

## **Ancient Law and Indian Rights: An Historical Perspective From the Argentine Chaco**

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*Sans doute les phénomènes juridiques ont-ils voyagé, comme tous les autres éléments de civilisation, mais d'une manière différente : ils voyagent par sauts.*

--Marcel Mauss, *Manuel d'Ethnographie*.<sup>2</sup>

While doing fieldwork in southern Madagascar, one of us--an E.O. Wilson book on biodiversity in hand--asked a Tatsimo farmer to give the names of the different species of chameleons in the land. Madagascar is, in the parlance of conservationists, a "biodiversity hotspot," and the place on earth with the largest number of species of chameleons. Not for the Tatsimo farmer.<sup>3</sup> He recognized just one archetypical chameleon. Its different shapes were attributes of the negative, shifty, social--not biological--place this creature has in the Tatsimo imagination. Needless to say the concepts "nature," "environment," and "biodiversity" have no equivalent Malagasy terms. They had to be imported into the local lexicon. This conceptual variance--indicative of larger differences of sense and sensibility--is not, of course, a phenomenon exclusive to Madagascar. In legal terms, the definition of what constituted a tree exercised the Roman jurist Ulpian, who died in 228 AD. He stated that most of the ancients considered vines to be trees, as were ivies, reeds and willows. These plants were trees if they could be uprooted and then transplanted. The stock of an olive was also a tree, whether or not it yet had roots. As Jill Harries, explains: "[Ulpian's] discussion of what a tree was is extracted from a work, not on arboriculture, but on detailed matters of law. Its object was to ascertain when, or in what circumstances an action for the secret felling of trees could be brought."<sup>4</sup>

In Madagascar, the placement of chameleons in whatever taxonomic order devolves into a matter of law. To protect a species conservationists need to argue for its uniqueness, or for the fragility of the environment that sustains it. From a Tatsimo perspective the ultimate act of colonial occupation is the nature reserve. The land, which was first planted, dug, and otherwise exploited for extraction of raw materials, should now remain untouched, yet managed by others.

What is ultimately at stake in all these attempts at establishing boundaries and definitions is the kind of relationships people have with objects, entities and other people, as well as the recognized rights and obligations that derive from these.

At the very beginning of the deliberations of the ancient Justinian Institutes, justice is defined "as an unswerving determination to acknowledge all men's rights."<sup>5</sup> The Institutes were imperial instruments, and conflicts of interpretation on issues of property, kinship, divinity and others were matters for constant negotiation.

There is a resemblance and continuity in subject matter between these classical antecedents and ancient law and Indian rights. In borrowing the title of our paper from Henry Sumner Maine's famous book,<sup>6</sup> we intend to draw attention to these resemblances, and to the considerable intellectual, political and practical problems they present. Ancient law here stands for the set of practices and regulations--orally transmitted, customary--of the Indians of the Argentine Chaco, and Indian Rights, for the rights assigned to them, and other Indians of Argentina, by the nation-state in the reformed constitution of 1994. It is often overlooked that these two sets of norms and universes are separate and not necessarily in communication.

We will briefly outline three areas of inquiry that are particularly relevant to our research.

### **One. Indian Rights in the Argentine Constitution**

In 1994 the Argentine constitution was modified, ostensibly to allow for the re-election of then incumbent president, Carlos Menem. Yet, the lawyers and politicians convened to work on the new text were lobbied by NGOs sympathetic to Indian causes--mainly Catholic groups--and consequently an article on "Indian Rights" was added to it: number 75/17. The scope and content of this guiding legislative framework owes much to jurisprudence established through three landmark cases presented to the US Supreme Court in the first half of the 19th century: *Johnson v. McIntosh* (1823), *Cherokee Nation v. Georgia* (1831) and *Worcester v. Georgia* (1832). What these cases have in common is that the opinions were written by Chief Justice John Marshall, and that they involve contested claims of sovereignty, land title and key arguments about what the jurists call dominium, a dense and history-rich concept, also debated by theologians and philosophers. It is by asserting dominium that a people ultimately exercise their sovereign right to their individual freedoms and to self-government.

This is a very complicated subject, which requires careful elucidation. We will only offer here a view of the landscape from afar.

Justice Marshall's influential legacy--in the United States and elsewhere--is an ambiguous and paradoxical one. And that is primarily

because in *Johnson v. McIntosh* he brought into American jurisprudence an old Spanish notion, that of "the right of discovery," which was always problematic in British legal tradition. As Marshall explained in his 33-page ruling, "the right of discovery" was established by Pope Alexander the Sixth in a bull issued in 1493; it had "the purpose of overthrowing heathenism, and propagating the Catholic religion . . . granting to the crown of Castile the whole of the immense territory then discovered, or to be discovered, between the poles, so far as it was not then possessed by any Christian prince." It provided legal justification to U.S. claims of dominion over Indian lands, a prerequisite for the "Indian Removal Act," promulgated in 1830.<sup>7</sup>

Even Spanish jurists and theologians found the "right of discovery" problematic because of its obvious implications for the right to govern over the non-European occupants of the discovered lands, and the right to claim sovereignty over those lands. For self-interested reasons, the British chose to implement a different policy towards America, one based on trade, negotiation of treaties with local inhabitants, and purchase of land. Differences between British and Spanish policies were clear and widely known. Remember that when Robinson Crusoe considered his fate as a castaway on an island, he wondered whether he should kill the Caribs who inhabited it—should he encounter them. He decided he should not. Defoe made his hero say proudly that killing the cannibals "would justify the Conduct of the Spaniards in all their Barbarities practiced in America."<sup>8</sup>

By analyzing the "right of discovery" premise, Spanish theologians and jurists of the School of Salamanca, and later the Dominican Friar Bartolome de las Casas (1484-1566), had chipped away at the notion that Indians were merely occupying lands over which they could claim no dominion. They were human, they were organized in communities, they were not really children with deferred rights; and even if they were sinners, it was up to God, not a temporal ruler, to redeem and absolve them. As Anthony Pagden put it, "if the consequences of these arguments were to be taken seriously, the Spaniards had to withdraw from America and return to the Indians all that they had taken from them . . . The rights that the crown now had in the Indies were similar not to those it had over the people of Castile but to those it had in Milan. The Indian chieftains, like the Dukes of Milan, ruled over polities that were, in all respects, 'perfect republics', and their subjects were consequently free men with full dominium under their own laws."<sup>9</sup>

The realities on the ground were very different. The Spanish colonists, who at one point feared that their king would desert them, did not abide by the lofty dictates of the theologians. The society that had produced all

of them was the result of eight centuries of religious and military warfare against the Moors. As Luis Weckmann demonstrated in his classic *The Medieval Heritage of Mexico*, it carried to the New World and its peoples the values, rituals and perceptions of the Other developed during that long confrontation.<sup>10</sup> It was also a society that had experienced intense *metissage*, biological and cultural.<sup>11</sup>

And the Spanish theologians, as important and influential as their normative prescriptions were, did not have America and its inhabitants primarily in mind when they made their sophisticated arguments. They were concerned about saving the soul of the Catholic monarch, Charles V. They were thinking of Wycliff in Britain as well as Martin Luther and John Calvin in Europe, and what these agents of the Reformation had to say about sovereignty and the role of religion in private and public affairs.<sup>12</sup>

A British civil war, which was also a religious war, prompted the emigration of the Pilgrims to America. The mind-set and legal outlook that they carried with them, as well as their social demographics, were very different from those of the Spaniards. These differences had consequences for the kind of societies that emerged. We come now to another complicated subject--comparative social history--which cannot be dealt with properly here. For the sake of our argument we will venture to say that, in broad terms, the Spanish experiment was one of inclusion through *metissage* and the British-American experiment one of exclusion through separation.

Marshall's rulings in the Cherokee cases testify to this last trend. He was a cousin of Thomas Jefferson, and, like him, a supporter of the American Colonization Society, whose mission was to send African-Americans back to Africa--thus eliminating the problem of miscegenation. In *Cherokee Nation v. Georgia*, Marshall, borrowing from the juridical arguments of imperial reach that the Spaniards had discarded, denied the Cherokees the full exercise of their rights as a sovereign nation. "It may well be doubted," he wrote, "whether those tribes which reside within the acknowledged boundaries of the United States can, with strict accuracy, be denominated foreign nations . . . they may, more correctly, perhaps, be denominated domestic, dependent nations."<sup>13</sup>

There are many paradoxical features of Marshall's rulings. Some of these have to do with their odd place in British and American jurisprudence. When it comes to the influence they had on article 75/17 of the reformed Argentine constitution, the paradoxes are quite stark. Previously, Argentine law on Indian rights was broadly consistent with the Spanish notion that Indians were no different from the Milanese or the French: the

Spanish sovereign--subsequently the Argentine nation--had recourse to no sound legal arguments to claim dominium over their lives and lands, only allegiance. There was, to put it mildly, a convenient fog of ambiguity about this principle and the *Realpolitik* shrouding it. But there was no ambiguity in the Argentine Congress when in the 1880s it debated the question of whether to follow the American example, and legislate the creation of "domestic, dependent nations" within its territory. The thoroughly argued decision was not to do so. Article 75/17, in the 1994 constitution is, of course, a complete reversal of that decision.<sup>14</sup>

This is only a schematic summation of a very complex subject, absorbing as intellectual history as well as of clear, present, moral and practical consequence for the Indians of Argentina. Whether we think of Father Vitoria and the School of Salamanca, Wycliff, Calvin or Justice Marshall, it is also clear that the debate on Indian Rights has been a European/North American/Latin American affair, carried out, in the most part, without the input of Indians, and with little consideration for customary law.<sup>15</sup>

## **Two. Customary Law in the Chaco: A Sense of the Terrain**

Marcel Mauss observed, with his usual perception,

Law comprises the whole of customs and laws; as such, it forms the framework for society, it is 'the precipitate of a people' (Portalis). What defines a group of people is neither its religion nor its technology; it is quite simply its law. All the other phenomena including religious ones--no matter what is said about national religions--can stretch beyond the confines of a given society. But what defines us cannot reach beyond our frontiers. Thus the phenomenon of law is what gives a society its specificity, its armature. No doubt jural phenomena have traveled, just like the other elements of civilization, but in a different way: they travel by leaps."<sup>16</sup>

This is important to bear in mind when considering the differences between customary law and Indian rights--and the problems of reconciling the two. Traditionally in Argentina, Indians have been considered as a block, as a unity, set in opposition to the whites. Of course that block is in reality a kaleidoscope, and the two categories are convenient fictions. The first problem in the task of assigning rights to the distinct and multiple Indian cultures of Argentina is to establish the boundaries of each, and the normative systems under which they operate. This demands an enormous work of translation, analysis and interpretation. In oral cultures this requires, moreover, to listen

accurately--which is not an easy proposition--and then convert discourse into text.

Marcel Mauss highlighted the complexity and challenge of the enterprise when he pointed out that

Law can further be characterized by its intimacy and by the widely-felt sentiments of community that accompany it. Throughout the Roman Empire only the position of the *civis romanus* (Roman citizen) was guaranteed; everyone else was subject only to the *ius gentium*, which means that they relied on the emperor's indulgence.<sup>17</sup>

The intimacy of alien law forms does not readily yield itself to an outsider. All remedial instruments of *ius gentium*, externally imposed, are problematic and sometimes very costly surrogates. The concept of *ius gentium*, the laws of peoples, has undergone several avatars in history; and its relationship with customary law and, more broadly, human rights are extremely pertinent to this discussion, and have generated an ever-growing body of literature, from authors as diverse as John Rawls in the U.S. and Giorgio Agamben in Italy.<sup>18</sup> But we cannot explore any of this here.

Let us look at some ethnographic examples of customary law in the Argentine Chaco:

-Atilio Caballero, a Pilaga Indian from Pozo Molina, province of Formosa, was murdered by a white neighbor. At issue was a case of land tenure, made possible by the passing of law #426, labeled "For the Protection of the Aborigines." Relatives of the dead man converged on the place of the murder from all over the province. Among them was a paramount Pilaga leader and relative of the deceased, DesaRai'n, who was an important evangelical pastor. What Pilaga customary law demanded was blood revenge; the killer had to pay with his life. Several attempts were made by Braunstein, and others, to stop this from happening, and eventually the case was taken over by "the justice of the white people." The culprit was jailed but later released. More than a year later, DesaRai'n visited Braunstein in his house, together with twenty other Pilaga leaders, to seek his help in severing the ties of all the Pilaga with the Evangelical United Church of the province. They blamed the church for the death of Atilio Caballero. This was not the result of an error in logic: the Pilaga delegate procedures of defense to their leaders, formerly warriors proven in battle. Now some of these traditional roles of leadership have been functionally replaced by the hierarchies of the native church, and they were blamed for the failure in obtaining just retribution. There is longer a Pilaga Evangelical United Church in Formosa.

-In 1975 Braunstein visited the Anglican mission in Formosa. The wife of the missionary, R.L., was alone with her children, and scared. A Wichi Indian from Pozo Yacare, a convicted murderer, had been liberated and had come to the mission seeking refuge. The mission had advocated on his behalf at the time of the murder. Braunstein talked to the man over the course of two days trying to convince him to return home. But he would not. He knew that he was guilty, and that he was not going to be able to sidestep the revenge of the relatives of the man he had killed. Therefore, his return was the equivalent of suicide for him. The concept of guilt among the Wichi follows a clear, formal notion. The entire process is seen as a road that has a beginning, a middle, and an end. This man affirmed that the event he had set in motion was lacking its ending, which was obviously foretold.

-In 1973, Braunstein met an old Wichi man who had participated in the Chaco War of 1932-34 between Bolivia and Paraguay. The Bolivian troops had forcefully enlisted him while he was on a hunting expedition in the bush. After the war, he was transported to a concentration camp in Asuncion, Paraguay, the victorious country. After the Wichi man was liberated, he went in search of his family. When he eventually found them and was recognized, his relatives tried to kill him and he had to flee. Absent an understanding the concept of the person among the Wichi, this attempt at homicide makes no sense in an Argentine court. This man was seen as an *ahot*, a ghost, by his relatives. The terms *ahot* and Wichi function in an unstable, dangerous system for those participating in it. In broad terms the *ahot* have as their main task the conversion of Wichi into *ahots*. The Wichi, in turn, try to endure, and remain Wichi. It is a layered contest between the living and the dead, which provides a privileged window into essential, pervasive characters of the Wichi world view.

There is no space here to cite the many other existing examples of "the intimacy of the law," as it renders itself invisible to outsiders--including cases of shamanic homicide, polygyny, rape, and the marriage of a Wichi man to the daughter of his wife by a previous husband.<sup>19</sup> This is a well-known marriage institution among the Wichi and currently two Wichi men are in jail because they are guilty of incest according to Argentine law. The point is that, no matter what the national and provincial codes may say, customary law is more extolled than embraced, its contents either unknown or alien to the majority of Argentines.<sup>20</sup>

### Three. Ethnography and History

We cannot finish this quick overview without addressing the fiction of a

"white" Argentina, set aside from a phantom-like population of "Indians," issuing laws in their defense.

Bernardino Rivadavia, the country's first president and an ardent product and promoter of the Enlightenment, was noted for his mixed lineage, which included African ancestors. He was referred to as "Dr. Chocolate" by his enemies.<sup>21</sup> General Jose de San Martin, Argentina's liberator, was known among the polite society of Buenos Aires as "el indio." It is believed that his mother was of M'baya ancestry.<sup>22</sup>

The Junta that declared the "United Provinces of the River Plate" independent from Spain, had its declaration printed in Spanish, Quechua and Guarani.

The historian Maria del Carmen Ferreyra, examining documents in colonial archives, has found that several prominent families of the Argentine northwest had two names, a Spanish and an Indian one.

During the many years of civil wars that followed independence from Spain, local caudillos like Facundo Quiroga counted invisible shamans among the troops that rode with him into battle. Other caudillos, temporarily down on their luck, took refuge among the Indian *toldos* (camps). One of them, General Baigorria, became a Ranquel chief.

The kinship maps of both "whites" and "Indians" in Argentina are extremely intricate and revealing. They open up a field of studies that resembles Macondo more than Buenos Aires. Unfortunately it has not yet attracted the attention of many scholars.

In the last quarter of the 19<sup>th</sup> century the group of criollos who were intimate with this history began to disappear, overwhelmed by repeated waves of massive European immigration. This has had an effect on the histories that Argentines have written since, and the way they tend to imagine themselves today.

Vicente Quesada (1830-1913), a lawyer and historian who served as Argentine ambassador to Washington from 1885 to 1890--and afterwards wrote a wry, critical book about the US under the pen name of Domingo de Pantoja--remembered wistfully and with an ethnographer's eye in his *Memoirs of an Old Man*<sup>23</sup> the criollo way of life in the provinces, centuries in the making and already obliterated by the time he recalled it. He also described the African neighborhood of Buenos Aires, known as "Barrio del Tambor" (the Drum Neighborhood) divided by the "nation of origin" of its inhabitants: Congo, Mozambique, Minas, Mandingas, Manguelas . . .



He describes, without using the term "Voodoo," the elaborate protocols of what obviously were Voodoo rituals performed at the center of the city. All this was also gone from Buenos Aires by 1910.

Quesada was well aware of the plight of the Indians. Writing about the province of Jujuy he said: "Indians here are treated with more rancor than the Jews in Germany . . . Where will they go when they are thrown out of their homes, that represent all their traditions, and those of their ancestors before them? These hapless peoples have no rights; powerless, they could not shake off with sheer numbers the illegitimate owners of someone else's lands."<sup>24</sup>

The framework of a nation-state, intolerant of particularities, shapes the way we tend to look at history, excluding much. The most vocal contemporary discourse on rights also suffers from short memory and from provincialism. Yet we have seen that some of the most serviceable trails proverbially go back to Rome and confront us, even in peripheral cases like that of Argentina, with the type of questions and challenges to interpretation that Marcel Mauss so masterfully laid before us.

#### Footnotes:

1 A version of this paper was read at the annual meeting of the Society for the Anthropology of Lowland South America (SALSA) held at Oxford and Paris in July, 2008. It is a brief overview of a joint research project in which the authors have been engaged since 1996.

2 Editions Payot, Paris, 2002.

3 The Tatsimo inhabit a cultural and ecological transition zone in southern Madagascar between the arid spiny desert and the rice-growing southeast.

4 Jill Harris, *Law and Empire in Late Antiquity*. Cambridge: Cambridge University Press, 1999: vii.

5 *Justinian's Institutes*. Translated with an introduction by Peter Birks and Grant McLeod. With the Latin text of Paul Krueger. New York: Cornell University Press, 1987: 1.

6 Henry Summer Maine. *Ancient Law. Its connection with the early history of society and its relation to modern ideas*. London: John Murray, 1861. See also Maine's *Lectures on the Early History of Institutions*, London: John Murray, 1875.

7 The quote comes from a recent analysis of Justice Marshall's Indian legislation by Lindsay J. Robertson, *Conquest by Law. How the Discovery of America Dispossessed Indigenous Peoples of Their Lands*. New York: Oxford University Press, 2005.

8 Cited in Laura M. Stevens, *The Poor Indians. British Missionaries, Native Americans, and Colonial Sensibility*. Philadelphia: University of Pennsylvania Press, 2004:1.

9 Anthony Pagden, *Spanish Imperialism and the Political Imagination*. New Haven: Yale University Press, 1990:13-36.

10 Luis Weckmann, *La Herencia medieval de Mexico*. México, D.F.: Colegio de

México, Centro de Estudios Históricos, 1984.

11 See Maria Rosa Menocal, *The Ornament of the World. How Muslims, Jews, and Christians Created a Culture of Tolerance in Medieval Spain*. Boston: Little Brown and Company, 2002; and Hugh Kennedy, *Muslim Spain and Portugal. A Political History of al-Andalus*. London: Longman, 1996.

12 See Anthony Pagden's introductory essay in Anthony Pagden and Jeremy Lawrence, eds., *Vitoria. Political Writings*. Cambridge: Cambridge University Press, 1991.

13 Cited in Jill Norgren. *The Cherokee Cases. Two Landmark Federal Decisions in the Fight for Sovereignty*. Norman: University of Oklahoma Press, 2004:167.

14 See Edgardo Krebs, "La Patria indígena frente a la Ley," *La Nación*. Buenos Aires, December 7, 1997.

15 This statement does not imply that Indians both in the British colonies (later the U.S.) and the Spanish-American colonies (later Mexico, Argentina, Chile, etc.) would not engage with the laws that were laid down for them by empire and nation-state. The archival resources that substantiate this last point are vast. A very interesting secondary, analytical literature is beginning to take advantage of this rich information. See, among others, Norgren op. cit.; Brian P. Owensby. *Empire of Law and Indian Justice in Colonial Mexico*. Stanford: Stanford University Press, 2008; and Richard White. *The Middle Ground. Indians, Empires, and Republics in the Great Lakes Region, 1650-1815*. New York: Cambridge University Press, 1991.

16 Mauss op. cit.: 196.

17 Ibid.

18 John Rawls. *The Law of Peoples*. Cambridge: Harvard University Press, 2002. Giorgio Agamben has several works which are especially illuminating for this discussion, in particular, *Homo Sacer: Sovereign Power and Bare Life*. Stanford: Stanford University Press 1998.

19 The technical term in Spanish is privignado. The institution also exists among North American Indians. Kroeber uses the term "step-daughter marriage" to denote it. This latter term is confusing though because for American law and for Argentine law a step-daughter is not a permissible marriage partner. The important issue here is that according to this particular Wichi institution the step-daughter is proscribed as a legitimate partner.

20 The theologian Francisco Vitoria derived positive, civil law from natural law, which in turn flowed from first principles linked to the divine. There is no way for any legal system understood in these terms to converse or engage with a different one based on its own "first principles", if these remain unknown. In the case of the Wichi, anthropologist John Palmer has produced an ethnography which attempts to clarify those principles, using Schopenhauer's notion of "will and representation" as an apt metaphor and starting point (John Palmer. *La Buena voluntad wichi: Una espiritualidad indígena*. Salta, Argentina, 2005. This book is an expanded version of Palmer's 1997 Oxford University DPhil, *Wichi Goodwill: Ethnographic Allusions*). To illustrate some of the formidable obstacles to the execution of Article 75/17 in the Argentine Constitution, it is useful to consult John Palmer's article "Wichi Toponymy," in *Hacia una nueva carta étnica del Gran Chaco*, # 6, Las Lomitas, 1994. The boundaries of the Wichi territory, as they understand it, overlap with and exceed the boundaries of the province of

Formosa. But, the differences in world views and in normatives conflict in many sensitive areas. In a broad province-wide consultation with Toba-Pilaga and Wichí Indians following the passing of Article 75/17, it became abundantly clear that a major effort of translation would be necessary to bridge everything from the mutual misunderstanding of key words and concepts, to things as elementary for Indian survival as hunting permits, the establishment of hunting seasons and how to issue access to hunting grounds which are fenced in and considered private property by Argentine ranchers. See *Pensamientos de los Indígenas de la Provincia de Formosa*. 3 vols. Buenos Aires: PPI, 2002.

21. George Reid Andrews. *The Afro-Argentines of Buenos Aires, 1800-1900*. Madison: University of Wisconsin Press, 1980.

22. Maria Rosa Oliver. *Mundo, mi casa*. Buenos Aires: Ediciones de la Flor, 1995.

23. *Memorias de un Viejo*. Buenos Aires: Ediciones Ciudad Argentina, 1998.

24. Ibid.: see chapter 13 "Jujuy y sus Indios" pp. 231-235.