

THE REBEL DEMOCRACY: A LOOK INTO THE RELATIONSHIP BETWEEN THE *MAPUCHE* PEOPLE AND THE CHILEAN STATE

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Having left behind dictatorial regimes, many Latin American countries are transitioning to democratic regimes. According to international agencies and developed countries, this is remarkable progress and a step toward the implementation of inclusive polities. In the particular case of Chile the economic prosperity is an advantage that strengthens the country in the new millennium. The government is effectively fighting poverty; the atrocities committed under the Pinochet era are no longer denied, and the living standard of large portions of people have critically increased, giving to Chile the image of a good student among the messy class of Latin America.

In this context, social protests carried on in several countries contrast to Chile's signing of free-trade agreements with different developed countries. This viewpoint tends to overlook, nonetheless, one of the gravest and most ancient political and legal problems: the (unfriendly) relationship that the Chilean State has historically had with its native populations. Since the early years as an independent nation Chile has carried on a controversial and ambiguous relationship with the indigenous peoples that inhabited the country's land. At some times, explicit hostility has taken place; at some others an effort to get closer.

The current situation is particularly problematic. The return to democracy, in the late 1980's, generated legitimate and grounded expectations in the indigenous that the wave of

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democratization would entail a new type of relationship with the State. However after fourteen years of democratic government, a new legal statute for the indigenous, and many breached promises, a significant proportion of the indigenous, in particular the Mapuche, deploy violent protests that have forced the State to pay unexpected attention. Land invasions and criminal prosecutions have replaced agreements, putting a discordant note in Chilean society's desired harmony.

How should the democratic system react to these forms of social protest? On the one hand, the protests may attempt to undermine the value of social order and rule of law. But, on the other hand, they are nothing but the desperate cry of those who have tried to speak by all normal means. When social movements such as the Mapuche deploy violent forms of social protest, do they strength or weaken democracy?

In the following work my intention is to offer certain considerations about the relationship between democracy and the indigenous social movement in Chile. To that end I shall begin by describing briefly what goes to making up the social actors who today protest in Latin America (I), next reviewing the way in which links have been formed between the Chilean State and the Mapuche (II). After that I establish as a paradox the fact that the recovery of democracy, as a political system, has not meant significant improvement in the way of life of the most passed-over sectors of Chilean society, laying down conditions for protests, both organized and irregular - as I shall explain what I mean by that (III). Finally I shall outline the need to adopt a different way of translating the differences which have marked the growing distance between those included in the social pact and those who have remained outside it in order to reinforce the degree to which the rule of law is in force (IV).

I. Social protest actors

Under the label “new social movements” one can include two large kinds of groups with one important difference (and one which adds another separation between the developed and underdeveloped worlds, or, for optimists, the developing world), and that is the nature of the cause for which they have been organized. While groups of ecologists, consumers, and (more and more) pacifists are the ones who “compete” in Europe and the U.S.,¹ in Latin America those who have drawn social attention are collections of people who do not proclaim – at least not directly – causes which would benefit human beings or the planet in general, but rather primordially very personal claims (which, however, appear or are often presented in a collective way).² In the words of Santos, “the emancipation one is fighting for aims to transform the day to day situation of the victims of oppression here and now, and not in the distant future”.³ I emphasize this point not because it contrasts with the goals of protestors in developing countries, but rather it shows evidence that the *intensity* of the battle each one is fighting is located on different battlegrounds, both within themselves and regarding the value I suppose democracy has.

¹ Claus Offe, *New Social Movements: Challenging the Boundaries of Institutional Politics*, 52 SOCIAL RESEARCH 817 (1985)

² Exceptions to this classification could be found in movements of unemployed workers and in the feminist movement, which play a significant role as social organizations. For this see René Mouriaux and Sophie Beroud, *Para una definición del concepto de ‘movimiento social’* [A definition of the concept of ‘social movement’] in the REVISTA DEL OBSERVATORIO SOCIAL DE AMÉRICA LATINA (OSAL) [LATIN AMERICAN SOCIAL WATCH REVIEW] 119 (2000). Also of particular interest is the description and analysis made by Hertz of the consumers organizations in the US and Europe as new actors who question the “silent takeover” transnational firms practice of different countries’ democracies. According to her, different governments have been losing ground to multinationals, thus affecting the citizens’ or consumers’ quality of living, which has made the way the really powerful act particularly relevant. See NOREENA HERTZ, *THE SILENT TAKEOVER: GLOBAL CAPITALISM AND THE DEATH OF DEMOCRACIES* (2001).

³ Boaventura de Sousa Santos, *Los nuevos movimientos sociales* [The new social movements] in the REVISTA DEL OBSERVATORIO SOCIAL DE AMÉRICA LATINA (OSAL) [LATIN AMERICAN SOCIAL WATCH REVIEW] 178 (2001)

Without trying to deny the relevance of living in an environment which is free of pollution, and in a world in which the use of force is discouraged, and where those who want to use it must observe minimum rules (dramatically not kept to), one must bear in mind that in Latin America, the very diverse causes of the social movements – which, people insist, makes it very difficult to define them – have however a common denominator: a transversal struggle to obtain recognition of *essential* claims like freedom, equality, and justice (or, at the most, higher levels of these). I do believe that these claims may be used as the grounds on which social movements base their protests in developed countries. For example, consider the debate over same-sex marriage in the US. Gay rights groups also demand recognition of their interests on grounds of equality and liberty. The situation is different, however, if we keep in mind that those who *intervene* in this social process use normal or regular mechanisms of protest –e.g., litigation or ballots.⁴

I am aware that there are more factors involved in the way these or those act, but it seems to me that by simply establishing how basic are the claims made by these sectors of society and the continuing impossibility of channeling them properly, it requires us to begin by taking good heed of this issue (which is likewise an elemental one).

More and more, Latin American has been witnessing new manifestations of social discontent in significant sectors of the countries – for their number or their special condition of vulnerability -, caused by factors which the literature on the subject usually attributes to the

⁴ See WILLIAM ESKRIDGE, EQUALITY PRACTICE: CIVIL UNIONS AND THE FUTURE OF GAY RIGHTS (2002). In this vein it is remarkable that on November 2, 2004, some Americans not only elected George W. Bush as president but also approved state constitutional bans of same-sex marriage. My point is that leaving aside accusations of ballot mishandling or misinformation, the debate over this sensitive political and legal issue remains open to the people's opinion. And what is determinant to my discussion below, it is carried on through what Reed calls "forms of political activity," such as voting. See Douglas S. Reed, *Popular Constitutionalism: Toward a Theory of State Constitutional Meanings*, in 30 RUTGERS L. J. 871, 875 (1999)

progressive implementation of neo liberal policies by the states, policies which, among other things, they say, have accentuated the levels of exclusion of these groups, though a more exhaustive examination would require the incorporation of other variables, which makes it difficult to make uniform the cases of different countries.⁵

The Movement of Landless Workers (*Movimiento Sem Terra*, MST) in Brazil, the coca-growers in Bolivian Chapare, the Confederation of Indigenous Nationalities in Ecuador, the Zapatistas in Mexico, and the notable protest raised by the Piquetero Movement in Argentina, are all examples of a new kind of collective organization around objectives, which, although they were there before the new protests, - of which the first (and greatest) is the MST – distinguish themselves, nevertheless, by the methods of action, and by incorporating a discourse more complex than that known since the students’ and workers’ mobilizations half way through the last century.

⁵ See, in particular, Rodolfo Stavenhagen, *Social Dimensions: Ethnicity*, in DEMOCRACY IN LATIN AMERICA. (RE)CONSTRUCTING POLITICAL SOCIETY [hereinafter, DEMOCRACY IN LATIN AMERICA] 161, 180 (M.A. Garretón and E. Newman eds., 2001) (“indigenous populations became particularly vulnerable to the negative effects of globalization and so-called structural adjustments”). See generally José Seoane, *Introduction to MOVIMIENTOS SOCIALES Y CONFLICTO EN AMÉRICA LATINA [SOCIAL MOVEMENTS AND CONFLICT IN LATIN AMERICA]* 11 (José Seoane comp., 2003) [hereinafter, MOVIMIENTOS SOCIALES] (“the retreat of representative democracy as a consequence of applying neo liberal policies”); Raúl Zibechi, *Los movimientos sociales latinoamericanos: tendencias y desafíos [Latin American social movements: trends and challenges]*, in the REVISTA DEL OBSERVATORIO SOCIAL DE AMÉRICA LATINA (OSAL) [LATIN AMERICAN SOCIAL WATCH REVIEW] 185, 185 (2003) (“the answers to the social earthquake caused by the waive of neo liberalism in the 80’s”); Claudinei Coletti, *Avanços e impasses do MST e da luta pela terra no Brasil nos anos recentes [Advances and obstacles for the MST and the struggle on the land in the recent years in Brazil]*, in MOVIMIENTOS SOCIALES 73, 77 (“the neo liberal policies, therefore, have significantly amplified the social bases of the land-struggle movements in Brazil”); Diego J. Duquelsky, *Derecho y nuevos movimientos sociales. Algunas reflexiones sobre el ambiguo rol del discurso jurídico en los conflictos sociales [Law and new social movements: some reflections on the ambiguous role of the legal discourse on social conflicts]* in DESDE OTRA MIRADA: TEXTOS DE TEORÍA CRÍTICA DEL DERECHO [FROM A DIFFERENT PERSPECTIVE: ESSAYS ON CRITICAL THEORY OF LAW] 119 (Christian Courtis comp., 2001); Margarita López, *Introduction to LUCHA POPULAR, DEMOCRACIA, NEOLIBERALISMO: PROTESTA POPULAR EN AMÉRICA LATINA EN LOS AÑOS DE AJUSTE [POPULAR STRUGGLE, DEMOCRACY, NEO LIBERALISM: POPULAR PROTEST IN LATIN AMERICA IN THE YEARS OF ADJUSTMENT]* 6, 8 (Margarita López ed., 1999) (“we are discovering the way in which the sectors whose expectations and living conditions have been most knocked about by the adjustment policies have begun to demand their rights”), and Manuel Antonio Garretón, *The new socio-political matrix*, in DEMOCRACY IN LATIN AMERICA 224 (“the neo-liberal model has constituted a rupture and demonstrated its inherent failure to become a stable and self-sustaining development”)

As can be seen, among the protest movements existing in Latin America today, some raise their demands and actions from claims typical of indigenous or country people (the coca-growers in Bolivia, the Zapatistas in Mexico, the Indigenous Confederation in Ecuador and the Landless in Brazil). I will concentrate on this form of collective action because, as I understand it, it is the one most likely to exist in Chile. In the case of Chile social protest can also be related to indigenous claims, yet less attention is paid to it, compared to both the indigenous and non-indigenous protests in the rest of the region. Still, the scope and cause of the indigenous protests in Chile are similar to the others, namely, the State's permanent denial of the group.

There are those who think that between the "new" movements organized socially and the "traditional" ones it is possible to point out important differences. They say the social movements, like the emancipation of women and the worker movement, can be portrayed as "collective agents which intervene in the process of social transformation (promoting changes or opposing them)",⁶ while the "new" social movements should not be considered "the contemporary expression of (the) old aspirations of emancipation (of these)".⁷ In their opinion "the novelty lies, basically, 'in the values, forms of organization, mobilization, action, sociopolitical objectives and cultural contents of the NSM'."⁸

I should like to discuss this approach. From the definition given above one concludes that the new social movements, though they show features which separate them from the old socially organized groups, - like the methods of action and their cultural contents-, are no different from these in one very relevant aspect, namely, their condition as interveners in the process of social transformation. Even accepting that the values and the ways of organizing and mobilizing

⁶ J. REICHMANN AND F. FERNÁNDEZ, REDES QUE DAN LIBERTAD [FREEDOMS' WEBS] Chapter 1 (1994), quoted by Duquelsky, *supra* note 5 at 125.

⁷ Duquelsky *supra* note 5 at 126.

⁸ REICHMANN, *supra* note 6 at 69, quoted by Duquelsky *id.*

themselves vary from some to others – which, indeed, requires a greater pause to clear the air -, the new social movements could also be understood, in accordance with this vision, as “collective agents which intervene in the process of social transformation”. It would seem that in that way of understanding there were a merely contemplative vision of these movements, rather as if in the functioning of the state part of the political action is (or has to be) channeled by social groups with greater or lesser presence in public affairs – sometimes identified by the equivocal name of “civil society”, which do not necessarily pour their aspirations into the institutionalized political channels, but which anyway attempt to obtain (or in fact have) degrees of participation-, or, to be exact, levels of *intervention* “in the process of social transformation.”⁹

But the issue in which I am now interested has a feature that makes this conceptualization, at least, incomplete. The Mapuches’ protest, as well as the other social movements’ protests in Latin America, draws public officials’ and academics’ attention since it is viewed both as a strengthening of our democratic system –if they didn’t protest the way they do, we wouldn’t be aware of their grievances- and as a threat to it –i.e., by attacking other people’s property. The issue that, I think, should concern us at this point is the question of what kind of intervention they claim, and what kind they should have. In order to review this I shall limit myself to viewing the situation of the Mapuche in Chile, since they represent a significant social group – regarding the character of the original people –and, together with that, for their condition of being vulnerable, as an excluded group.

A feature which is shared by social protest movements which use non-institutional methods in Latin America is their lack of connection to the institutionalized system of the state; they live under juridical regimes which feel absolutely alien to them, and of which they do not

⁹ See Reva B. Siegel, *The Jurisgenerative Role of Social Movements in U.S. Constitutional Law*, available at <http://islandia.law.yale.edu/sela/eprog04.htm>. (Spanish version forthcoming in LOS LÍMITES DE LA DEMOCRACIA [THE LIMITS OF DEMOCRACY] (Editores del Puerto, 2005)

see how they form part, but which, all the same, impose burdens on them while at the same time (supposedly) assuring them of their rights. But the lack of exercising these and, in some situations, the lack of their rights being recognized, leads them to act “irregularly”- according to the concept of our institutional systems.^{10 11}

It is well known that the eruptions of the new social movements occur, generally, as a reaction to situations in which, in a more or less persistent manner, the state’s structures have shown themselves to be unfeeling towards the demands of these sectors. In a word, the intervention of these groups, however it may be, has always been possible, and, besides, provoked by the absence of dialogue with the state, or simply due to the state’s being deaf. In that sense it does not seem clear that it is a matter of actors who really intervene – if by that one understands something more than manifestations *ex post facto* – in the process of state decision-making; in short, in the self-government proclaimed in the countries in whose lands they live. And if it is true that a promise of democracy is the possibility that the people may feel that they have (some) influence in decision-making, then close attention should be paid to the way in which these groups’ intervention is fulfilled.

II. The distance between the Mapuche and the Chilean state

¹⁰ When I say “irregularly” I want to underline that the means by which these demands make themselves heard today are not those that the law has *specifically* laid down to that end. In other words, although someone might think that the new forms of social protest are nothing but a way of exercising fundamental rights, such as freedom of expression, or the right to petition the authority –and consequently really are considered legitimate ways of acting by the law-, insofar as those who emit these demands denounce the lack of dialogue and deem as void conventional mechanisms of deliberation, they have to “act outside” the system, and in that sense the channel of their claims is irregular. I am grateful to Laura Saldivia for opening my eyes to this point and her disagreement with my perspective.

¹¹ According to Larry Kramer circa 1786, before the US Supreme Court went down with *Marbury*, “it was not the judiciary’s responsibility to enforce the constitution against the legislature. It was the people’s responsibility: a responsibility they discharged mainly through elections, but also, if necessary, by other, *extralegal means*.” See LARRY KRAMER, THE PEOPLE THEMSELVES. POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW 58 (2004) (Emphasis added)

It draws one's attention that documents about social conflict and protest movements do not generally refer to the situation in Chile as a subject to study. Can it be that in Chile cases of social exclusion similar to the rest of Latin America don't exist? Is there any standard to which these cases become relevant? All social groups pledge allegiance to the legal system and channel their claims through ordinary mechanisms? Or is it that, while there is social and political exclusion, groups are not able to mobilize, and those outside the institutional system must resign themselves to receiving the mere assistance of the state?

Within the context of Latin America Chile appears to enjoy a better situation as far as poverty indices go – although this is not so in the inequality rating – if you compare it with the figures for the rest of the countries.¹² However, this may lead us to the wrong conclusions, since the study of social conflict is often related to income data and poverty figures. Thus as Chile maintains a strong economy, and lower poverty level, one might tend to minimize the size of the conflict, and not delve into its causes and implications. As said, it is not poverty what determines how radical the socially organized groups are (at the most, one could hold to it as a *condition sine qua non*). It is, nevertheless, the extreme situation these people find themselves in: their condition of social exclusion, of not feeling part of the same *demos*, of not sharing a history and a common future with the rest of society – That is what makes them lose all faith in

¹² According to the official figures, about 19% of the population lacks the monthly income necessary to buy a basic basket full of food. Likewise 10% of the poorest homes get only around 2% of the nation's income while the richest get roughly 40%. There are no figures for the indigenous people's level of poverty, but it is remarkable that the region where these people are concentrated, in particular the Mapuche, has the highest level of poverty -29%. See the Planning Ministry, Poll CASEN 2003, Vol. 2: "Pobreza y Distribución del Ingreso en las Regiones", August 2004, p. 7, available at http://www.mideplan.cl/publico/ficha_tecnica.php?cenid=121. On the other hand, Chile's Gini coefficient is 0,57, but as it has been noted, "if the Gini coefficient is calculated for the other 90% of the region's households, the resulting figure is much lower than the result for the total population." See Economic Commission for Latin America and the Caribbean (ECLAC), *Social panorama of Latin America 2004* at 11 (briefing paper, November 2004). According to information from ECLAC, in 2002, in Argentina the poverty index rose to 41.5%; in Brazil, in 2001, 37.5%, and 50.6% in 2002; in Mexico, 39.4%, and Peru 54.8%, in 2001. The average for Latin America, according to the same source, was 44%. See ECONOMIC COMMISSION FOR LATIN AMERICA AND THE CARIBBEAN (ECLAC), SOCIAL PANORAMA OF LATIN AMERICA 2002-2003 54-55 (2004)

democracy as a method of decision-making which will affect them, and may lead them, with the aim of drawing attention to their position in of disadvantage, to practice methods of social protest which put the democratic institutions in check.¹³

Documents show how the Chilean State has been the main actor in suffocating indigenous claims – and particularly those of the Mapuche – by means of institutional acts, like laying down the juridical rules which allowed the transference of land to individuals, as much at the dawn of Chilean independence,¹⁴ as during the 20th century¹⁵ – the process being accentuated during the military dictatorship,^{16 17} and by means of an evident lack of will, and of constant lack of activity, which has relegated “the indigenous question” to a far shore.¹⁸

The story of the relationship between the Chilean State and the Mapuche people is one of a constant forced assimilation of the latter into the former. Even when at the beginning of Chilean republican life, juridical equality was decreed between the indigenous people and the rest of the Chileans –something that might be seen as a genuine progressive achievement in new nations- that allowed their lands to be “freely” traded, and the Chileans exerted a great deal of

¹³ Others discuss the point regarding an eventual situation of “legal alienation”. A propos, see Carlos Rosenkrantz, *La pobreza, la Constitución y la ley [The legal and constitutional demands of poverty]*, in EL DERECHO COMO OBJETO E INSTRUMENTO DE TRANSFORMACION [LAW AS OBJECT OF TRANSFORMATION] 241-257 (Roberto Saba ed., 2003) and Roberto Gargarella, *La última carta. El derecho de resistencia en situaciones de alineación legal [The last resort: the right of resistance in situations of legal alienation]*, in VIOLENCIA Y DERECHO [LAW AND VIOLENCE] 295-320 (Roberto Saba ed., 2004)

¹⁴ JOSÉ BENGOA, HISTORIA DEL PUEBLO MAPUCHE [THE HISTORY OF THE MAPUCHES PEOPLE] 155-162 (1985)

¹⁵ JOSÉ BENGOA, HISTORIA DE UN CONFLICTO. EL ESTADO Y LOS MAPUCHES EN EL SIGLO XX [THE HISTORY OF A CONFLICT: THE MAPUCHES AND THE STATE DURING THE 20TH CENTURY] 28-30 (1999)

¹⁶ GABRIEL SALAZAR AND JULIO PINTO, HISTORIA CONTEMPORÁNEA DE CHILE II. ACTORES, IDENTIDAD Y MOVIMIENTO [CONTEMPORARY HISTORY OF CHILE II. ACTORS, IDENTITY AND MOVEMENT] 166 (1999)

¹⁷ In 1979, Pinochet’s government made two laws by decree (2568 and 2750) whose purpose was to divide the Mapuche communities, allowing any occupant of them –indigenous or not- to ask for it to be divided. That added to the so-called “Agrarian Counter reform” –by which properties which had been given to Mapuche, through the Agrarian Reform of the previous governments were given back to their former owners- and to political persecution, arrests, tortures, and the disappearance of many of the leaders “had grave psychosocial consequences for the [indigenous] population in general”. See INSTITUTO DE DERECHOS INDÍGENAS, LOS DERECHOS DE LOS PUEBLOS INDÍGENAS EN CHILE [THE RIGHTS OF THE INDIGENOUS PEOPLES IN CHILE] 308 (2003)

¹⁸ Id. at 157-282 (Specially 157-166)

pressure in order to buy indigenous lands, which were acquired at prices which bore no relation to their real value, or else fraudulently. In spite of ordering – due to the above-mentioned practices – that the acquisition of Mapuche land required authorization by the state, in practice contracts continued to be drawn up. Add to this military occupation of Mapuche territory – the history books call it “the pacification of Araucania” (which had its analogue in Argentina, called “the conquest of the Desert”)¹⁹ – together with the institutional process in which the indigenous people were settled in settlements.

In this way efforts or attempts to *integrate* the Mapuche people have been unrecorded data in the years of the independent life of the country, favoring a policy of (forced) assimilation, which has successfully permeated the social fabric, generating a de facto discrimination (and its consequent exclusion) on the part of Chilean society.²⁰

What we have today, as I have stated, and as has been made manifest, is that in spite of reaching minimum levels of constitutionalism (I follow Nino), - with charters that put power into a certain order (democratic) and with bills of rights which serve as a limitation, though a minimum one, to legislative action – what some call “the sphere of the decidable”²¹ or, as Bickel put it, “that special kind of law which establishes a set of preexisting rules within which society works out all its other rules from time to time”²² – the return to democracy has not brought with it

¹⁹ It’s remarkable, as Bengoa shows, that a century after “the conquest of the Desert” (1981), both Argentina and Chile were under military dictatorships, and “in both sides of the Andes mountains modern barbarians were chased through the “Operation Condor,” a modern version of the military campaigns that brought together the Argentine and Chilean armies at the end of the 19th Century.” BENGEOA *supra* note 15 at 22. The Operation Condor was a conspiracy by several South American countries, allegedly led by Pinochet, to murder their political opponents around the world during the 1970’s. See JOHN DINGES, THE CONDOR YEARS: HOW PINOCHET AND HIS ALLIES BROUGHT TERRORISM TO THREE CONTINENTS (2004)

²⁰ According to the results of a poll conducted in 2003, 19.2% of the population considers that “the only problem the Mapuches have is the poverty they live in, and not the lack of recognition of their culture”. See FUNDACIÓN IDEAS, II ENCUESTA INTOLERANCIA Y DISCRIMINACIÓN [SECOND SURVEY ON INTOLERANCE AND DISCRIMINATION] (2001)

²¹ LUIGI FERRAJOLI, DERECHOS Y GARANTÍAS. LA LEY DEL MÁS DÉBIL [RIGHTS AND GUARANTEES] 23-24 (1999)

²² ALEXANDER M. BICKEL, THE MORALITY OF CONSENT 30 (1975)

an improvement in the quality of living of important sectors of the population frustrating their expectations and converting this land into a fertile soil for authoritarian and irregular experiments – such as the claims which convene this discussion.²³

Certainly, this is not a new claim in political thought. Sunstein explains that when framing the US Constitution, Madison, “probably the most influential voice in the founding period,” considered as a means of combating factions, ‘the evil of parties,’ that people have “a state of comfort.”²⁴ This shows, according to him, that there is “a clear link between the elimination of poverty and the preconditions of democracy.”²⁵ As Nino pointed out, at the beginning of the 1990s, when democracy was timidly expanding across the continent (and recently arrived at Chile), “when the demands related to (the improvement of people’s standards of living) were not satisfied many people began to express skepticism about some aspects of democracy, growing impatient at the need to respect certain procedures when what they are looking for are immediate results (which) represents a danger for the consolidation once and for all of a democratic system”.²⁶ Thus he gave warning about the need to pay more attention to the economic bases of democracy – as “the question of the external debt, the fall in terms of exchange, the effects of protectionism against third-world countries’ exports, inefficient and

²³ According to a Report from United Nations Development Programme (UNDP), published in April 2004, “54.7% of the Latin Americans would be willing to accept an authoritarian government if this would solve [their] economic situation”. See UNDP, *Democracy in Latin America: Towards a Citizens’ Democracy*, available at www.undp.org/democracy_report_latam_america/.

²⁴ James Madison, 14 *The Papers of James Madison* 197-98 (1983), quoted by Cass R. Sunstein, *Why Does the American Constitution Lack Social and Economic Guarantees?* 36 Public Law Working Paper, Univ. of Chicago (January 2003) at 6, available at <http://ssrn.com/abstract=375622>.

²⁵ CASS R. SUNSTEIN, *THE SECOND BILL OF RIGHTS: FDR’S UNFINISHED REVOLUTION AND WHY WE NEED IT MORE THAN EVER* 116 (2004). For a description of the economic foundations of democracy, see Roberto Gargarella, *Las precondiciones económicas del autogobierno político [The economic preconditions of politic self-government]* 259-273, in *FILOSOFÍA POLÍTICA CONTEMPORÁNEA. CONTROVERSIAS SOBRE CIVILIZACIÓN, IMPERIO Y CIUDADANÍA [CONTEMPORARY POLITICAL PHILOSOPHY: CONTROVERSIES ON CIVILIZATION, EMPIRE AND CITIZENSHIP]* (Atilio A. Borón comp., 2003)

²⁶ CARLOS S. NINO, *FUNDAMENTOS DE DERECHO CONSTITUCIONAL [FOUNDATIONS OF CONSTITUTIONAL LAW]* at 8 (1992) (Emphasis added)

unjust systems of contributions, inflation, etc.” as an element of danger for the stability of incipient democratic governments which were being installed in the region. Events that it was to set loose in various parts of the continent were to show that he was right.

In the specific case of the Mapuche - maybe *the* social movement in Chile today²⁷ - one can trace a moment of political relevance in the relationship between the state and this people of original inhabitants: in 1989, shortly before the presidential elections after the military dictatorship, the then candidate (and later President of the Republic), Patricio Aylwin, signed an agreement with the indigenous movement of that time – known as the “Nueva Imperial Agreement” – by which they agreed to back Aylwin’s candidacy on condition that the future government establish in its agenda the constitutional recognition of those peoples and their economic, social, and cultural rights, and the creation of a special commission on indigenous peoples.²⁸ The Mapuche also asked for a tax cut on their estates, a claim that wasn’t accepted by Aylwin –who saw himself being loudly ridiculed by the indigenous audience.²⁹

This commission was set up as agreed in the pact, which at first was seen as an unequalled opportunity for the indigenous peoples to pour out their demands forever put off in the past. Meetings were held with the aim of picking up what the indigenous groups aspired to. They drafted a bill that was given to President Aylwin and that was critically edited by several public

²⁷ Salazar and Pinto end their book saying: “if there is an indigenous movement [in Chile] that is because there is a social movement.” *See supra* note 16, at 173.

²⁸ For a more detailed description *see* FACULTAD DE DERECHO, UNIVERSIDAD DIEGO PORTALES, INFORME ANUAL SOBRE DERECHOS HUMANOS EN CHILE 2003. HECHOS DE 2002 [ANNUAL REPORT ON HUMAN RIGHTS IN CHILE 2003. FACTS OF 2002] 299 (2003)

²⁹ BENGEOA *supra* note 15, at 184. Bengoa, who witnessed the scene says he cannot remember “how [Aylwin] made the blunder stop, but somehow it all ended in a big applause”. (Id) According to him, the meeting seemed like the setting of “a strong and decent relation between the indigenous and the elected President. With both agreements and disagreements there wasn’t any sort of the candidates’ silly populism, dressed up with an acquiescent and paternalistic smile (...)”. He finally explains that at that moment “Nueva Imperial means, no more no less that the construction of the Chilean democracy would be concerned with the indigenous issue, showing respect for their cultures, making them participate and taking their opinions into account as equal members of the community.” (Id. at 185)

officials, which in turn led to the making of a special law in 1993, known as “the Indigenous Law”.³⁰ In Bengoa’s words, “democracy had finally arrived in a material way to the indigenous peoples, allowing them to participate in the public domain. It was worth being. It was a large intellectual process in which everyone presented his or her thoughts in a proper way. The respect shown by all the participants of this enterprise permitted the construction of a large consensus on what the relation between the indigenous peoples and the state ought to be in the last decade of the Century.”³¹

However, in the context of the 500th anniversary of the Spanish conquest (1992), the indigenous peoples, especially the Mapuche, relying on the discourse of International Human Rights Law, began to mobilize in protest at the Government’s legal project, which they saw as unsatisfactory in accordance with the demands that they themselves had made previously (and had been agreed upon by President Aylwin). The ‘Indigenous Law’ had not yet been passed, though the crucial changes made by technocrats to the original deeply discussed draft revitalized both the skepticism and the anger that had been politically silenced. Congress rejected two critical pieces of the legislative agenda: the constitutional amendment that provided formal recognition to the indigenous peoples and the ratification of the International Labor Organization Convention No 169 concerning Indigenous and Tribal Peoples in Independent Countries (of 1989). Indigenous leaders started to get impatient, and the indigenous organizations perceived that the Chilean society, through its new elected authorities, didn’t see them as “actual individuals, but as mere beneficiaries of some legal aid.”³² So began (again) a series of acts of

³⁰ Law N° 19.253, on the Protection, Promotion and Development of the Indigenous Peoples, published in the Official Journal, 5th October 1993.

³¹ BENGOA *supra* note 15 at 186.

³² *Id.* at 201

social protest, which were to set the position of the Mapuche at an even greater distance from the official line.³³

Some might be troubled by the force I assume the Nueva Imperial agreement ought to have. The question is whether it is possible to derive actual implications from the political promise a candidate makes during the heat of her political campaign. And were we to say yes, what kind of implications or obligations would that entail? For if the former candidate (current public official) breaches what she previously said –I refuse to say her *promise* for the moment-, then wouldn't the non-breaching party –e.g., the Mapuche- be permitted not to fulfill its duties? A legalistic and positivist reading of the political agreements such as Nueva Imperial suggests that we not consider them as genuine (political) contracts, for if this were the case then social protests arising from the lack of fulfillment of claims made under the pressure of becoming elected authorities would be legitimized, and therefore the value that we assign to institutions seriously undermined –even eliminated.

However it is not only the legal and political force of the agreement –which tends to obsess my legal colleagues- that is at stake here. As noted by Waldron we should also look at ‘the logic of consent’ given by people when entering into a certain polity –here, the new relationship between the state and the indigenous peoples.³⁴ In the words of Walzer, we should see the social contract as “a moral bond [that] connects the strong and the weak, the lucky and the unlucky, the rich and the poor, creating a union that transcends all differences of interest

³³ I say they start “again” because in the sixties, under Frei Montalva’s government, “legitimacy was assumed for non-institutional ways of resolving the ‘indigenous question’, such as seizing land to recover what had been usurped or, in particular cases, squatting on lands owned by the State, following the policy of ‘going and conquering more land’, a policy defended by the National and Indigenous Rural Federation of Chile and the Rural Revolutionary Movement”. SALAZAR AND PINTO, *supra* note 16 at 157.

³⁴ This ‘logic’ “entails, first, that consent is given for reasons. If we are really serious about basing political obligation and legitimacy on consent, then those reasons provide the basis of our account of what civil society is for.” See JEREMY WALDRON, *THE DIGNITY OF LEGISLATION* 140 (1999)

[...].”³⁵ I therefore do not see Nueva Imperial, as long as it represents the act of political consent, as a sort of rigid wall on which bricks are added or removed so as to engender a fixed moment when it is finally built. It is more realistic to see it as a flow, where the intensity of reasons and the commitments adopted pave the path of the political duties derived from it.³⁶ As it has been shown this was a genuine practice of civility, which - based upon the substance of a new understanding of the relation between these two parties - generated legitimate expectations in the historical and traditionally weakest party, that is, the indigenous.

From a different perspective, the need to trace the meaning of promises and agreements made under these circumstances helps the constituents to make their representatives accountable, since the anticipation of the retrospective control that voting allows is, as noted by Elster, a “very diluted” means of control.³⁷ In other words, given that “[i]f presidential authority cannot be tied to campaign promises or platforms, then the ground for electoral accountability disappears,”³⁸ that suggests the reasonability of giving (some) force to the *Nueva Imperial Agreement* –as long as it was not signed as a *promise*.

Finally I shall consider the specificity of the Mapuche’s understanding of their ‘political’ engagement with other peoples. During the first centuries of the Spanish colonization, the Spaniards saw the indigenous as genuine war enemies with whom they had to establish some channel of communication. This special form of dialogue between the Mapuche and the Spanish

³⁵ MICHAEL WALZER, SPHERES OF JUSTICE 82-83 (1983)

³⁶ As Waldron puts it: “Theorists of authority and political obligation often look for something that can be construed as consent and they treat it then as a sort of “On/Off” switch that magically generates for their theory all the conclusions about political obligation that the most authoritarian could desire.” (Id.) Although I use Nueva Imperial hereinafter as a the breaking point of the relationship between the Mapuche and the Chilean state I do it for the purpose of tracing the historical context that generated unfulfilled expectations in this group. By doing this I don’t disregard what I have previously said on Waldron, about the flow of consent and the reasons for which it is given.

³⁷ Jon Elster, *Introduction to DELIBERATIVE DEMOCRACY* 2-3 (Jon Elster ed., 1998)

³⁸ Catalina Smulovitz and Enrique Peruzzotti, *Societal accountability in Latin America*, 11 JOURNAL OF DEMOCRACY, 147, 149 (2000)

Crown was named as ‘talks’ (*parlamentos*). More than a dozen of these *parlamentos* were held between the conquerors and the Mapuche. The first of them, known as “*parlamento de Quilín*” (1642), provided that the Mapuche acknowledge to be subject of the king, that they fight the crown enemies, that they allow the entrance of missionaries to their territories, and that they come back to live on their lands south of the border (the Bío-Bío river). The Spanish agreed that their military forces should not enter into the Mapuche territory, controlled by the indigenous as an independent territory.³⁹ After Quilín the Mapuche people and the Spaniards held several *parlamentos*, which has led some scholars to assert “the relation of Chile with the Mapuche is one of a pact.”⁴⁰ Since tradition is a critical feature of the Mapuche culture it is possible to convey that in 1989, when Nueva Imperial was held, there was a deep collective understanding of it as a modern *parlamento*, as a genuine agreement that generated rights and duties to both parties.

The expectations were thus becoming more and more a far-reaching declaration with no actual meaning. As stated above, the constitutional recognition of their standing as original inhabitants – another of the agreements reached at Nueva Imperial – became a promise which it was impossible to keep, since the proposal was not supported in Congress – still less by the opposition members of parliament. On the other hand, while the possibility of approving the ILO Convention No 169 was being debated, opposition deputies contested it before the Constitutional Court, and they managed to get a ruling from that tribunal – even when it rejected their requirement – which stated that these peoples “do not constitute an autonomous collective entity

³⁹ Bengoa, *supra* note 14 at 33.

⁴⁰ Pablo Marimán *Presentación [Presentation]* to PARLAMENTO Y TERRITORIO MAPUCHE [TALKS AND MAPUCHE TERRITORY] 14 (Pablo Marimán comp., 2002)

between individuals and the State”,⁴¹ thus closing off the road to recognition of rights of a collective nature.⁴²

Meanwhile the trials began for the criminal actions incurred by some groups – which the Government started to label as terrorist action – and this served to make the relationship between the (now democratic) Government and the Mapuche even more distant. Currently this is what has drawn the international community’s attention: Mapuche leaders are convicted of terrorists charges such as threats and arson, for which they are prosecuted with less judicial guarantees (like anonymous or “face-less” witnesses).⁴³

⁴¹ Chilean Constitutional Court, decision 309, 4th August 2000 (paragraph 44). Deputies also went to the CCC alleging the procedure had been unconstitutional regarding the quorum needed.

⁴² For a contrary perspective on the need of giving constitutional recognition to the indigenous people in Chile see Lucas Sierra, *La Constitución y los indígenas en Chile: reconocimiento individual y no colectivo* [*The Constitution and the indigenous in Chile: individual, not collective recognition*] 92 ESTUDIOS PÚBLICOS [PUBLIC STUDIES] 19 (2003). Sierra affirms that the specific recognition of the indigenous as a collective body is inconvenient since it will tend to concentrate power in lieu of doing the opposite, that is, to decentralize it as a feature of a modern liberal democracy. He argues that if this were to be done, “there would be certain indigenous collectives with a given authority grounded on the Constitution to rule upon their members, and entitled with collective ‘rights’ [all of which will provoke] political and constitutional tensions, and the immovability of goods.” (Id. at 23) Following Kymlicka’s distinction between external protections and internal restrictions of collective rights, Sierra believes that the constitutional recognition of the indigenous would create “internal authority upon both the members and the goods and resources of these groups”, which he sees as unacceptable from a liberal perspective. Although it is not my purpose to discuss the merits of the indigenous constitutional recognition –I rather rely on the proposal already made by a special commission, as I will explain in a moment- it must be said that his own argument (let us call it ‘anti-paternalistic’) can be used against his own claim. For if he is concerned that “the political community should *in any case* decide for them,” (at 25) it is precisely by not acknowledging their special standing that the polity disregards the indigenous’ most ancient valued claim: it is they the indigenous who seek for constitutional recognition, in order to have their own self-determined political structure –a surely improper claim to the liberal perspective that Sierra espouses. Therefore it is by not granting this recognition that the State falls into the situation that Sierra seeks to eradicate. On the other hand, Kymlicka’s distinction appears to be more complex than [it is] described by Sierra: according to the Canadian professor, it is possible that the external protections do not conflict with the individuals rights of the members of the group –e.g., the indigenous. Thus the liberal perspective and the recognition of collective rights is not, as Sierra believes, an oxymoron. Finally in the particular case of Chile it is not indigenous groups who have drawn the attention of both public officials and civil society. Rather, internal restrictions are known to exist within religious organizations such as the Colonia Dignidad [the Dignity Colony], a settlement founded by a German corporal during WW II accused of sexually molesting children. While the Mapuche have not been accused of any private communications interceptions, or forced labor, sexual abuse, corporal punishment, and the segregation of men from women and parents from children, the reclusive German-speaking colony that allegedly was used as a torture center during the early years of the Pinochet regime has become an icon of these accusations.

⁴³ For a complete report on this see Human Rights Watch and the Observatorio de los Pueblos Indígenas [Indigenous Peoples’ Rights Watch], *Undue Process: Terrorism Trials, Military Courts, and the Mapuche in Southern Chile* (2004) [hereinafter, *Undue Process*]

All this led to President Ricardo Lagos deciding to set up, in 2001, a Special Commission devoted to analyzing the indigenous question in Chile from an all-embracing point of view, with the aim of establishing “institutional, juridical and political mechanisms to [achieve] full participation, recognition and enjoyment of the rights of the indigenous peoples in a democratic system, on the basis of social consensus and the reconstruction of historical confidence”,⁴⁴ attempting to tackle the relationship which, until now, has been marked by the seizing and burning of properties in the Araucanía region (in the south of Chile), and the growing “penalizing of social protest”.⁴⁵ It appears as a paradox that the same administration that inaugurated the use of the anti-terrorist statute –enacted during the Pinochet dictatorship and amended by the first democratic Government of Patricio Aylwin- called for a common enterprise to convey the different perspectives and present recommendations to pay off an ‘historical debt.’ Human rights organizations explain this by citing the administration’s need to show immediate results rather than a long-term policy toward the indigenous peoples.⁴⁶

The conclusions reached by the said Commission – presided over by former President Aylwin – are significant: the constitution of the Chilean state imported a policy of assimilation for the original inhabitants, and this policy brought negative consequences for the latter – some even called the State’s performance “genocide”, since by putting their policy into practice, some peoples lost the systems which fixed their norms, lost their native tongues, and even certain

⁴⁴ Report of the Commission of Historical Truth and a New Deal for Indigenous Peoples, I, 3

⁴⁵ According to the expression used by the Special Rapporteur On The Situation Of Human Rights And Fundamental Freedoms Of Indigenous Peoples, Rodolfo Stavenhagen, who visited Chile in July, 2003. See FACULTAD DE DERECHO, UNIVERSIDAD DIEGO PORTALES, INFORME ANUAL SOBRE DERECHOS HUMANOS EN CHILE 2004. HECHOS DE 2003 [ANNUAL REPORT ON HUMAN RIGHTS IN CHILE 2004. FACTS OF 2003] 250-252 (2004) and Commission on Human Rights, *Human rights and indigenous issues Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people*, 60th session, E/CN.4/2004/80/Add.3, 17th, November, 2003, available at [http://www.unhchr.ch/Huridocda/Huridoca.nsf/\(Symbol\)/E.CN.4.2004.80.Add.3.En?Opendocument](http://www.unhchr.ch/Huridocda/Huridoca.nsf/(Symbol)/E.CN.4.2004.80.Add.3.En?Opendocument).

⁴⁶ *Undue Process*, at 4.

peoples disappeared. Added to that the Commission insisted on the need to give indigenous people recognition in the constitution, and to establish institutional mechanisms that would ensure a new relationship with the State and a genuine political intervention. Once again, we witness the call for a social consensus between the Chilean State and the native peoples who inhabit this land.

The Government took longer than it had promised to announce the specific measures which it would push forward in order to make the Commission's findings effective, in a context in which it was evident how little attention the public paid to the Commission's Report. All the same, however, the new proposal insists on the constitutional recognition, and that ILO Convention No. 169 must be approved, together with scholarships for education, the setting up of an Undersecretary's Office of Indigenous Affairs, and the creation of special communes (one of which was already rejected in Parliament).

III. Democracy's fault

What does all the above tell us about the relationship between the Mapuche social movement and the State or, for the effects of this panel, between the former and democracy itself? The first thing arising from the preceding description is that this relationship has been marked by domination on the part of the State and Nation, which, at times indirectly, and at times out loud, has denied the very condition of indigenous within Chilean territory.⁴⁷

⁴⁷ In 1978, the then Minister of Agriculture, talking about the legislation which allowed the divisions of the communities, stated that "in Chile there aren't any indigenous peoples; they are all Chileans". SALAZAR AND PINTO, *supra* note 16 at 165.

This condition of domination by the State –mitigated by the political participation that some Mapuche leaders had during the 20th Century-⁴⁸ is, more and more, being followed by the use of punishment as a tool, due to the different problems arising from the seizing of land, which stands out because they use even more oppressive instruments such as the anti-terrorist law. Add to the Government’s position a Report from the Senate’s Constitution, Legislation and Justice Commission, in May 2003, in which it manifests its “deep concern at finding the principle of juridical security, as an essential element for the protection of the fundamental rights assured by the Political Constitution, gravely affected,”⁴⁹ added to the rejection of the constitutional amendment that would have given formal recognition of the special standing as *native* peoples. The Judiciary has also played its part: in particular, the Supreme Court, which has been signaled as an obstacle rather than a guarantor of citizens’ rights,⁵⁰ has twice “issued highly controversial decisions reversing [district courts’ decisions favoring Mapuche defendants in terrorism cases].”⁵¹ In short, a context of questioning, on the part of the State, the way in which the indigenous people, especially the Mapuche, protest at what they consider a situation where they have been abandoned, and permanently disregarded by the authorities. I don’t deny the State’s right/duty to react against violence, by proportionate means that promote a legitimate and

⁴⁸ As pointed out by Bengoa, during the 20’s and 30’s, “many Mapuche are candidate for deputy or mayor, and every political campaign has some degree of Mapuche participation [...] that young generation of indigenous leaders is confident to the chances of integrate that the Chilean society has to offer.” BENGOA, *supra* note 15 at 102. See also BENGOA, *supra* note 14 at 387-389

⁴⁹ Quoted by FACULTAD DE DERECHO, UDP, *supra* note 45 at 242.

⁵⁰ *See id.* (Especially Chapter I.)

⁵¹ *Undue Process*, at 34. One of the cases involved a current justice of the Constitutional Court who is also known as a very influential lawyer. His unreported but spread lobbying added to the accusations made by a Senator for the Araucanía region –where most Mapuche live- that the acquisition of the defendants was nothing but “a victory for terrorist groups,” set the context for the reversal of the decision. After the retrial, the defendants were found guilty of arson under the anti-terrorist law. Thus they were convicted for more than 5 years of prison. Other Mapuche “are serving prison sentences up to ten years under the anti-terrorism law for arson or threats of arson committed against the properties of landowners and forestry companies. Sixteen, including five of those already convicted, are currently on trial for belonging to a group allegedly dedicated to terrorist acts (“illicit terrorist association”), with a possible sentence of fifteen years for those convicted of being a leader of the group. If convicted again some of the accused could go to prison for up to twenty-five years.” (*Id.* at 1)

necessary result. Actually I want to highlight the situation in which the indigenous claims, especially the Mapuche's, have systematically been disregarded, adding a legal and political sentence that has paved the road to the State violence against this ethnic minority. By so doing the positions of the parties have become more radical and their distance widened.

As a result, a question arises which, as I said, seems a paradox: democracy is restored, after a long period in which this sector of society was particularly knocked about. Promises are made to improve the juridical and social conditions they are in, and this generates what Santos calls a “fund of stable expectations”,⁵² and the positions appear to grow farther apart instead of finding roads to travel together.

This paradoxical situation could be attributed to several causes, but in the interests of this debate I shall offer certain special considerations. First, in fact the obsession that the still juvenile Chilean democracy shows toward the political consensus needed to advance in its development – which was explicitly indicated as a way of adopting collective decisions, aided by a system of representation which tends to reach agreements, and which it has not been possible to modify.⁵³ The latter has choked the discordant voices within the body social, accentuated the irreconcilable positions of the divergences, and thus made the demands even more radical. And the “political” consensus has not been limited – and seems unlikely to be so in the future – to questions of the basic structure of society, but rather has tried – though indirectly – to deny the validity of the conceptions of those who build its identity collectively, through a partial exclusion *de jure*, but one which in fact is very complete.

⁵² Boaventura de Sousa Santos, *Nuestra América: la formulación de un nuevo paradigma subalterno de reconocimiento* [Our America: the formulation of a new subordinate paradigm of recognition] in LA CAÍDA DEL ANGELUS NOVUS: ENSAYOS PARA UNA TEORÍA SOCIAL Y UNA NUEVA PRÁCTICA POLÍTICA [THE ANGELUS NOVUS'S FALL: ESSAYS FOR A SOCIAL THEORY AND A NEW POLITICAL PRACTICE] 83 (2003)

⁵³ See Jorge Contesse, *Las reformas a la Constitución desde los derechos fundamentales* [Constitutional Reform from a Basic Rights-Perspective] in 212 REVISTA DE DERECHO [LAW REVIEW] 115 (2002)

Special value, then, would seem to be gained by the complaints made against the universalistic positions, if it is so that, with all this, the differences are denied, and the subjects hindered from holding dialogue from their own individuality (built though it is, as I said, in a collective manner).⁵⁴ It does not seem healthy for democracy itself, things being as they are, to go on denying diversity, aversion to combativeness or “agonism,” understanding by that something stronger than the mere recognition that there exist others who are not like oneself, but rather with the imposition that it is a duty, in order to build inclusive democratic systems, to grant genuine room for political participation, at the risk of having non-regular manifestations of social discontent provoked by democracy’s own weakness and deficit.⁵⁵ As noted by Waldron on the right to participate in collective decisions, the insult that someone excluded from these processes feels “does not require him to think that his vote –if he had it- would give him substantial and palpable power. He knows that if he has the right to participate, so do millions of others. All he asks –so far as his participation is concerned- is that he and all others be treated as equals in matters affecting their interests, their rights, and their duties.”⁵⁶ As for the situation of the Mapuche, their (legitimate) aspirations to intervene and participate in the process of decision-making that takes place in Santiago and Valparaíso –where the Executive and Congress are located- have found no response within the transitional process to democracy initiated in 1989.

Next, if one were to pay attention to the circumstances in which the indigenous movement at the beginning of the 1990s agreed to give support in the elections to the political project which has governed Chile since that year, one might consider it a special political agreement, as a sort

⁵⁴ See CHANTAL MOUFFE, *THE RETURN OF THE POLITICAL* (1996) and CHANTAL MOUFFE, *THE DEMOCRATIC PARADOX* (2000)

⁵⁵ See Jorge Contesse, *El Parlamento en mora. Algunas reflexiones sobre la función representativa del Congreso Nacional* [Congress in Default: Some Thoughts on the Representative Role of Congress], in 65 *REVISTA DE DERECHO PÚBLICO* [PUBLIC LAW REVIEW] 284 (2002)

⁵⁶ JEREMY WALDRON, *LAW AND DISAGREEMENT* 239 (1999)

of constituent social pact drawn up between the indigenous people and the State, in which the latter undertook to give juridical recognition at constitutional level and to grant special protection to this historically handicapped group. However, as has been seen, in understanding the “indigenous world” the State has failed in its remit; and what is more, they do not even regard it as a failure – provided it represents an effort, even a minimum effort – whereas it is clearly a failure to keep promises made, thus affecting the “fund of stable expectations” which were generated by the Chilean State itself.

If the Nueva Imperial Agreement can be held to be a political pact between the State and the indigenous inhabitants, in which these and those agreed on a defined way of relating to one another, then, when faced with broken promises, as Locke made clear in his day, it is the governor who has turned his back on his subjects, converting the government into the one accused of rebellion (at least regarding this social group).⁵⁷ It is serious that this dissolving of the pact should have come about only in relations with some sectors and not with the rest of society that lives under the same regime, since the visibility and therefore the legitimacy of the implications of breaching the agreement have less, so to speak, *political* strength. In the case of Chile we attend to a scenario where the official discourse pledges allegiance to the democratic progress the country has made while the most ancient and relevant indigenous claims are

⁵⁷ When Locke talks about the dissolution of the government he says that one of the ways that these can legitimately be brought down occurs precisely when they turn aside from the purpose for which they have been instituted. Thus, in such cases, in which the civil government has not done its duty to its subjects when either for its acts or lack of action attacks the property of those who have deposited their faith in it, it cuts itself off from the state of civil society, returning to the natural condition, in which each man recovers that equal right to protect his life, liberty and belongings. In such a case, Locke says, “those who set up force again in opposition to the laws, do *rebellare*- that is, bring back again the state of war, and are properly rebels”. See JOHN LOCKE, SECOND TREATISE OF GOVERNMENT §226 y §227. “For rebellion being an opposition, not to persons, but authority, which is founded only in the constitutions and laws of the government: those, whoever they be, who, by force, break through, and, by force, justify their violation of them, are truly and properly rebels”; “and so destroying the authority which the people did, and nobody else can, set up, and introducing a power which the people hath not authorised, actually introduce a state of war (...) and so they putting themselves into a state of war with those who made them the protectors and guardians of their peace, are properly, and with the greatest aggravation, rebellantes, rebels”.

increasingly exiled. The latter takes place in spite of the current political coalition approving of them before heading to office.

In this view, and contrary to what is often stated, it is democracy itself which has rebelled against them (and not against others), thus losing its authority, and so, regarding these, bringing about a dissolution of every political link; and this means that non-institutional acts like invading land with criminal consequences can only be considered legitimate (though irregular) ways of relating this new state of affairs. It's the official discourse itself that sustains this: according to it, we are all Chileans. If this is the panorama, it is on the bases of our social pact that the reasons for not believing in the foundations of state authority rely.

If making the rule of law effective is a value which is difficult to put in place, and one which is generally absent from Latin American countries, it would seem that we must take on the (political) duty of designing institutional arrangements which will allow us to translate the languages which, in principle, leave apart those who should share the terms of a collective agreement. Although Santos presents it as a mechanism for making intelligible the different movements, groups or networks, of which some seek recognition and others to establish difference, it seems possible to consider a theory of translation which has the virtue of “preserving intact the autonomy of the struggles in question as a condition for bringing the translation forward, since only what is different lends itself to translation”,⁵⁸ as a measure which would allow one to invite (and, even, summon to declare) those who do not believe the political pact, the conditions in which it arose and is to be carried out, to take part in it. If it is true that this has been the cause of the rebellion of governors, which these groups adduce, it is not a task of making them think they were wrong, but rather “to be willing to argue with one foot in one

⁵⁸ Santos, *supra* note 52 at 91.

culture and the other in the other”,⁵⁹ in order to achieve – as indeed was disposed in the act of constituting the Commission of Historical Truth and a New Deal for the indigenous peoples of Chile – a relationship built “on the basis of a social consensus.”

IV. Conclusion: Translating the differences

Since events are stronger than what is decreed by conventional agreements and the practices that derive from them, trying to hide the conflict – the agonistic dimension of pluralism – only generates greater strength and creativity among those excluded. If there exists a commitment in believing that democracy is a system which makes it possible in the best way to make effective ideals like equality, freedom, and, above all, justice, then one must assume the duty of reconstructing and practicing this system in terms of minimizing its excluding features and embrace those methods which genuinely allow one to count on impartial decisions, in terms that all those potentially affected (or indeed benefited) intervene in adopting them.

That implies, of course, designing institutional arrangements which would be capable of registering diverse sensitivity and of making the translation which has so far been absent, keeping at arm’s length those political arrangements which are transacted with a strict market-oriented logic (or those “market transactions”, according to some), and which convert the public sphere of collective decisions into a lair when faced with the threats of “the others.” If, as Cohen says, “[t]he immediate motive to productive activity in a market society is typically some mixture of greed and fear”,⁶⁰ and this same understanding also governs political relations that States delineate with their subjects or citizens –what today takes place as a way of making

⁵⁹ Id. at 115

⁶⁰ This mixture, Cohen notes, varies “with the details of a person’s market position and personal character. In greed, other people are seen as possible sources of enrichment, and in fear they are seen as threats.” See G. A. Cohen, *Why Not Socialism*, in *DEMOCRATIC EQUALITY: WHAT WENT WRONG?* 59, 66 (Edward Broadbent ed., 2001)

politics interested in “peoples’ *preferences*”⁶¹ or the pervasiveness in developing countries of “patron-client relationships”⁶² - then that explains, on one hand, the armor with which today’s democratic systems are covered, and it justifies, on the other hand, the radical protest which social movements raise against them. This state of affairs makes no contribution to the progress of the still-unstable Latin American democracies.

It is not the actors that act irregularly outside the system who created unemployment, marginal living and the State’s lack of feeling; but it is due to them that, after much trying, they are managing to get people to raise their sights and start looking for those responsible, and for answers. If this is not taken into account, and if it is not understood that it is democracy itself which must offer regular mechanisms of political participation, the force of the events and feelings – what Santos calls the “baroque ethos”⁶³ will, in the words of Bello, make the conventional political agreements no more than “a light leaf which floats on the surface of a revolutionary torrent, and in the end sinks in it”.⁶⁴

In view of all this, the usual and common calls for higher degrees of democracy cannot mean the deepening of a system such as it has been conceived up till now. That could bring about a greater separation among those who see themselves pushed further and further away, dressed up in a progressive discourse that claims [for] sensitivity toward other people’s fortune but that has already been exposed by history in its real measure, which is why the juridical demand of new ways of participation (institutional ones) in the democracy has in its favor a

⁶¹ Contesse, *supra* note 55 at 291

⁶² Amy Chua, *The Paradox of Free-Market Democracy: Rethinking Development Policy*, in 41 HARV. INT’L L.J. 287, 310 (2000)

⁶³ Santos, *supra* note 52 at 97.

⁶⁴ Andrés Bello, *Constituciones [Constitutions]* in ANDRÉS BELLO: ESCRITOS JURÍDICOS, POLÍTICOS Y UNIVERSITARIOS [ANDRÉS BELLO: LEGAL, POLITICAL, AND ACADEMIC WRITINGS] 56 (Agustín Squella ed., 1979) (1848)

political component of great weight: the matter of fixing, in a consistent way, the moment in which those who historically have not intervened are to do so. In order that the protest mounted by the indigenous people of Chile should not grow more radical in terms of endangering, really or deceptively, institutional stability, it seems a good moment to consider, from a standpoint of (political) equals, the duty of questioning the structures which have allowed the separation and the forced assimilation of this sector to increase, rather than its integration.

The persistence of the present state of relations between protest groups and the institutional designs does not seem to be marching in the direction of a solution to social conflicts, but rather quite the opposite, towards deepening them. Therefore if “democratizing democracy” is to mean more than a mere slogan at hand of political contingencies we should tend towards incorporating those who have so far been outside, in order to make it possible to demand fulfillment of such obligations as the institutional system, only in these conditions, may dispose. Otherwise democracy must resign itself to these fundamentally illegal acts, caused by its own slackness, for having been changed – democracy itself – into a rebellious defendant.