

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

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A decree by Hamilton does not halt the charge
of the plainsman's horse.
A phrase by Sieyes does nothing to quicken
the stagnant blood of the Indian race.

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Many Latin American countries are shifting from authoritarian regimes and moving toward democratic systems of government. According to international agencies and more developed countries, this is a remarkable new phenomenon. In the case of Chile, economic prosperity is an advantage that the country now enjoys in the new millennium; the government is effectively fighting poverty. The atrocities committed during General Pinochet's era are no longer denied, and the living standard of large portions of the population has increased, giving Chile the image of a good student, in the messy classroom that is Latin America.

Many observers tend to focus on Chile's signing of free-trade agreements as evidence of its progress. This seems to contrast sharply with the social unrest taking place in other Latin American countries. This viewpoint, however, overlooks one of the gravest and most ancient political and legal problems in Chile: the hostile relationship that the Chilean state has historically had with its Native peoples. Since its early years as an inde-

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1. JOSÉ MARTÍ, *OUR AMERICA: WRITINGS ON LATIN AMERICA AND THE STRUGGLE FOR CUBAN INDEPENDENCE* 86 (Elinor Randall et al. trans., Philip S. Foner ed., 1977).

pendent nation, Chile has maintained a conflicted and ambiguous relationship with the indigenous peoples that inhabit the country. At times, there has been an explicit hostility; at others times, there have been conciliatory efforts.

The current situation is particularly problematic. The return to democracy in the late 1980's naturally generated increased expectations among Chile's indigenous peoples that the wave of democratization would result in a better relationship between them and the State. However, after fifteen years of democratic government, oppressive legal reforms and breached promises have led Chile's indigenous citizens, in particular those among the Mapuche, to deploy violent protests that have forced the state to pay unexpected attention to them. Land invasions and criminal prosecutions have replaced agreements, putting a discordant note in Chilean society's desire for harmony. How should the democratic system react to these extreme forms of social protest? On the one hand, the protests may undermine the value of social order and the rule of law. But on the other hand, they are nothing but the desperate cries of those who have tried to speak through normal means and have been effectively silenced. More generally, when social movements such as the Mapuche deploy violent forms of social protest, do they strengthen or weaken democracy?

This article will explore certain aspects of the relationship between democracy and the indigenous social movement in Chile. Part I will briefly describe the social composition of those who protest in Latin America today. Part II reviews the way in which links have been formed between the Chilean state and the Mapuche. Part III establishes as a paradox the fact that the return of a democratic political system has not brought about significant improvement in the lives of the most overlooked groups in Chile, thus creating conditions for both organized and irregular protests. Part IV outlines the need to adopt a different way of bridging the growing differences 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. After that, some concluding thoughts will follow.

I. SOCIAL PROTEST ACTORS

Under the label "new social movements" one can include two large kinds of groups. These groups have one important difference, and it is a difference that adds another layer of separation between the developed and underdeveloped worlds, or, for optimists, the *developing* world. This salient difference is the nature of the cause for which the groups have been organized.

While groups of ecologists, consumers, and pacifists are the ones who “compete” in Europe and the United States,² in Latin America those who have drawn social attention are collections of people who do not proclaim to be advancing—at least not directly—causes which would benefit human beings in general, but instead have very personal claims which often appear or are presented in a collective way.³ 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.”⁴ This statement does not contrast with the goals of protestors in developing countries but instead illustrates the *intensity* of the battle that each one is fighting. It is a battle that is fought simultaneously on different battlegrounds: both within the protestors themselves, and externally with regards to the inherent value which democracy arguably possesses.

One cannot deny the benefits of living in an environment which is free of pollution, or in a world in which the use of force is discouraged, and where those who choose to use it must observe minimum rules. One must bear in mind, however, that in Latin America, the very diverse causes of the social movements—which makes it difficult to define them—have a common denominator: a transversal struggle to enhance recognition of *essential* claims, such as to freedom, equality, and justice. These claims may be used as the grounds on which social movements in developed countries base their protests. Consider, for instance, the debate over same-sex marriage in the United States. Gay rights groups demand recognition of their interests on grounds of equality and liberty. This situation is different than from Latin America because those who *intervene* in the same-sex marriage debate in the United States typically use normal or regular mech-

2. Claus Offe, *New Social Movements: Challenging the Boundaries of Institutional Politics*, 52 *SOC. RES.* 817, 817 (1985).

3. 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. See René Mouriaux and Sophie Beroud, *Para una definición del concepto de ‘movimiento social’* [A definition of the concept of ‘social movement’], in 1 *REVISTA DEL OBSERVATORIO SOCIAL DE AMÉRICA LATINA (OSAL)* [LATIN AMERICAN SOCIAL WATCH REVIEW], June 2000, at 119. Also of particular interest is the description and analysis made by Hertz of the consumers organizations in the U.S. and Europe as new actors who question the “silent takeover” transnational firms practice on various 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 very powerful act particularly relevant. See generally NOREENA HERTZ, *THE SILENT TAKEOVER: GLOBAL CAPITALISM AND THE DEATH OF DEMOCRACIES* (2001).

4. Boaventura de Sousa Santos, *Los nuevos movimientos sociales* [The new social movements], 5 *REVISTA DEL OBSERVATORIO SOCIAL DE AMÉRICA LATINA (OSAL)* [LATIN AMERICAN SOCIAL WATCH REVIEW], Sept. 2001, at 178.

anisms of protest—e.g., litigation or the ballot-box.⁵ There are, of course, more factors at play when trying to understand the way different groups act. However, it seems that simply recognizing how basic the claims made by these sectors of society are—and the continuing impossibility of channeling social intervention properly—requires us to begin by taking heed of this likewise elemental issue.

Increasingly, Latin America has been witnessing new manifestations of social discontent in significant sectors of its countries—sectors noteworthy for their number or their special condition of vulnerability—that were caused by factors that the relevant literature usually attributes to the progressive implementation of neo-liberal policies by the various states (policies which they claim have accentuated the level of exclusion of marginalized groups). A more exhaustive examination of the subject would require the incorporation of other variables, which naturally makes it difficult to form a uniform paradigm that applies to the cases of different countries.⁶ The Movement of Land-

5. See generally 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 U.S. citizens 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. What is determinant to my discussion below, the discussion is carried out through what Reed calls "forms of political activity," such as voting. See Douglas S. Reed, *Popular Constitutionalism: Toward a Theory of State Constitutional Meanings*, 30 RUTGERS L.J. 871, 875 (1999).

6. See, in particular, Rodolfo Stavenhagen, *Social Dimensions: Ethnicity, in DEMOCRACY IN LATIN AMERICA. (RE)CONSTRUCTING POLITICAL SOCIETY* 161, 180 (M.A. Garretón and E. Newman eds., 2001) [hereinafter *DEMOCRACY IN LATIN AMERICA*] ("[I]ndigenous populations became particularly vulnerable to the negative effects of globalization and so-called structural adjustments."). See generally José Seoane, *Introducción, in MOVIMIENTOS SOCIALES Y CONFLICTO EN AMÉRICA LATINA [SOCIAL MOVEMENTS AND CONFLICT IN LATIN AMERICA]* 11, 11 (José Seoane ed., 2003) [hereinafter *MOVIMIENTOS SOCIALES*] ("[T]he 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 9 *REVISTA DEL OBSERVATORIO SOCIAL DE AMÉRICA LATINA (OSAL) [LATIN AMERICAN SOCIAL WATCH REVIEW]*, Jan. 2003, at 185. ("[T]he answers to the social earthquake caused by the waive of neo liberalism in the 80's . . ."); Claudinei Coletti, *Avanços e obstáculos 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 (José Seoane ed., 2003) ("[T]he 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 Curtis ed., 2001); Margarita López, *El mundo multifacético de la protesta popular actual en América Latina [The multifaceted world of actual popular protest in Latin America]*, in *LUCHA POPULAR, DEMOCRACIA, NE-*

less 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 protests raised by the *Piquetero* Movement in Argentina are all examples of a new kind of collective organization around objectives. Although such movements existed before the new protests, these new movements distinguish themselves by their new methods of action, and by incorporating a more complex discourse than what has been known since the students’ and workers’ mobilizations of the mid twentieth-century.

Among the protest movements existing in Latin America today, some act and make demands arising from claims typical of indigenous or rural people, such as the aforementioned coca-growers in Bolivia, the Zapatistas in Mexico, the Indigenous Confederation in Ecuador, and the landless peasants in Brazil. This form of collective action is the most relevant to this analysis because it is the one most likely to exist in Chile. In the case of Chile, social protest can also be related to indigenous claims. However, the social unrest in Chile has received less attention than similar indigenous and non-indigenous movements elsewhere in the region. Still, the scope and cause of the indigenous protests in Chile is similar to these others, namely, the state’s continued marginalization of the group.

There are those who think it possible to point out important differences between the “new” socially organized movements and the “traditional” ones. They claim that social movements, like the emancipation of women and worker movements, can be portrayed as “collective agents who intervene in the process of social transformation promoting changes or opposing them.”⁷ The ‘new’ social movements, however, should not be considered “the contemporary expression of the old aspirations of emancipation of these.”⁸ In their opinion, “the novelty lies, basically, in the values, forms of organization, mobilization, action, sociopolitical objectives and cultural contents of the new social movements.”⁹ In short, some argue that there has been a substantial

OLIBERALISMO: 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] 7, 8 (Margarita López ed., 1999) (“[W]e 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”); Manuel Antonio Garretón, *The new socio-political matrix*, in DEMOCRACY IN LATIN AMERICA 220, 224 (“[T]he neo-liberal model has constituted a rupture and demonstrated its inherent failure to become a stable and self-sustaining development”).

7. DUQUELSKY, *supra* note 6, at 125 (quoting J. RIECHMANN & F. FERNÁNDEZ, REDES QUE DAN LIBERTAD Ch. 1 (1994)).

8. *Id.* at 126.

9. *Id.* at 69.

transformation of the values and interests that new social actors espouse. Not only do actors differ; their grievances and concerns are also different. This approach bears further discussion.

From the definition given above, one can conclude that the new social movements, though they show features which differentiate them from the old socially organized groups (e.g., the methods of action and their cultural content), are not different from the older groups in one very relevant aspect—their condition as interveners in the process of social transformation. Even if the values and ways of organizing and mobilizing themselves might vary from group to group, the new social movements could also be understood in accordance with this paradigm as: “collective agents which intervene in the process of social transformation.” This worldview suggests a merely contemplative vision of these movements. It is a vision where the state part of the political action is, or needs to be, channeled by social groups with varying degrees of presence in public affairs. These groups, sometimes identified by the equivocal name of “civil society,” do not necessarily pour their aspirations into the institutionalized political channels. They nonetheless attempt to obtain, and indeed have attained, degrees of participation, or to be exact, levels of *intervention* “in the process of social transformation.”¹⁰ While Jorge Reichmann and others see the new social movements as taking part in this process, some participants of these new social movements—in particular the Mapuche people in Chile—engage in social protests precisely because *they cannot intervene in the process of social transformation*.

This particular issue has a feature that makes Reichmann’s conceptualization at least incomplete. The Mapuches’ protest, like other similar protests in Latin America, draws public officials’ and academics’ attention because it is viewed both as strengthening our democratic system (if they did not protest violently, we would not be aware of their grievances) and as a threat to it (e.g., by attacking other people’s property). The issue that should concern us at this point is the question of *what kind of intervention* they claim, and what kind of intervention they should have claimed. The Mapuche’s situation is enlightening because they represent a significant social group (i.e., indigenous peoples) that is in a vulnerable position because it is excluded.

A feature that is shared by social protest movements that use non-institutional methods in Latin America is their lack of connection to the state’s formal institutions. They live under legal

10. See Reva B. Siegel, *The Jurisgenerative Role of Social Movements in U.S. Constitutional Law* (2004), available at <http://islandia.law.yale.edu/sela/eprog04.htm> (follow hyperlink Reva B. Siegel).

regimes which feel absolutely alien to them, and to which they see no connection. Nevertheless, the state imposes burdens on them while at the same time claiming to be assuring their rights. The Mapuche's unwillingness and inability to exercise their rights leads them to act "irregularly,"¹¹ according to the concept derived from our institutional systems.¹²

It is well known that the eruptions of the new social movements generally occur as a reaction to situations in which the state's structures have shown themselves to be persistently uncaring to their demands. The intervention of these groups, whatever their methods, is provoked by the absence of dialogue with the state, or alternatively by the state's deafness to their concerns. In that sense it is not clear that they can really be called actors who intervene in the process of state decision-making, if by intervention one means something more than *ex post facto* manifestations. If it is true that the promise of democracy is the notion that people should feel that they have some influence in governmental decision-making, then close attention should be paid to the way in which these groups' intervention is ultimately resolved.

II. THE DISTANCE BETWEEN THE MAPUCHE AND THE CHILEAN STATE

It is important to note that documents about social conflict and protest movements do not generally refer to the situation in Chile as a case study. Could it be that in Chile instances of social exclusion similar to the rest of Latin America simply do not exist? Is there any standard to which these cases become relevant? Do all social groups pledge allegiance to the legal system and channel their claims through ordinary social mechanisms? Or is it that while social and political exclusion does exist, groups are not able to mobilize, and that those outside the institutional system

11. When I say "irregularly" I want to underscore that the means by which these demands make themselves heard today are not those that the law has *specifically* laid down for 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 within 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 for her permanent disagreement with my perspective.

12. According to Larry Kramer circa 1786, before the U.S. Supreme Court issued its opinion in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), "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).

must resign themselves to receiving the mere assistance of the state?

Within Latin America, Chile is in a better situation as far as poverty indices go (although not so in the inequality rating) when compared to the rest of the countries.¹³ This may lead us to wrong conclusions, since the study of social conflict is often related to income data and poverty figures. Thus, because Chile maintains a strong economy and low poverty levels, one might tend to minimize the extent of the conflict and not delve into its causes and implications. But it is not poverty that determines how radical the socially organized groups are. At most, one could deem it as a condition *sine qua non*. Some allusion to unemployment or lack of opportunities is necessary to help explain the frustration that, from time to time, explodes with unexpected anger.

However, such a misguided explanation does little to improve the condition of those who protest by irregular means—be it in southern Chile or in the *banlieus* of Paris. It is the extreme and particular situation in which these groups find themselves that explains their radical behavior: 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 their society. As the ‘alien’ word suggests, they feel as “partial members of the community with limited membership rights”¹⁴ That is what makes those who are excluded lose all faith in democracy as a method of decision-making that can have an impact on them. It

13. According to the official figures, 18.8% of the population lacks the monthly income necessary to buy a basket of basic food staples. See GOBIERNO DE CHILE, MINISTERIO DE PLANIFICACIÓN Y COOPERACIÓN [Planning Ministry], ENCUESTA CASEN 2003, VOL. 1: “POBREZA, DISTRIBUCIÓN DEL INGRESO E IMPACTO DISTRIBUTIVO DEL GASTO SOCIAL” 7 (Aug. 2004), available at http://www.purochile.org/CASEN_2003.pdf. Likewise, “[t]he richest 10% of the people 41.2% of total income, while the poorest 10% only receive 1.2%.” See Pamela Caro & Marco Kremerman, *Less poverty, more inequality*, SOCIAL WATCH REPORT: CHILE (2005), available at <http://www.socialwatch.org/en/fichasPais/fichaPaisPortada.shtml> (follow “Select the Country: Chile” hyperlink; then follow “Full text”).

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 GOBIERNO DE CHILE, MINISTERIO DE PLANIFICACIÓN Y COOPERACIÓN [Planning Ministry], ENCUESTA CASEN 2003, VOL. 2: “POBREZA Y DISTRIBUCIÓN DEL INGRESO EN LAS REGIONES” 7 (Sept. 2004), available at http://www.mideplan.cl/admin/docdescargas/centrodoc/centrodoc_121.pdf. 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).

14. Kevin R. Johnson, “*Aliens*” and the U.S. Immigration Laws: *The Social and Legal Construction of Nonpersons*, 28 U. MIAMI INTER-AM. L. REV. 263, 271 (1996-97) (discussing the implications of the ‘alien’ terminology in U. S. law and its utilization to stigmatize subordinate groups within American society).

may also lead these marginalized groups to practice methods of social protest that put the democratic institutions in check in order to draw attention to their position of disadvantage.

Documents show how the Chilean state has been the main actor in suffocating indigenous claims, particularly those of the Mapuche. One means by which Chile has done this is through institutional acts like laying down the legal norms which allowed the transfer of indigenous people's land to individuals. This is a process that began at the dawn of Chilean independence¹⁵ and continued through the 20th century¹⁶ when the military dictatorship then in existence accentuated the process.¹⁷ Chile has also discouraged indigenous claims through an evident lack of will to deal with them, resulting in a 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 constant forced assimilation of the latter into the former. At the beginning of Chilean republican life, legal equality was decreed between the indigenous people and the rest of the Chileans—a genuinely progressive achievement in new nations.¹⁹ This legal declaration allowed indigenous lands to be "freely" traded, and the Chileans exerted a great deal of pressure on the Native groups to sell their lands. Lands were then acquired either fraudulently or at prices which bore no rela-

15. JOSÉ BENGÓA, *HISTORIA DEL PUEBLO MAPUCHE* [THE HISTORY OF THE MAPUCHE PEOPLE] 155-62 (1985).

16. JOSÉ BENGÓA, *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).

17. GABRIEL SALAZAR & JULIO PINTO, *HISTORIA CONTEMPORÁNEA DE CHILE II. ACTORES, IDENTIDAD Y MOVIMIENTO* [CONTEMPORARY HISTORY OF CHILE II. ACTORS, IDENTITY AND MOVEMENT] 166 (1999). 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 subdivided. 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 also INSTITUTO DE ESTUDIOS INDÍGENAS, UNIVERSIDAD DE LA FRONTERA, *LOS DERECHOS DE LOS PUEBLOS INDÍGENAS EN CHILE* [THE RIGHTS OF THE INDIGENOUS PEOPLES IN CHILE] 308 (2003).

18. *LOS DERECHOS DE LOS PUEBLOS INDÍGENAS EN CHILE*, *supra* note 17, at 157-66.

19. The Spanish Crown saw the indigenous peoples as "*miserabiles personae*," a category including widows, orphans, and other persons similarly in need of special protection under the law, thus grounding the Spanish claim of a duty to 'protect' the native peoples of the New World through the teaching of Christianity. See Susan Scafidi, *Old Law in the New World: Solórzano and the Analogical Construction of Legal Identity* 55 FLA. L. REV. 191, 192-93 (2003).

tion to their real value.²⁰ In spite of the fact that the acquisition of Mapuche land required state authorization, in practice sale contracts continued to be drawn up. The military occupation of Mapuche territory also took place at this time. The history books call this occupation “the pacification of Araucania” (which had its analogue in Argentina where it was called “the War of the Desert”).²¹ This process also included the resettlement of indigenous people into reservations.

Efforts to *integrate* the Mapuche people have gone largely unrecorded in the years since Chile’s independence. The Chilean state has favored a policy of forced assimilation that has successfully permeated the social fabric of the country, and that has generated de facto discrimination and consequent exclusion of the Mapuche by the rest of Chilean society.²² Today gross inequality still exists, despite the existence of minimum levels of legal freedom through constitutional charters and bills-of-rights which serve as “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” and are in fact minimal limitations to legislative action.²³ Sadly, the return to democracy has not brought with it improvement to the quality of living for some indigenous sectors of the population, but instead has frustrated their expectations and converted Chile into fertile soil for authoritarian and irregular experiments—such as the claims which underlie this discussion.²⁴

20. Land dispossession, Guadalupe Luna has observed, is also one of the means the United States used to subordinate Chicanas and Chicanos in the Southwest. According to her, the United States did this in violation of a post-war international agreement that it had signed with Mexico. See Guadalupe T. Luna, *Chicana/Chicano Land Tenure in the Agrarian Domain: On the Edge of a “Naked Knife,”* 4 MICH. J. RACE & L. 39, 41 (1998) (discussing “the dispossession of Chicanas/Chicanos from their property interests following the war between the United States and the Republic of Mexico”) (footnotes omitted).

21. Remarkably, as Bengoa shows, a century after “the War of the Desert” (1981), both Argentina and Chile were under military dictatorships, and “in both sides of the Andes mountains modern ‘barbarians’ were persecuted [through] ‘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 16, at 22. ‘Operation Condor’ was a conspiracy by several South American countries, allegedly led by General Pinochet, to murder their political opponents around the world during the 1970’s. See generally JOHN DINGES, *THE CONDOR YEARS: HOW PINOCHET AND HIS ALLIES BROUGHT TERRORISM TO THREE CONTINENTS* (2004).

22. 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).

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

24. 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 situa-

To be sure, this is not a new avenue in political thought. Cass Sunstein explains that when framing the United States Constitution, James Madison—“probably the most influential voice in the founding period [of the United States]. . . .”—considered, as a means of combating factions or “the evil of parties,” the fact that people have “a state of comfort.”²⁵ According to Sunstein, this demonstrates that there is “a clear link between the elimination of poverty and the preconditions of democracy.”²⁶ As Carlos Nino pointed out at the beginning of the 1990’s, when democracy was timidly expanding across the continent:

[W]hen 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] represent a danger for the consolidation once and for all of a democratic system.²⁷

Thus, Nino gave warning about the need to pay more attention to the economic foundations of democracy like “the question of the external debt, the fall in exchange rates, the effects of protectionism against third-world countries’ exports, inefficient and unjust systems of contributions, inflation, etc.”²⁸ All these, Nino rightly thought, would pose a threat to the stability of incipient democratic governments that were being installed in the region. Subsequent events in various parts of the continent demonstrated that he was indeed correct.

In the specific movement of the Mapuche, perhaps *the* social movement in Chile today,²⁹ one can trace a moment of political relevance in the relationship between the state and these original inhabitants. In 1989, shortly before the first presidential elections following the military dictatorship, then candidate (and later President of the Republic) Patricio Aylwin signed an agreement with the indigenous movement of that time. This agreement became known as the “*Nueva Imperial*” Agreement. This agree-

tion.” See U.N. Development Programme, *Democracy in Latin America: Towards a Citizens’ Democracy* (2004), <http://democracia.undp.org/Default.asp>.

25. CASS R. SUNSTEIN, *Why Does the American Constitution Lack Social and Economic Guarantees?* 6, 16 (Univ. of Chicago, Pub. Law Working Paper No. 36, Jan. 2003) (quoting JAMES MADISON, 14 *THE PAPERS OF JAMES MADISON* 197-98 (Robert A. Rutland, et al. eds., 1983), available at <http://ssrn.com/abstract=375622>).

26. CASS R. SUNSTEIN, *THE SECOND BILL OF RIGHTS: FDR’S UNFINISHED REVOLUTION AND WHY WE NEED IT MORE THAN EVER* 116 (2004).

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

28. *Id.*

29. Salazar and Pinto end their book by saying that: “if there is an indigenous movement [in Chile] it is because there is [also] a social movement.” SALAZAR & PINTO, *supra* note 17, at 173.

ment entailed that indigenous groups would agree to back Aylwin's candidacy on the condition that the future government would establish as part of its agenda the constitutional recognition of their economic, social, and cultural rights, and that it would create a special commission on indigenous peoples.³⁰ The Mapuche also asked for a tax cut on their estates, but Aylwin rejected this claim and found himself being loudly ridiculed by an indigenous audience.³¹

The special commission was set up as agreed to in the pact, and it was seen at first as an unequalled opportunity for indigenous peoples to put forth their demands that had been forever ignored in the past. Meetings were held with the aim of understanding the indigenous groups' aspirations. A bill was drafted and given to President Aylwin, and it was critically edited by several public officials. This bill led to the drafting of a special law in 1993 known as "the Indigenous Act."³² In the words of José Bengoa, a prominent Chilean scholar on indigenous issues:

[D]emocracy 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.³³

However, in the context of the 500th anniversary of the Spanish conquest, indigenous peoples (including the Mapuche) began to mobilize in protest of the government's military draft, relying on the discourse of international human rights law. These groups viewed the draft as incompatible with their previous demands—demands that had been previously agreed to by President Aylwin and now were being reneged. Although "the Indigenous Act" of

30. For a 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] 299-300 (2003).

31. BENGOA, *supra* note 16, 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 to be the establishment of "a strong and decent relation between the indigenous and the elected President. With both agreements and disagreements there was not any sort of the candidates' typical 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.

32. Law No. 19.253 (1993) (Chile) (on the Protection, Promotion, and Development of the Indigenous Peoples).

33. BENGOA, *supra* note 16, at 186.

1993 had not yet been passed, the major changes made by the government bureaucrats to the hotly-debated original draft revitalized the skepticism and the anger that had been temporarily 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 Labour Organisation's (ILO) Convention 169 concerning indigenous peoples' rights.³⁴ Indigenous leaders started to get impatient because their organizations perceived that Chilean society, through its new elected authorities, did not see them as "actual individuals, but as mere beneficiaries of legal benefits."³⁵ Paradoxically, the resumption of democracy did not seem to bring about any change to their status as "*miserabiles personae*." So began once again a series of acts of social protest which were to set the position of the Mapuche at an even greater distance from the official line.³⁶

Some might be troubled by the assumption that the *Nueva Imperial* agreement ought to be given any weight at all. A better question is whether it is possible to derive actual implications from the political promises a candidate makes during the heat of her political campaign. If we were to say yes, what kind of implications or obligations would that entail? For if the former candidate and current public official breaches what she previously said, then should a non-breaching party, such as the Mapuche, be permitted to not fulfill its concurrent duties? A legalistic and positivist reading of political agreements such as the *Nueva Imperial* suggests that we should not consider them as genuine political contracts. If this were the case, then social protests arising from the non-fulfillment of claims made under the political pressure of an election would be legitimized, and the value that we assign to social institutions would be seriously undermined or even eliminated.

However, it is not only the legal and political force of the agreement that is at stake here. As Jeremy Waldron has noted, we should also look at 'the logic of consent' given by people

34. ILO, Convention 169, *International Labour Conventions and Recommendations 1919-1991*, Vol. 2, 1436-47 (1991) (concerning indigenous and tribal peoples in independent countries), available at <http://www.ciesin.org/docs/010-282/010-282.html>.

35. BENGGOA, *supra* note 16, at 201.

36. 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 & PINTO, *supra* note 17, at 157.

when entering into a certain polity—here, the new relationship between the state and the indigenous peoples.³⁷ 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.”³⁸ Therefore, the *Nueva Imperial* agreement, in so far as it represents the act of political consent, should not be seen as a 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.³⁹ The agreement was a practice of genuine civility which, based upon a new understanding of the relationship between these two entities, generated legitimate expectations in the traditionally weaker party—the indigenous.

A different perspective on the matter holds that tracing the meaning of promises and agreements made under these circumstances helps constituents to make their representatives accountable, since the anticipation of the retrospective control that voting allows is a “very diluted” means of control.⁴⁰ To put it differently, “[I]f presidential authority cannot be tied to campaign promises or platforms, then the ground for electoral accountability disappears.”⁴¹ This view implies the reasonability of giving some force to the *Nueva Imperial* agreement—as long as it was not signed as a *promise*.

Finally, the specificity of the Mapuches’ understanding of their ‘political’ engagement with other peoples and how it can affect the present situation should be considered. During the first centuries of Spanish colonization, the Spaniards saw the indigenous peoples as genuine war enemies with whom it was expedient to establish some channel of communication. The special

37. 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).

38. MICHAEL WALZER, *SPHERES OF JUSTICE* 82 (1983).

39. As Waldron puts it: “[t]heorists 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 complete authoritarian could desire.” WALDRON, *supra* note 37, at 140. Although I use *Nueva Imperial* hereinafter as 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 do not disregard what I have previously said on Waldron about the flow of consent and the reasons for which it is given.

40. Jon Elster, *Introduction*, in *DELIBERATIVE DEMOCRACY* 1, 2 (Jon Elster ed., 1998).

41. Catalina Smulovitz & Enrique Peruzzotti, *Societal Accountability in Latin America*, 11 *J. DEMOCRACY* 147, 149 (2000).

form of dialogue between the Mapuche and the Spanish crown was named ‘talks’ (*parlamentos*). More than a dozen of these *parlamentos* were held between the conquerors and the Mapuche people.

The first of these *parlamentos*, known as “*parlamento de Quilín*” (1642), provided that the Mapuche must acknowledge to be subjects of the king, that they would fight the enemies of the Crown, that they allow the entrance of missionaries into their territories, and that they would go back to live on their lands south of the border (the *Bío-Bío* river). The Spanish agreed that their military forces would not enter into Mapuche territory, which the Mapuche controlled as an independent territory.⁴² After the *Quilín parlamento*, the Mapuche people and the Spaniards held several more *parlamentos*. This has led some scholars to assert that “the relation of Chile with the Mapuche is one of a pact.”⁴³ Since tradition is a central 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*; it was seen 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.

The constitutional recognition of the Mapuche’s standing as original inhabitants—one of the agreements reached at *Nueva Imperial*—became a promise which was impossible to keep when the proposal was not supported in Congress. On the other hand, while approval of ILO Convention 169⁴⁴ was being debated, conservative legislators contested it before the Constitutional Court. Though it rejected the congressmen’s arguments, the Court nevertheless held that indigenous peoples “do not constitute an autonomous collective entity between individuals and the state”⁴⁵ and thus closed off the path to the recognition of rights of a collective nature.⁴⁶

42. BENGUA, *supra* note 15, at 33.

43. Pablo Marimán, *Presentación [Foreword]*, in *PARLAMENTO Y TERRITORIO MAPUCHE [TALKS AND MAPUCHE TERRITORY]* 14 (Pablo Marimán ed., 2002).

44. ILO, Convention 169, *supra* note 34.

45. Chilean Constitutional Court, Decision 309, § 44 (Aug. 4, 2000). Legislators also went to the Court alleging the unconstitutionality of the procedure regarding the required quorum. *Id.*

46. For a contrary perspective on the need to give 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

Meanwhile, the criminal trials for the violent actions of some groups began. The Chilean government began to label their protests “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: some Mapuche leaders are convicted of terrorist charges (like threats and arson) for which they are prosecuted with fewer legal guarantees.⁴⁷

All of this led President Ricardo Lagos to decide to set up in 2001, a *Special Commission* devoted to analyzing the indigenous question in Chile from an all-embracing point of view.⁴⁸ This Commission had the aim of establishing “institutional, legal, 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 reconstruc-

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 Will 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.” *Id.* at 25. It is precisely by not acknowledging their special standing that the polity disregards the indigenous’ most ancient valued claim. It is 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 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 WWII accused of sexually molesting children. While the Mapuche have not been accused of any private communications interceptions, forced labor, sexual abuse, corporal punishment, or 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. *Id.* at 23-35.

47. Some of these prosecutions, for example, involve the use of anonymous or “face-less” witnesses. For a complete report on this issue, see HUMAN RIGHTS WATCH AND THE OBSERVATORIO DE DERECHOS DE LOS PUEBLOS INDÍGENAS [INDIGENOUS PEOPLES’ RIGHTS WATCH], *UNDUE PROCESS: TERRORISM TRIALS, MILITARY COURTS, AND THE MAPUCHE IN SOUTHERN CHILE* (2004) [hereinafter *UNDUE PROCESS*].

48. REPORTE [COMMISSION REPORT], COMISIÓN DE VERDAD Y NUEVO TRATO DE LOS PUEBLOS INDÍGENAS [COMMISSION OF HISTORICAL TRUTH AND A NEW DEAL FOR INDIGENOUS PEOPLES] (2001) (Chile).

tion of historical confidence[.]”⁴⁹ The Commission also attempted to tackle the relationship between indigenous peoples and the state, which until now has been marked by the seizing and burning of properties in the Araucanía region in southern Chile and the growing “penalizing of social protest.”⁵⁰ 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—has 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 develop a long-term policy toward indigenous peoples.⁵¹

The conclusions reached by the Commission presided over by former President Aylwin are significant. The constitution of the Chilean state imported a policy of assimilation for the aboriginal inhabitants, and this policy brought negative consequences for the latter. Some even called the state’s actions “genocide,” since by putting its policy into practice some native peoples lost their systems which fixed their norms, lost their native tongues, and certain peoples even disappeared completely. The Commission also insisted on the need to give native peoples 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 Chile’s Native peoples.

The Government took longer than it had promised to announce the specific measures that it would push forward in order to make the Commission’s findings effective. It was sadly evident how little attention the public paid to the Commission’s Report. All the same, the new proposal insisted on constitutional recognition and approved of ILO Convention 169, along with scholarships for education, the setting up of an Undersecretary’s Office of Indigenous Affairs, and the creation of special counties. Re-

49. *Id.* at § I, 3.

50. 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] 250-52 (2004); See also 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, Nov. 17, 2003, [http://www.unhcr.ch/Huridocda/Huridoca.nsf/\(Symbol\)/E.CN.4.2004.80.Add.3.En?Opendocument](http://www.unhcr.ch/Huridocda/Huridoca.nsf/(Symbol)/E.CN.4.2004.80.Add.3.En?Opendocument) (follow the PDF hyperlink).

51. UNDUE PROCESS, *supra* note 47, at 4.

markably, the creation of one of these counties was immediately rejected in Parliament. In August 2005, fifty-eight amendments to the Constitution were passed. Two however, were not passed—the reform of the electoral system and the formal recognition of the indigenous peoples. The two failed amendments, to be sure, are intertwined. If Congress had a different composition it would be reasonable to expect a more open attitude toward indigenous people's affairs.

III. DEMOCRACY'S FAULT

What does the above discussion tell us about the relationship between the Mapuche social movement and the state? What does it actually tell us about the relationship between the Mapuche and democracy itself? The first implication arising from the preceding description is that this relationship has been marked by domination on the part of the nation-state, which at times has even denied the very existence of indigenous peoples within Chilean territory.⁵²

This condition of domination by the state—mitigated by the political participation of some Mapuche leaders during the 20th century⁵³—is increasingly being followed by the use of punishment as a tool, due to the different problems that arise when land is seized. Such punishment stands out because the state even uses highly oppressive instruments like the anti-terrorist statute. The state's position is clearly set forth in a May 2003 report from the Senate's Constitution, Legislation, and Justice Commission that manifests the government's "deep concern at finding the principle of legal security, as an essential element for the protection of the fundamental rights assured by the Constitution, gravely affected."⁵⁴ Moreover, as previously mentioned, the constitutional amendment that would have given formal recognition of the indigenous' special standing as *native peoples* was again defeated. The Judiciary, particularly the Supreme Court, has also acted as an obstacle to, rather than a guarantor of, indigenous citizens' rights.⁵⁵ The Court has twice "issued highly controversial deci-

52. In 1978, the then Minister of Agriculture, when discussing the legislation which allowed the divisions of the communities, stated that "in Chile there do[es] not exist any indigenous peoples; they are all Chileans." SALAZAR & PINTO, *supra* note 17, at 165.

53. As pointed out by Bengoa, during the 20's and 30's, "[m]any Mapuche are candidates for congress or mayor, and every political campaign has some degree of Mapuche participation . . . [T]hat young generation of indigenous leaders is confident of the chances to integrate that Chilean society has to offer." BENGEOA, *supra* note 16, at 102. See also BENGEOA, *supra* note 15, at 387-89.

54. FACULTAD DE DERECHO, UNIVERSIDAD DIEGO PORTALES, *supra* note 50, at 242.

55. *Id.*

sions reversing [district courts' decisions favoring Mapuche defendants in terrorism cases]."⁵⁶

In short, there exists a situation in which the state questions the way that indigenous peoples, especially the Mapuche, protest against what they consider a situation wherein they have been abandoned and permanently disregarded by the authorities. The state's right or duty to react against violence cannot be denied—so long as action is taken by proportionate means and promotes a legitimate and necessary result. Unfortunately, there clearly exists a situation in which the claims of the Mapuche have been systematically disregarded, adding a legal and political dynamic that has paved the road to the state's use of violence against indigenous people. As a result, the positions of the parties have become more radical, and their distance has widened. Thus, a question arises which seems to be a paradox: democracy is restored, but after a long period, this sector of society continues to be particularly knocked about. Promises are made to improve the legal and social conditions of indigenous peoples, and this generates what Santos calls a "bundle of stabilized expectations."⁵⁷ The positions appear to grow farther apart instead of finding roads to come together.

This paradoxical situation could be attributed to several causes. First, the still juvenile Chilean democracy shows an obsession with the political consensus needed to advance its development. This situation is best described as a way of adopting collective decisions aided by a system of representation which tends to force agreements, and which it has impossible for dissenting voices to modify. Consensus-building has choked off discordant voices within the body social, accentuated the irreconcilable positions of the divergences, and, thus, made the demands of the relegated groups even more radical. The "political" consensus has not been limited—and seems unlikely to be so

56. *UNDUE PROCESS*, *supra* note 47, 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 widespread lobbying added to the accusations made by a Senator for the Araucanía region—where most Mapuche live—that the assertion of jurisdiction over the defendants was nothing but "a victory for terrorist groups," and 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 sentenced to more than five years of prison. *Id.* at 33-34. Other Mapuche,

are serving prison sentences of 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 [Mapuche], including five of those already convicted, are currently on trial for allegedly belonging to a terrorist group ("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.

57. Boaventura de Sousa Santos, *Nuestra America: Reinventing a Subaltern Paradigm of Recognition and Redistribution*, 54 *RUTGERS L. REV.* 1049, 1051 (2002).

in the future—to questions about the basic structure of society. Rather, it has tried indirectly to deny the validity of the conceptions of those who build its collective identity through a partial *de jure* exclusion that is in fact almost complete.

Special value, then, would seem to be gained by the complaints made against the universalistic positions if the differences are denied and the subjects hindered from holding dialogue from their own individuality—even though the dialogue is built in a collective manner.⁵⁸ It does not seem salutary for democracy itself to go on denying diversity, aversion to combativeness, or *agonism* (meaning something deeper than the mere recognition of the existence of others unlike oneself). Rather, in order to build inclusive democratic systems, genuine room for political participation must be granted, even at the risk of having non-regular manifestations of social discontent provoked by democracy's own weaknesses and deficits. As Jeremy Waldron notes when discussing 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.⁵⁹

As for the Mapuche, their legitimate aspirations to intervene and participate in the decision-making process that takes place in Santiago and Valparaíso—where the Executive and Congress are located—have not found a place within the so called “transitional process” to democracy initiated in 1989. It might well be the case, as some scholars suggest, that the very label ‘transitional democracy’ no longer fits the political reality of the country.⁶⁰ In fact, the transition paradigm has allowed for the maintenance of a type of ‘protected democracy’ in which certain groups have little or no access at all to political power. According to Thomas Carothers’ terminology, a “feckless pluralism” exists wherein “the whole class of political elites, though plural and competitive, is profoundly cut off from the citizenry, rendering political life an ultimately hollow, unproductive exercise.”⁶¹

If one were to examine the circumstances in which the indigent movement at the beginning of the 1990's agreed to give its

58. See generally CHANTAL MOUFFE, *THE DEMOCRATIC PARADOX* (2000); CHANTAL MOUFFE, *ON THE POLITICAL* (2005).

59. JEREMY WALDRON, *LAW AND DISAGREEMENT* 239 (1999).

60. See Thomas Carothers, *The End of the Transition Paradigm* 13 *J. OF DEMOCRACY* 5 (2002).

61. *Id.* at 11.

support in those elections to the political project which has governed Chile since that year, one might consider it a special political agreement—a sort of constituent social pact drawn up between the indigenous peoples and the state—in which the latter undertook to give legal recognition to the former at a constitutional level, and to grant special protection to this historically disenfranchised group. However, in understanding the ‘indigenous world’ the state has failed in its remit. Moreover, the state does not even regard it as a failure—provided that it has given even a minimal effort—even though it did not keep the promises it made. Thus, the Chilean state ignores the “bundle of stabilized expectations”⁶² that it itself generated.

If the *Nueva Imperial* agreement can be seen as a political pact between the state and indigenous peoples in which both parties *consented* to a defined way of relating to one another, then, when faced with broken promises, as Locke made clear, it is the ruler who has turned his back on his subjects and thus converted the *government* into the one who can be accused of rebellion—at least with regards to the Mapuche.⁶³ It is important to note that the dissolution of the pact happened only in the relations with some of the sectors, and not with the rest of society that lives under the same regime, since the visibility and, thus, the implications of breaching the agreement had less political strength that way. In the case of Chile, we thus encounter 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 still ignored. The latter takes place in spite of a

62. See Santos, *supra* note 57.

63. 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 AND A LETTER CONCERNING TOLERATION* 102 (Tom Crawford ed., Dover Publications, Inc. 2002) (1690). “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.” *Id.*

[A]nd so destroying the authority which the people did, and nobody else can, set up, and introducing a power which the people hath not authorised, they 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. *Id.* at 103.

fifteen year-old political coalition that had approved of the claims before even taking office.

Accordingly, it seems inappropriate to point *prima facie* at those who stand against the structures of an unfair system of mutual cooperation. It is democracy itself which has rebelled against them, and not against others. Democracy has thus lost its mantle of authority and, ironically, brought about the dissolution of every political link. Therefore, non-institutional acts like invading land (with its attendant criminal consequences) can only be considered legitimate—though irregular—ways of relating to this new state of affairs. It is the official discourse itself that sustains this: according to it, we are all Chileans. If this is the true panorama, it is on the basis of the social pact that the reasons for not believing in the foundations of state authority rely.

If making the rule of law effective is difficult to achieve, given its general absence from many Latin American countries, it would seem that we must take on the political duty of designing institutional arrangements that will allow us to translate the languages which leave out those who should rightly share the terms of a collective agreement. Although Boaventura de Sousa 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 “[keeping] intact the autonomy of the struggles in question as condition for the translation, since only what is different can be translated.”⁶⁴ Such a measure would allow one to invite those who do not believe the political pact to take part in it, so that they may declare the conditions in which the pact arose and the way it should be carried out. If it is true that this has been the cause of the rebellion of governors (as the indigenous groups claim), it is not a task of making them think they were wrong. It means rather to be “capable of and willing to argue with one foot in one culture and the other foot in another”⁶⁵ in order to achieve a relationship built on the basis of a social consensus.⁶⁶ As was hoped for when the Commission of Historical Truth and a New Deal for the indigenous peoples of Chile was created.

IV. TRANSLATING THE DIFFERENCES

Since events are usually stronger than the mandates of conventional agreements and the practices that derive from them, trying to hide conflict—the agonistic dimension of pluralism—

64. Santos, *supra* note 57, at 1058.

65. *Id.* at 1082.

66. See WALDRON, *supra* note 37.

only generates greater strength and creativity among those excluded. If a commitment exists to the belief that democracy is a system which makes it possible to achieve ideals like equality, freedom, and above all justice, then one must assume the duty of reconstructing and practicing democracy in a way that minimizes its exclusionary tendencies. We must embrace those methods which genuinely allow one to count on impartial decisions, and through which *all* those potentially affected by these decisions participate in the process of adopting them.

That entails, of course, designing institutional arrangements that would be capable of registering diverse sensitivity and making the translation which has so far been absent. It also involves keeping at arm's length those political arrangements which are transacted with a strict market-oriented logic, and which convert the public sphere of collective decisions into an impregnable fortress when faced with the threats of "the others." If, as G.A. Cohen says, "[t]he immediate motive to productive activity in a market society is typically some mixture of greed and fear,"⁶⁷ and if this same understanding also governs political relations that states delineate with their subjects or citizens (what today takes place as a way of making politics interested in "peoples' preferences" or the pervasiveness in developing countries of "patron-client relationships"),⁶⁸ then that explains the armor with which today's democratic systems are covered, and it also justifies the radical protests which social movements raise against them. This state of affairs does not further the progress of the still-unstable Latin American democracies.

It is not the actors outside the system who are forced to act irregularly the ones who created unemployment, marginalization, and the state's apathy. It is due to them, however, that people have begun to raise their sights, and start demanding answers from those responsible. If this is not taken into account, and if it is not understood that it is democracy itself which must offer regular mechanisms for political participation, the force of the events and feelings—what Santos calls the "baroque ethos"⁶⁹—will, in the words of the most influential jurist in Chile, make the conventional political agreements no more than "a light leaf

67. 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).

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

69. Santos, *supra* note 57, at 1064.

which floats on the surface of a revolutionary torrent, and in the end sinks in it."⁷⁰

V. CONCLUSION

In view of all of this, the usual calls for increased democracy cannot mean the furthering of the system such as it has been constructed up until now. That kind of system could likely bring about a greater separation among those who see themselves pushed farther and farther away. Their demands are dressed up in a progressive discourse that claims sensitivity toward other people's fortune, but that have already been exposed by history and revealed their true nature. This is why the *legal* demand of new ways of participation in the democracy has in its favor a *political* component of great weight: the fixing of the moment in which those who historically have not intervened are to do so. In order for the protest mounted by the indigenous peoples of Chile to not grow more radical and endanger institutional stability, we must question the structures which have allowed the separation and the forced assimilation of this sector to increase.

The present state of relations between protest groups and the institutional designs does not seem to be moving towards a solution to the social conflicts, but rather quite the opposite—towards deepening them. Therefore, if “democratizing democracy” is to be more than a mere slogan in the hand of political contingencies, then we should work towards incorporating those who have so far been excluded from the process. Doing so will make it possible for them to demand the fulfillment of the institutional system's obligations. Otherwise, democracy must resign itself to these fundamentally illegal acts, which are caused by its own slackness, and for having been changed into a rebellious defendant.⁷¹

70. Andrés Bello, *Constituciones [Constitutions]*, in ANDRÉS BELLO: ESCRITOS JURÍDICOS, POLÍTICOS Y UNIVERSITARIOS [ANDRÉS BELLO: LEGAL, POLITICAL, AND ACADEMIC WRITINGS] 56 (Agustín Squella ed., 1979). On the influence of Andrés Bello in Latin America generally, and Chile specifically, see IVAN JAKSIC & ANDRÉS BELLO: SCHOLARSHIP AND NATION BUILDING IN NINETEENTH-CENTURY LATIN AMERICA (2001).

71. See LOCKE, *supra* note 63.