



Chile's biased Counter-terrorist laws: the Luchsinger-Mackay Case

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The Dakota Access pipeline project stirred controversy last year, as it began to shed some light on the often overlooked issue of Native American rights and the question of land sovereigntyⁱ. Unfortunately, these rights were and still are routinely ignored, in order to accommodate an array of corporate and bureaucratic ventures. The Americas and the countries that comprise them tend to share this colonial history; as a result, many treaties similar to the one granted to the Standing Rock Sioux people in North Dakota fall short, or otherwise completely disregard the full enactment of indigenous rights; fomenting a biased legal system across the continent. Chile is no exception to the rule; its Mapuche community has suffered from the pernicious nature of neoliberalism, with the conspicuous aid of top government officials and ethically questionable judges. The Luchsinger-Mackay case exemplifies this, unveiling a flawed judicial system, whose legal framework allows for gross discrimination based upon who happens to be sitting in the prisoner's dock. The aforementioned case has attracted national attention, in part because it investigates a double homicide, but mostly because it conjures up an old colonial antagonism between landowners of European descent and people native to the *Araucanía* Region in southern Chile. Surveys show that 87.3% of the indigenous population (4.6% of the country's total population) identify as Mapucheⁱⁱ, making them the largest minority present in the country and historically, the most prone to systemic discrimination.

Historical Context:

The Mapuche people have been credited as being the only native Americans to have successfully resisted the conquest of the Spanish Empire, due in part to their guerilla-like military strategy, high adaptability and largely decentralized political system. The first incursion of Spanish troops in what is now modern Chilean territory came in approximately 1541 in the northern part of the country. As they progressed southward, their intent, like their counterparts in the rest of the region, was to take dominion of these 'newly' discovered lands and rule them directly. The *Arauco* War between the Spanish colonial forces and the Mapuches began in 1550, and according to contemporary historians, lasted more than a century, transitioning to a more subtle and intermittent

conflict, which lasted up until 1883. That year marked the subsuming of Mapuche territory under the recently formed Chilean state; this annexation was unilateral and militaristic in nature ⁱⁱⁱ. Thereafter, ensued a century of socio-cultural marginalization within Chilean society, closely linked to habitat loss and systemic ethnic discrimination.

Fast-forward to the late 1970's, during the Pinochet military dictatorship, a number of draconian economic, political and legal reforms were introduced, which greatly affected the community. Most notably, Decree Law number 2.568, delimited individual land parcels to the Mapuche ^{iv} whose agricultural society was largely community oriented. This was arranged to stimulate economic growth and promulgate an aggressive form of free market ideology inspired by Chilean economists. These scholars were also known as the 'Chicago Boys', they received their education from the University of Chicago under the tutelage of Milton Friedman, a leading libertarian free market economist. This configuration resulted in an unprecedented imbalance of power, with indigenous landowners being subjected to the weight of powerful industrial families exercising almost unlimited economic and political leverage. The former were forced to sell off their land at rock bottom prices in order to survive, or, if possible, join an exploitative workforce. What was once foreign colonization, came to be, in sociological terms, an internal one, becoming a distinctive feature of Chilean socio-economic pattern ^v.

The ramifications of this relationship are still apparent to this day. Logging companies such as Celulosa Arauco, which operate in two historically disputed Mapuche territories -the BioBio and Araucanía regions - have settled their operations on Mapuche grounds, profoundly disturbing the local ecosystem. The companies' deforestation designs and extensive planting of exogenous tree species, such as eucalyptus, have generated both a peaceful as well as a more violent response from a variety of Mapuche protest groups. Sabotage operations have become more frequent over the years, damaging critical infrastructure and machinery; arson and intimidation tactics have also been reported ^{vi}. The only deaths suffered in this conflict had been among the Mapuche faction, until the night of January 4, 2013.

A reported mob of a dozen Mapuche individuals penetrated the Fundo Granja Lumahue, a farmstead owned by an elderly couple, Mr. Werner Luchsinger and Mrs. Viviane Mackay. A confrontation allegedly occurred between Luchsinger and the trespassers after the latter party had thrown stones at the property. This resulted in Luchsinger's firing several shots from a gun he owned into the crowd; moments later, a fire broke out in the cottage where the couple resided. Firemen arrived at the scene, battled the flames for hours, then entered the burnt structure only to find two carbonized bodies which were later identified as belonging to the two owners. Hostility between the two sides had been building up for days as the fifth anniversary of the death of a young activist, Matías Catrileo, approached. Catrileo had been shot in the back and killed by police whilst attending an occupation protest on the property of Mr. Luchsinger's cousin.

The mob held Wenger Luchsinger and his immediate family directly responsible for his death ^{vii}.

The Court Case:

After the flames finally subsided on that fateful night, a police patrol found, not far from the farm, Mr. Celestino Córdova, wounded in the thorax with what seemed to be a bullet entry point. Upon his capture, he reportedly stated: “I’m Mapuche, I’m hurt. This is a claim for our land. That is all I am allowed to say” ^{viii}.

After a relatively brisk trial, he was sentenced, in early 2014, to 18 years in prison for homicide induced by arson ^{ix}. However, the closing of the Córdova case did not leave the justice system nor the Luchsinger family satisfied. As a result, Eleven others were charged on March 30, 2016, on similar charges. Amongst those convicted was Francisca Linconao Huircapan^x, an elderly spiritual leader also referred to as a *Machi*, whose indictment would prove to be highly controversial. The reopening of the case came two years after the sentencing of Cordova following the testimony of a key witness, José Peralino, who claimed that he had participated in the attack and knew all of those involved. Interestingly, Peralino later withdrew his testimony, accusing the police of both threatening him physically and psychologically, ultimately forcing him into filing a false testimony^{xi}. The Chilean Supreme Court launched an investigation in February 2017 regarding the torture allegations made by Mr. Peralino. - this is crucial to the trial's outcome, considering that the only proof directly linking Linconao and the other ten suspects to the homicide is solely based on this testimony.

Unlike the Córdova case, all 11 suspects were accused of terrorism and consequently the Counter-Terrorist Act was put into full effect. This new measure allowed Chilean authorities to put into preventive custody all of the defendants, arguing that they were a menace to society. From March 30, 2016, up until today, all 11 co-defendants have been either sent to federal prison or placed under house arrest. For the *Machi* Linconao, who is sixty years of age, her incarceration in the women’s prison of Temuco has proven to be physically and spiritually degrading. She has always claimed her innocence, and has even directly called for President Bachelet to intervene in her favor via a letter sent to the presidential palace that was later made public^{xii}. On December 23, 2016, the Mapuche leader began a hunger strike in protest of the Chilean government's’ actions; she had been incarcerated for the past 9 months without any tangible proof or formal sentencing issued. Doctors monitoring her throughout the hunger strike, began to raise the alarm regarding her deteriorating health; as a result, domestic and foreign organizations increased their efforts to free her from prison. Fourteen days later, the court of appeals placed her under house arrest until further notice. Although this can be considered a small victory for human rights, the remainder of the defendants, due to their relative good health, have not been granted a comparable privilege.

Counter-Terrorist Laws:

The Counter-Terrorist Act had first been formulated in 1984 under the Pinochet military dictatorship, in order to more efficiently control and repress the opposition, stripping the defendants of some of their most basic human rights. The record for Chile's rule of law was found to be inadequate at the time, and arguably continues to be so today, though admittedly on a smaller scale. In 2001, the Counter-Terrorist Act was subject to reform in order to accommodate the "Mapuche problem". Indeed, now any act of resistance, protest, or any display of violence perpetrated by a self-confessed or otherwise known Mapuche militant could be, if the judge in charge so determined in light of evidence, trialed under these provisions. Before analyzing the parameters of this Act, a brief reminder of what constitutes a good rule of law should be outlined.

In short, there are three fundamental directives that should be applied to any impartial application of the rule of law. First, the judicial system must be publicly promulgated and legitimately enacted; second, the law must impose meaningful restraints on all affected members of society, including government officials. Finally, all laws must be applied equally to all citizens, regardless of circumstances^{xiii}.

The Counter-Terrorist Act itself defines in its first article what constitutes an act of terrorism as: any premeditated action intended to harm or terrorize the entire Chilean population, as well as any smaller section thereof, and whose sole purpose is to undermine the Chilean Government's legitimate authority and legal jurisdiction^{xiv}. Crimes such as murder, kidnapping, use of explosive devices, derailment, arson, to name but a few, are all listed as terrorist activities. The wording employed here leaves much to interpretation, which gives any prosecutor *carte blanche* to attempt to establish a murder for example, as a terrorist crime. When one searches for the impartiality accomplishments of Chilean legal institutions, many past occurrences of suspect decisions are to be scrutinized (please refer to *Lonkos*^{xv} and *Poluco Pidenco*^{xvi} court cases). With regards to the case at hand, Linconao's lawyers have tried on four separate occasions before the hunger strike began, to put the *Machi* on house arrest due to her old age and fragile health. This was repeatedly denied by Luis Troncoso, Temuco's court of appeals Minister, whose track record in comparable cases involving Mapuches systematically favors the plaintiff, or otherwise protects landowners^{xvii}, raising legitimate questions regarding the official's credible impartiality.

Furthermore, any person who is suspected of being connected to terrorist acts -be it closely or loosely- can be charged with illicit association and may be prosecuted as a terrorist^{xviii}. Such is the case with Linconao, whose chief accusation is that of being the mastermind behind the incident. Following this logic, a whole Mapuche commune could be guilty of a crime, which may or not have been committed by one of its residents, on the

sole basis that they are members thereof; in essence, coming close to facilitating legal racial profiling.

Article fifteen of the same act authorizes the prosecutor to use anonymous witnesses to inculcate perpetrators of alleged terrorist acts. This measure seriously undermines any impartiality, since no background checks may be readily available to the public of the circumstances of a witness's connection to the case. This line of reasoning has been used in the *Poluco Pidenco* case, in which a logging company was the target of an arson attack on one of their plantations. The use of "faceless witnesses" sanctioned the arrest and sentencing of Mapuche commune members^{xix}.

Finally, nowhere is it mentioned that a suspect has the right to a presumption of innocence, which is to be found in the Chilean criminal code^{xx}; this allows the judge in charge of the case to treat any person suspected of a terrorist crime as guilty before any formal proceedings have been initiated, legally incarcerating them. This leaves suspects like Linconao deprived of basic rights and portraying her to the public eye as a proven criminal.

Low-level coercive methods utilized by police representatives, as well as high-level pressures exercised on government officials, coupled with an anti-Mapuche penchant from these same officials, may point to some grave ethical breaches. The international law *status quo*, formalized in the International Covenant on Civil and Political Rights and signed by the Chilean government in 1969, seems to have been largely ignored when it comes to Mapuche criminal indictments^{xxi}. Furthermore, other court cases involving the use of bombs by anarchist groups in the Chilean capital have not been as of yet processed as Terrorist acts^{xxii}. The Luchsinger-Mackay court case epitomizes what is wrong with the Chilean Court system, as well as highlights how the government courts and multinational corporations collude for the sake of sanctified profits in complete disregard of the Mapuche community.

Conclusion:

The issue at stake here is not whether the defendants are guilty, but rather, are they being treated equally under the law, or are they subject to prejudice and unfairly targeted because of their ethnicity? The lingering dictatorial penal code has been subtly transformed to tackle what the government may consider: at best, what and whom constitutes a threat; at worst, who should be treated as second-class citizens. Nonetheless, these breaches in legal ethics have not gone unnoticed by the international community. In 2009, the UN distinctly condemned Chile's handling of cases involving Mapuche defendants. The International Convention on the Elimination of All Forms of Racial Discrimination stated in its report on Chile that, "The Committee notes with concern that

the Counter-Terrorism Act (No. 18.314) has been mainly applied to members of the Mapuche people for acts that took place in the context of social demands relating to the defense of their rights to their ancestral lands.”^{xxiii} In relation to Linconao’s treatment, organizations such as Amnesty International have also voiced their concerns^{xxiv}. However, not much has been done to reform the Counter-Terrorism Act. The Bachelet administration did commission an investigation amongst other requests, on a possible reform of said Act^{xxv}, but no official repeal is to be expected .

To be sure, the erosion of the rule of law in Chile has been unapologetic and surprising to say the least, considering that the country is regarded as one of the countries in the region boasting some of the strongest democratic institutions. Further action must urgently be taken for Chile to embrace its modern status as an example for the rest of Latin America to follow. As of today, the trial for the Luchsinger-Mackay case has not had an official court date filed.

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