the Mapuche's associative capacity, which appears to provide a solid basis for voicing land rights claims. In recent years, there has been a revitalisation of Mapuche culture and an increase in mobilisation efforts. The Mapuche have the capacity to join forces and create associations that

are able to mobilise around land rights issues, encourage collective action and generate international support. Mapuche organisations were active in opposing the Ralco project, and had the capacity to collectively mobilise and to cooperate on strategies to support the Pehuenche communities affected by the project. Various strategies were employed, ranging from demonstrations and road blockings to judicial initiatives. One of the legal actions brought against the Ralco project had the effect of postponing construction on the dam.

Most of the Mapuche population is poor, and justice is expensive. Hence, the Mapuche are dependent on free legal assistance in order to be able to claim their rights in the legal system. Public legal aid is provided by CONADI, which today has several legal service offices all over the country, including the regions with the highest concentration of Mapuche population. In the 1990's, however, CONADI had fewer offices, and lacked staff and resources to adequately respond to the Mapuche's increasing demand for legal aid. According to Aylwin (2000: 15), until 1997, CONADI was unable to provide sufficient legal aid for the Mapuche-Pehuenche communities affected by the Ralco project. Instead, the Pehuenche received legal assistance from university legal programmes.

So far, after having examined these variables, the situation does not seem that bad with respect to the possibilities for voicing Mapuche land rights claims in the legal system. However, the Mapuche face a number of obstacles that impede access to justice. Some of the barriers are practical and comprise language barriers and the costs related to litigation (which makes the availability of legal assistance crucial), but I find that the most significant barriers preventing the Mapuche from accessing the judicial system are motivational barriers. Studies have revealed a profound distrust towards the legal system among some poor sectors of Chilean society, and it seems this has been one of the major problems in the case of the Mapuche as well.

Fear and distrust towards the judiciary stems from the Chilean justice system's criminalisation of the Mapuche and their acts of social protest. Many Mapuche activists and leaders have been prosecuted for crimes committed in relation to their social struggle to defend land rights and other rights, and the courts have prosecuted them as terrorists. The application of antiterrorist legislation allows the courts to measure out sentences that are disproportionate to the crimes committed. As a result of the application of the anti-terrorist law, they are also in part denied some of the guarantees that are available to defendants in the new criminal justice

system. The Mapuche have been charged with “illicit terrorist action” for crimes such as incendiary fire, crimes which hardly qualify them as terrorists. The courts’ rough response to the Mapuche social protest creates perceptions of discrimination and racism among the Mapuche, and discourages them from seeking redress through the judicial system. I consider this one of the most important factors affecting the Mapuche’s motivation to pursue a legal strategy.

The law and the legal system may also present barriers to Mapuche individuals and communities. The Chilean legal system is bureaucratic and formalistic, and impedes a speedy and efficient protection. The formalities of the judicial process create a disincentive to seeking justice among people in general and among the Mapuche. The main mechanism for the protection of human rights, the writ of protection, is designed and implemented in a way that hinders an effective protection. But among the variables relating to the law and the legal system, I find that the legal basis for land rights litigation is the most important. The legal framework is insufficient for the protection of indigenous land rights. Although law 19.253 of 1993 represents an important advancement in the area of indigenous rights, it is insufficient in relation to international norms on indigenous rights. The law fails to include the concepts of territory and natural resources, concepts that are largely included in the legal and constitutional frameworks of other countries in the region. The law also excludes the term “peoples”, recognising only the existence of various “ethnicities”, and this has implications for the Mapuche’s rights to self-determination. Another crucial matter is that Chile, in contrast to most other Latin American countries, has not yet ratified ILO convention 169 concerning the rights of indigenous peoples.

Taking these obstacles into account, it seems the Mapuche’s possibilities for voicing claims in the legal system are limited, and it might affect their choice of using litigation as a strategy. It is possible to assume that other strategies have constituted a more important arena for mobilising around land rights. The availability of alternative channels may also have reduced the Mapuche’s motivation to pursue a legal strategy. If alternative strategies are considered more effective, the Mapuche might choose to opt for these strategies instead of litigation. By alternative channels, I refer primarily to the political and social mobilisation strategies used by the Mapuche to demand land rights, such as demonstrations and other protest actions. These have been widely used by the Mapuche movement to mobilise around indigenous rights

to land. On the other hand, litigation used in combination with political mobilisation might strengthen the voice of the Mapuche.

Despite the barriers affecting the voice of the Mapuche, they have been able to bring legal actions related to their land rights. Chapter 4 discussed the courts' responsiveness towards the Mapuche's land rights claims. When examining the lawsuits brought in relation to the Ralco case, I was interested in assessing what determined the responsiveness of the courts towards the claims brought, and why some courts were more responsive than others. The findings reveal that the courts responded quite differently to the Pehuenche's claims. The Santiago Sixth Civil Court acknowledged the Pehuenche's land rights, first by ordering the suspension of the construction on the dam, then by nullifying the environmental authorisation for Ralco. The Court of Appeals of Santiago, on the other hand, reversed the decision to nullify the environmental authorisation, and rejected both cases filed by the Pehuenche in 2000, allowing the electricity law to take precedence over the indigenous law.

The application of certain sectoral laws is precisely one of the factors explaining Chilean courts' response to Mapuche land rights claims. Sectoral laws such as the electricity law and the water code may take precedence over the indigenous law and render the latter ineffective. One of the factors explaining courts' responsiveness to Mapuche land rights claims is the legal culture. In Chile, the legal culture is formalistic and conservative, and there is a lack of attention towards human rights. Application of international human rights standards is important, because it introduces new elements to the law, and may reduce the degree of formalism in the legal system. Chilean courts, however, have generally been reluctant to apply the norms contained in international human rights treaties. This suggests that the courts also have been reluctant to apply international norms on indigenous rights, since such norms are part of international treaties, and may therefore serve to explain why the responsiveness of the courts towards Mapuche claims.

Equally important to explain the courts response to Mapuche land rights claims is judges' sensitivity towards human rights. This influences the manner in which judges interpret the law, and depends on what training and educational activities are available to judges. The Judicial Academy offers training programmes for judges, and their programmes have received positive evaluations from the students. The training activities may serve to educate and sensitise judges by focusing on topics such as judicial ethics, judicial reasoning and

interpretation of the law. While I found no information on training geared towards human rights or indigenous rights, I maintain that the training activities offered by the Academy have a positive impact, because they may contribute to reduce formalism and introduce new perspectives. According to studies of the training activities, one of the most important effects was that they made the participants more open to changes in the legal system. Ongoing training might make judges more liberal and generally more open and sensitive to human rights issues.

Sensitisation to human rights issues is also influenced by judges' social background, and thus depends on the composition of the bench. In Chilean courts, there is generally little diversity on the bench, and there are very few indigenous persons employed in the legal system. This affects the ability of judges and judicial employees to relate to the concerns of the Mapuche, and thus the ability of the legal system to respond to Mapuche claims. Also, the Chilean judicial system has been one of the most classed biased systems in South America. This has grave implications for the Mapuche people, who are among the poorest and most marginalised in Chile.

Composition of the bench is influenced by appointment procedures. The new system for selecting judges to the lower courts has achieved positive results. Appointment procedures are transparent, objective and graduates feel more independent after being selected through the Judicial Academy. Regarding the appointment of Supreme Court judges, however, the court's responsibility to nominate judges itself makes it possible to select candidates with profiles similar to that of the court. This may prevent the introduction of new values and perspectives, and may contribute to strengthen conservatism in the court. I consider these factors relevant to explaining the Supreme Court's response to Mapuche litigants, because a conservative judiciary is generally less oriented towards human rights and consequently indigenous rights. And the differences in the appointment procedures might explain why lower courts were more responsive to indigenous land rights claims than higher courts in the Ralco case.

The findings in this thesis lead to the conclusion that Chilean courts have not assumed an active role in defending the land rights of the Mapuche people. Litigation has been an unsuccessful strategy in the narrow sense, since it has not been sufficient to protect the Mapuche against violations of their land rights. However, I maintain that litigation has had a positive impact as part of a broader mobilisation strategy. Litigation has had the effect of

stimulating social mobilisation, creating awareness and consciousness among the Mapuche, attracting attention to the Mapuche cause from the media and human rights organisations, and influencing public discourse on indigenous land rights. Thus, litigation may have an impact on policies on indigenous land rights, regardless of the outcome of a case in court.

Hopefully, Chilean courts will be more responsive to Mapuche claims in the future, and develop significant and progressive jurisprudence with regard to indigenous peoples' rights to lands, territories and resources.

The purpose of this thesis was to conduct an in-depth case study on the role of Chilean courts in enforcing the land rights of the Mapuche people. I have attempted to fulfil the aim of the thesis by analysing relevant variables and providing examples of three lawsuits related to indigenous land rights. The framework applied to this thesis could also serve to conduct broad comparative studies analysing a larger amount of cases. I would have liked to include a larger case-material, but lack of information on lawsuits and judgements precluded the possibility for doing so. The poor record-keeping of the Chilean judicial system has been commented on in previous studies (Couso 2004: 78) The Judicial Branch documents its decisions to a very little extent, and journals on civil jurisprudence include only a selection of the total amount of cases. Of all the cases I studied before selecting the three lawsuits that are included in this thesis, only one was found in the largest online jurisprudence database. All the information on the cases I present in this thesis is based on data collected from articles, documents and news located on the web pages of Mapuche organisations. It would be interesting to look into the lawsuit against Pangué, the first of the two dams to be constructed on the Bío Bío River. This case is interesting, because it was won in the appeals court, but ultimately lost when appealed to the Supreme Court (Aylwin et al 2001: 4). But again, the lack of available information on this case limited the possibility of including it in the analysis.

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