

## The Mapuche People's Battle for Indigenous Land

Litigation as a Strategy to Defend  
Indigenous Land Rights

Anne Skjævestad

**WP 2008: 3**



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## 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. 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" (Stavenhagen 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" (Stavenhagen 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). 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.<sup>1</sup> This paper deals with the issue of indigenous peoples' land rights and the possibilities for advancing these rights through the legal system.

The paper examines the case of the Mapuche people in Chile, and their possibilities for resolving their land conflicts in Chilean courts. The Mapuche constitute the largest indigenous population in Chile, and are grouped into five large territorial identities: Huenteche, Nagche, Lafkenche, Huilliche and Pehuenche.<sup>2</sup> They are among the poorest and most marginalised groups in Chilean society and the rural Mapuche population lives in conditions of extreme poverty. Among the Mapuche population, 38, 4% are situated below the poverty line, and the incidence of poverty is highest in the Bío Bío region, where 52, 3% of the Mapuche are considered poor (UDP 2003: 2). The human development index of the Mapuche population is one point lower than that of the non-indigenous population (0, 6 against 0, 7).<sup>3</sup> The average Mapuche income is less than half of that of non-indigenous persons.

One can establish 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 19<sup>th</sup> century and the beginning of the

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<sup>1</sup>The problems of access to justice are described by 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).

<sup>2</sup> The Mapuche population amounts to 604.349 people, equivalent to 87, 3% of the entire indigenous population (IFHR 2006: 5).

<sup>3</sup> The index comprises three dimensions: health, education and income (UNDP 2003: 14). There is also 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).

20<sup>th</sup> century.<sup>4</sup> 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). The substitution of native forest with exotic species such as pine and eucalyptus 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 the means of sustenance – is reduced, because communal lands have gradually become cut off inside vast forest plantations that are fenced off (Stavenhagen 2003: 10, par.22).

The Mapuche are increasingly affected by forest logging and infrastructure projects such as road constructions and dam constructions. 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). This paper examines 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 Mapuche-Pehuenche communities and the subsequent flooding of their ancestral territory.<sup>5</sup> The process which led to the approval of Ralco was full of irregularities. The environmental impact study (EIS) required to authorise Ralco was initially rejected by the National Environment Commission, CONAMA (COIT 2005: 13 – 14). The National Corporation for Indigenous Development, CONADI, was also critical to the project, claiming that it would risk the Pehuenche culture and their 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 into doing so.<sup>6</sup>

The purpose of the paper is to examine the strategy of litigation for the advancement of indigenous peoples' land rights by analysing two aspects: 1) *voice*; the ability of indigenous groups to articulate their concerns and effectively voice their claims in court, and 2) *responsiveness*; the willingness of courts to respond to such claims<sup>7</sup>. The specific aim is to determine the role of Chilean courts in the

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<sup>4</sup> In the period after the creation of the Chilean state, the Mapuche's lands, resources and sovereignty were gradually lost. 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. During the following decades, much of what was left of Mapuche lands was divided and transferred to non-indigenous people. This process culminated during the military government of Augusto Pinochet, when most of the communities and reservations were divided into individual plots (UFRO 2002: 2).

<sup>5</sup> 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, Pangue, 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.

<sup>6</sup> Interviews with the Pehuenche that would be affected by the project revealed that many of the Pehuenche who had signed contracts for land exchange had found themselves in a situation of forced consent, and felt that they had no other option than to leave. Others saw no point in resisting, because they thought that in the end the decision really was up to the energy company ENDESA and the government (Lillo 2002: 11 – 15). Some did not fully understand the contents of the contracts. For instance, one interviewee said: "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).

<sup>7</sup> These are based on the analytical framework for courts and social transformation presented in Gloppen 2004. The framework analyses the role of the courts in advancing social rights, examining four stages of the litigation process: a) *voice*; the ability of marginalised groups to voice their claims, b) *responsiveness*; the willingness of courts to respond to their claims, c) *capability*; judges' ability to give legal effect to social rights, and finally d) *compliance*; whether judgements are authoritative and implemented.



defence of the land rights of the Mapuche people by analysing the ability of the Mapuche to *voice* their land rights claims into the judicial system, and the courts' *responsiveness* towards such claims. Voice and responsiveness constitute the first stages of a litigation process, and each of them depends on several factors. For indigenous people to be able to effectively voice their claims, they must first of all be aware of their rights and the possibilities for redress through the legal system. Factors such as legal literacy and rights awareness programmes, as well as the existence of organisations mobilising around indigenous rights issues, may increase their awareness. Human rights education and a general focus on the rights of indigenous people in the media may also 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, geographical distance, 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. 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. Victims of a rights violation may abstain from pursuing legal action out of fear of humiliation or prejudice, or fear of judges ruling on class position (Gargarella 2002: 4). Many disadvantaged people consider the legal system a tool for the rich and powerful to use against them (Anderson 2003: 18). Negative prior experience with the judicial system or negative perceptions of corruption, bias or delays may also prevent poor people from claiming their rights in court. 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 (Gloppen 2004: 12). A slow judicial system and detailed formal procedures create a disincentive to pursue a legal strategy.

Access to various resources may help indigenous groups overcome the multiple barriers facing them, and enable them to effectively articulate their claims. Associative capacity is important in this respect; by forming associations that can create a common identity and solidarity, effectively mobilise around indigenous land rights claims and generate expertise and financial resources, indigenous groups are better prepared to voice their claims through the judiciary. 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 from legal organisations, is critical (Gloppen 2004: 13).

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 manner in which claims are voiced. The nature of the legal system, in particular the formal position of indigenous rights in the legal framework (including the status of international conventions), also has a significant impact on courts' responsiveness. Courts' 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 (Gloppen 2004: 15). Judges are likely to 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 has a positive impact on courts' responsiveness to the claims of the indigenous.

Variations in courts' responsiveness can also be explained by judges' sensitivity to human rights issues. Judges' sensitivity relates 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 (Gloppen 2004: 15). 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 (Gargarella 2002: 8). Sensitivity training, or training towards human rights, could help the judges become more responsive to the concerns of marginalised groups.

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.<sup>8</sup> Litigation may raise awareness of indigenous peoples' land rights issues, draw media attention to these issues and stimulate social mobilisation. Hence, litigation may have an important impact on indigenous policies, regardless of the outcome of a case. 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.

## Voicing land rights claims

Although the paper 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 comprising legal mobilisation and political mobilisation. Political strategies – both legal and illegal – may also complement litigation and strengthen the voice of the Mapuche. The Mapuche people's possibilities for voicing their land rights claims, and the factors relevant to explaining “voice” – awareness, resources, barriers to access, the law and the legal system – are analysed below.

### 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 redress through the courts. 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. According to UN Special Rapporteur Stavenhagen, the Chilean media pays little attention to indigenous people's human rights. Stavenhagen maintains 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” (Stavenhagen 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).

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<sup>8</sup> On the broader impact of litigation, see Gloppen 2005: 13 – 18.

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.

Rights awareness programmes may enhance the Mapuche's awareness about their collective rights, including land rights. The National Corporation for 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.<sup>9</sup> PIDI has 21 regional offices across the country, most of them located in the regions inhabited by Mapuche (16 in Araucanía and one in Los Lagos. There is also an office located in Santiago, with its attention directed towards urban indigenous people). 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.

It is important to underline the impact of NGOs and institutes specialising in indigenous issues on the awareness-raising of indigenous rights. Indigenous Peoples' Rights Watch (*Observatorio de derechos Indígenas*) is a nongovernmental organisation, whose purpose is the promotion, documentation and defence of indigenous peoples' rights. One of the organisation's main objectives is 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. Indigenous Peoples' Rights Watch also aims at enhancing the knowledge and capacity of the indigenous and their organisations in order for them to claim their rights.<sup>10</sup> 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.<sup>11</sup> 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. A great deal of information about indigenous peoples' rights is provided by Mapuche organisations, of which many 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.

## 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.

Over the last few years, there has been an increase in Mapuche mobilisation, which 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

<sup>9</sup> <http://www.conadi.cl/pidi.htm> Accessed 10 March 2006.

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

<sup>11</sup> <http://www.estudiosindigenas.cl/> Accessed 10 March 2006.

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. There has been a revitalisation of Mapuche culture over the last few years. More and more Mapuche are becoming aware of their tribal identity, and it is becoming increasingly popular to learn their native language, Mapudungun.<sup>12</sup>

Mapuche communities increasingly mobilise around land rights issues, actively opposing the large-scale investment projects that affect their situation. The communities carry out different kinds of protest actions such as demonstrations, hunger strikes and road blockings, and have also brought legal actions. During the planning of the Ralco dam, Mapuche-Pehuenche leaders and members of other communities joined together to manifest their objection towards 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 the owner of the project, the private energy company 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 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.<sup>13</sup> 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.<sup>14</sup>

Increased international attention and support from organisations such as Amnesty International, Human Rights Watch, and the United Nations 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. Some of the most important organisations to spread news and information about the Mapuche people are based in Europe, and are aimed at developing contacts between Mapuche organisations and European organisations. These organisations 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.

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<sup>12</sup> 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).

<sup>13</sup> See, for instance, Bío Bío Update no. 19, 2000.

<sup>14</sup> 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).

One of the most important resources for disadvantaged people who wish to access justice is legal aid. Legal aid for indigenous individuals and communities involved in land conflicts in Chile is provided by CONADI's Legal Defence Programme (PDJ). Law 19.253 on the Promotion, Support and Development of the Indigenous, otherwise referred to as 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). The specific functions of the Legal Defence Programme are:

- The management and coordination of legal service offices in most regions of the country.
- 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.

There are several legal advice centres in the Southern regions inhabited by the Mapuche; Bío Bío, Araucanía and Los Lagos.<sup>15</sup> 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.<sup>16</sup>

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 programme'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. Geographical distance was a 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 about 300 kilometres away from Ralco (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, the 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).

<sup>15</sup> [www.conadi.cl/djuridica.htm](http://www.conadi.cl/djuridica.htm) Accessed February 25 2006.

<sup>16</sup> 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 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).

Legal assistance has also been offered by university clinics and institutes. 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.<sup>17</sup> 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, a legal assistance programme was established at 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. 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. Concerning language, 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.

Other barriers to access are motivational, such as fear and distrust due to social and cultural distance between the Mapuche and judges. Lack of legitimacy and perceptions of discrimination also have a negative impact on the Mapuche's motivation to defend their land rights through the legal system. 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 this distrust 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. 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. For instance, in the *Poluco-Pidenco* case, five Mapuche individuals were sentenced to ten years of prison for arson committed against two estates owned by a forestry company (IFHR 2006: 41). On the sentence, Human Rights Watch said that "it

<sup>17</sup> <http://www.derecho.uct.cl/2clinicas.htm> Accessed February 23 2006.

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).

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). The use of faceless witnesses goes against international human rights norms:

“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” (Aylwin in UDP 2005: 308).

Mapuches charged with illicit terrorist action are in part denied the guarantees available to criminal defendants in the new criminal justice system.<sup>18</sup> 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).

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 expresses concern about the criminalisation of the Mapuche’s social protest:

“[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” (Stavenhagen 2003: 22, paras 69 and 70).

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, which they conceive 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.<sup>19</sup> As pointed out by Jaime Madariaga, a lawyer and defender of many Mapuche, it is reasonable that the Mapuche lack confidence in a

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<sup>18</sup> 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)

<sup>19</sup> UN News Centre 8 April 2004. <http://www.un.org/News/> accessed 10 may 2006.

justice system which in the past has stolen their lands, and which currently prosecutes them as terrorists.<sup>20</sup>

## 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.

In Chile, a formalistic legal culture and formalistic processes, combined 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 achieving results. 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).

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 main mechanism that protects basic human rights in Chile is the *recurso de protección* (writ of protection<sup>21</sup>). It is a procedure for the protection of constitutional rights, or a mechanism 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). Despite its apparent advantages, there are a number of problems related to its employment. In accordance with the writ of protection, 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.<sup>22</sup> 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 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".<sup>23</sup> 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

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<sup>20</sup> Interview with Madariaga by Cor Doeswijk, Radio Nederland Werelomroep, June 2004, Amsterdam.

<http://www.rnw.nl/distrib/realaudio/> .

<sup>21</sup> 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).

<sup>22</sup> For instance, the American Convention on Human Rights stresses that "[e]veryone has the right to simple and prompt recourse [...]" (article 25.1).

<sup>23</sup> Without specifying what exactly constitutes a lawsuit with an "obvious lack of foundation" (UDP 2004b: 33).



violation of a fundamental right. A person pursuing legal action may file a form at the office of a court of appeals, from 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).

Another crucial matter is the legal basis for litigating on indigenous land rights, and the status of international conventions on indigenous rights. 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 covers 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). The ILO (International Labour Organisation) Convention concerning Indigenous and Tribal Peoples in Independent Countries (otherwise known as ILO Convention no. 169) is among the international instruments containing provisions for the protection of the land rights of indigenous peoples. 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.<sup>24</sup>

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, territories 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 Latin American states have developed legislation for the regulation of such rights.

The Chilean legislation that protects the rights of the indigenous is Law no. 19.253 on the Protection, Support and Development of the Indigenous, otherwise known as the indigenous law. The indigenous law contains norms concerning the protection of indigenous lands, the development of indigenous people and communities, and the respect for and protection of the indigenous cultures and languages. Law 19.253 promotes 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. It establishes the National Corporation on Indigenous Development (CONADI), in charge of coordinating and executing the state's indigenous policies, and establishes a special legal procedure in cases involving issues related to land.

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-

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<sup>24</sup> 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.

indigenous persons, as well as norms intended to forestall any further division of those lands.<sup>25</sup> Among the central norms contained in the law is that indigenous lands “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 free consent of the owner and the authorisation of CONADI.

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). 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 with respect to the concepts of territories and natural resources. Law 19.253 is the first in Chile 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.<sup>26</sup> The right to self-determination guarantees the indigenous sovereign management of their territories and natural resources. 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.<sup>27</sup>

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<sup>25</sup> The law defines indigenous lands 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).

<sup>26</sup> Article 1.1 of the International Covenant on Civil and Political Rights establishes that: “All **peoples** have the right to **self-determination**” (emphasis added).

<sup>27</sup> Estay et al 2005, Riquelme 2001, <http://www.prodiversitas.bioetica.org/doc7.htm> Accessed March 15 2006.

In sum, the Mapuche's prospects for voicing land rights claims have been relatively good with respect to some aspects. Chilean NGO's and institutes focusing on indigenous rights, as well as the rights awareness programme, PIDI, may raise the Mapuche's awareness of their rights. The Mapuche movement has a strong associative capacity, and has had the ability to form associations and collectively mobilise around issues relating to their land rights. The numerous Mapuche organisations constitute a significant resource. On the other hand, Mapuche individuals or communities seeking redress through the judicial system face numerous obstacles, particularly in terms of motivational barriers. The Mapuche conceive the justice system as discriminatory and racist due to the stigmatisation of the Mapuche and the use of the anti-terrorism law in the context of their social protest. Distrust towards seems to be one of the main factors affecting the Mapuche's motivation to defend their rights through the judiciary. The costs of litigation and language also constitute barriers. The legal system is bureaucratic, and a number of formalistic and complex procedures impede a speedy and efficient process. Finally, the legal framework for the protection of indigenous peoples' land rights is insufficient in relation to international standards. 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, such as the concepts of territories and natural resources.

## 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 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.

Three members of the organisation Mapu Domuche Newen filed a lawsuit to the Sixth Civil Court in Santiago in 1997, demanding the annulment of the Environmental Impact Study (EIS) that had led to the approval of the Ralco project.<sup>28</sup> 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).

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<sup>28</sup>The 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, 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 electricity 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). 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). 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.

Both cases were ultimately rejected, 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 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 their 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 filed by the Pehuenche 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 put an end to the conflict, and the Pehuenche renounced the legal actions they had filed. The agreement involved economic compensation for the Pehuenche women, terrain in exchange for the Pehuenche lands and economic contributions to indigenous development programmes.

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 have their lands traded. 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 Appeals 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 insufficiencies of the legal framework for the protection of indigenous land rights, and the low status of international standards on indigenous rights are factors that affect the voicing of indigenous land rights, but they also have an impact on courts' response to such claims. Whether a court accepts claims related to the Mapuche's 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 standards. 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 electricity licence for Ralco, the electricity law took precedence over the indigenous law. The electricity 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. (Stavenhagen 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 (Stavenhagen 2003: 12).

## The legal culture

The manner in which judges interpret the law is important for explaining how courts respond to legal claims, and the interpretation of law is influenced by the legal culture. Courts also 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.

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.<sup>29</sup> 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).

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.

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

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<sup>29</sup> See, for instance, Vargas y Duce 2000; Morales 2003; UDP 2004.

Two quite recent initiatives are likely to reduce the degree of formalism in the Chilean legal culture. 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. 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.<sup>30</sup> 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 patterns still prevalent in the system (2003: 14). Although the reduction of formalism requires additional measures<sup>31</sup>, 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.

## 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 can also be shaped by education and training. Ongoing training may educate and sensitise judges towards human rights in general and indigenous rights in particular.

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".<sup>32</sup> The Academy's training programme (*Programa de Formación*) is directed at lawyers wishing to commence a judicial career. The programme is based on court internships and workshops and seminars. 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 workshops focus on various topics, such as judicial ethics, evaluation of evidence, judicial reasoning, interpretation of the law, and conflict resolution systems. 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). Graduates of the Academy express positive opinions about the programme, and consider its activities to shape legal standards and to provide them with the critical reasoning required for a judicial position (Morales 2003: 12).

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<sup>30</sup> 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).

<sup>31</sup> Morales stresses the need for introducing general transformations into the teaching at law schools (2003: 15).

<sup>32</sup> [http://www.academiajudicial.cl/quienes\\_somos.php](http://www.academiajudicial.cl/quienes_somos.php) Accessed 2 May 2006.

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 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.<sup>33</sup> 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.<sup>34</sup> 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

Judges' sensitivity to human rights is influenced by their social background and their experience, and a court's response to indigenous rights claims thus depends on the composition of the bench. 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 the poor, women and ethnic minorities, because this increases the chances of ruling fairly with regard to those groups. There is a general lack of social diversity in Latin American courts today. The representation of indigenous groups 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.

The composition of the bench depends on the process and the criteria for appointing judges. The process of nominating Supreme Court justices in Chile initiates with the court preparing a list of five candidates for nomination. 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 the reform, which was to bring new perspectives and opinions into the court. It may contribute to strengthening conservatism, because it

<sup>33</sup> 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).

<sup>34</sup> <http://www.academiajudicial.cl/habilitacion.php>



prevents 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*. 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 been less 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.<sup>35</sup> 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).

In sum, the legal basis for litigating on indigenous land rights has been an important variable in explaining courts' response to Mapuche claims. 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.

The Chilean judiciary is generally characterised by lack of diversity on the bench, in particular with respect to the representation of indigenous peoples. The system is also class biased. These factors combine to make judges less sensitive to indigenous rights issues, which in turn make courts less responsive to Mapuche claims. The selection mechanisms for lower court judges 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.

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<sup>35</sup> "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).

## Concluding remarks

The findings lead to the conclusion that Chilean courts have not assumed an active role in defending the land rights of the Mapuche people. 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. However, the Mapuche face a number of obstacles that impede access to justice. Despite the barriers affecting the voice of the Mapuche, they have been able to bring legal actions related to their land rights. The courts responded quite differently to the Pehuenche's claims in the lawsuits brought against the Ralco project. 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.

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, drawing 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.

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## SUMMARY

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 paper 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 paper 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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