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Ethnographic case, legal case: From the spirit of the law to the law of the spirit

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By André Menard and Constanza Tizzoni

In 1956, Claude Lévi-Strauss addressed a letter to the 1st International Congress of Black Writers and Artists held in Paris. In the letter, he stated that “after the aristocratic humanism of the Renaissance and the bourgeois humanism of the 19th century” the Congress announced the arrival of “a democratic humanism” in which “every human society must be represented, not just a few.”^[1]

A societies’ access to the rank of civilization is, however, neither evident nor immediate, but requires the presence of representatives. Lévi-Strauss explained this situation in the following manner: “these civilizations of which you are the spokespeople have hardly had any written documents and some only devoted themselves to the monument’s transitory forms. For lack of these so-called noble productions, in order to comprehend them, one must focus oneself, with the same degree of passion and respect, on the ‘popular’ manifestations of culture: those shared by all members of society.”^[2]

In this statement from Lévi-Strauss, we can see three things: an expression of the politics of deracialization policies promoted by organizations such as the United Nations and Unesco since the end of World War II; the promotion of the concept of culture over race as the new tool for the management of the human differences; and the creation of a new subject—indigenous peoples as an internationally recognized political and legal category.

What is perhaps most meaningful in Levi Strauss’ statement, however, is that this new global category takes the shape of a special kind of subject: the anthropological informant—that anonymous person or individual whose name always functions at a secondary level after the authorship of the ethnographer, whose role is to instantiate a collective category, which was understood in the past as race, and is today known as culture. Every gesture and word of the informant becomes a sign of beliefs, mythologies or worldviews of the culture to which he or she supposedly belongs.

Hence the informant assumes the obligation of not only belonging to the

group but also representing it, that is to say, *not only being but also appearing* as the authentic representative of a different culture. This mandate of authenticity becomes urgent in the present context of multicultural policies, in which the exemplary form of representation of cultural identity is the dominant form of visibility that indigenous actors must draw on when dealing with the political, legal and administrative apparatus of their respective national States.

In Chile this model of multicultural management has been implemented since 1993 with the enactment of Law No. 19.253, also known as the “Indigenous Law”, which was subsequently confirmed with the entry into force of ILO Convention 169 [3] in 2009. This is a national law on the protection, promotion and development of Indigenous Peoples, which recognizes as indigenous those individuals who maintain cultural traits of any of the nine indigenous ethnicities recognized by the Chilean State and who also self-identify as such (Article 2, letter c). Likewise, the Indigenous Law recognizes traditional organizations and specific forms of indigenous organization (Articles 61 and 68).

We are interested in addressing the problem of representation of the ethnographic case: that a particularity comes to stand in for a (cultural) generality. We address this problem, through an older and more traditional genre—the legal case—where we can also identify a tension between the universality of a law and the specificity of situations to which it applies. However, in the case of the “Indigenous Law,” culture appears as an intermediate category between the universal and the particular that points to a type of untranslatability between cultural and legal systems, while also, as we shall see, introducing the necessity of some special category that will allow for translation.

The case of Moisés Maliqueo

On August 17, 2013, Mapuche farmer Moisés Maliqueo was sentenced to ten years in prison after being found guilty of killing his wife a year earlier.[4] The case would have been treated like other femicides in the country if it had not been for the cultural belonging of the accused.[5] That he was Mapuche allowed him to benefit from the services of an agency specifically focused on the defense of the Mapuche peoples of southern Chile: the Mapuche Public Defender.[6] The defense requested an anthropological investigation in order to assess the existence of any extenuating cultural aspects for his crime.[7] Along with the anthropologist, a psychiatrist also appeared in the trial acting as an expert, as well as a “machi” (Mapuche shaman) who healed Maliqueo, and who acted as a witness.

The primary concern of the judges and prosecutors (much like that of the

ethnographer with the informant) was to confirm the authenticity of the Mapuche defendant, that is to say, his level of attachment to his culture. In the statement made by the psychiatrist, certain suspicions were raised regarding the genuine nature of his cultural belonging, supported by the vagueness that, in the professional's opinion, characterized Maliqueo's explanation of the evil (witchcraft) that had turned him into an alcoholic and driven him to kill his wife. The psychiatrist explained,

"With regard to this story of evil, it struck us that he was too vague when describing what this evil consisted of and how he was treated, so we began to question whether he was really describing a belief rooted in his culture, or if it was something he'd simply made up to justify his actions."[\[8\]](#)

From this point of view alcoholism is a sufficient and admissible cause for Maliqueo's violent act in the context of the court. On the contrary, the magical cause implied by the evil eye, works as a supplementary cause[\[9\]](#) with respect to this psychiatric cause. It appears as a cultural supplement of causality in a certain way no less magical than the evil eye and hence also an object of suspicion.

The psychiatrist continued:

"Finally, we conclude as a team that this is a man of a rural origin ... We also delved a little into how cross-cultural he is: he considers himself both Mapuche and Chilean, takes part in activities characteristic of his culture and of his ethnicity, but in turn participates quite normally let's say in the more Chilean-Western part of society. The team has its doubts as to whether this is genuine behavior from the point of view of his culture, or is simply an argument that he uses to justify his behavior."[\[10\]](#)

An anthropologist was then called upon. Since his role consists in proving cultural extenuating circumstance for Maliqueo's crime, it may be important to note that in March 2013 the Sernam (the State office devoted to the defense and promotion of women's rights) denounced that 17 Mapuche have been exculpated of domestic violence by appealing to Convention 169.[\[11\]](#) In those cases the defense argued that based on the Mapuche customs the simple excuse of the aggressors was enough to exculpate them.[\[12\]](#) Thus, within this contextual and legal background he began by stating the nature of his work: organizing a field trip, interviewing people, in short, undertaking ethnography. It was in the course of this work that he realized "that a socio-cultural environment operates within the community." *But what does this mean?*, the judge wanted to know. To this question, the anthropologist offered the following reply:

"In other words, there exists a Mapuche religiosity called nguillan mawün,

according to which, and specifically within this community, they celebrate 'nguillatun' [a collective propitiatory ceremony], the cultural practices characteristic of the Mapuche people, like what is called machitún [a shamanic healing rite]."[\[13\]](#)

Here something is described that will be a constant not only in this case, but in most trials of this type, that is, when it comes to proving the cultural belonging of the accused, judicial protagonists refer exclusively to two aspects: use of the Mapuche language and participation in Mapuche religious ceremonies. Both the psychiatrist and the prosecutor were emphatic about establishing that Maliqueo speaks Spanish.

However, and in spite of the fact that Maliqueo does speak Spanish, the defense (in order to perform his cultural identity) managed to get the court to assign him an "intercultural facilitator," a Mapuche court official responsible for translating the process both linguistically and culturally to the accused. As for the argument about religion, both the defense and the anthropologist confirmed Maliqueo's participation in traditional ceremonies, as well as his trust in the machi (shaman) from whom he sought assistance. In fact, in the first intervention of the defense of the accused, the following was stated:

"My client [Maliqueo] is a Mapuche man. I think it is very significant in this context and in this particular case to identify who this person is. Witness statements will be given by an anthropologist who will reveal who this person is, along with a social worker and a machi. My client speaks Mapudungun (translator's note: the Mapuche language), he follows the Mapuche religion and ceremonies; he prays in his own language, this is called 'guillatucar' in Mapuche, and is also a 'pifilquero,' that is to say he plays the pifilca [a Mapuche flute], and he takes part in various ceremonies, in nguillatunes, as well as machi ceremonies, as he is also the assistant of a machi."[\[14\]](#)

Thus the trial turned to focus on the actual impact that this cultural condition had in the lead up to his actions. The machi Victor Caniullán, who attended to the defendant after he had been arrested, was called as a witness, where, in addition to providing details about the killing, he was asked to give a quasi class to the jury on Mapuche ethnology. The judge began by asking him about the conditions required to practice as a machi, to which he replied:

"Usually there are two types of spirits: a spirit needed for being a person and one needed for being a machi. When there's a machi within the family, that spirit normally returns a long time after the death of the old machi."[\[15\]](#)

He then recounted how, in Maliqueo's case, it was the spirit of a grandmother that was transmitted to him. The machi was then questioned by the defense and asked to explain the Mapuche concept of health:

Machi: Within the Mapuche classification of health we observe four areas: the physical, spiritual, psychological, and the social.

Defense: Can you explain a little more about each one of these?

Machi: Essentially there is a concept called kutxan, which basically means pain. Sickness is not only physical pain, you know? Rather the physical has to do with the whole issue of a person's body, the physical pain, the ailments, in short. For example, a cough may be a physical illness. When we treat social problems, we include the area where the person develops, grows, lives and coexists. And when we deal with the issue of the psychological, this relates to the issue of consciousness. And in spiritual terms, this is basically how our spirit relates to the surrounding environment, and to all the beings that exist.[\[16\]](#)

Next the machi gave a statement regarding the classification of illnesses according to the mapuche system. He explained that there are five illnesses, of which Maliqueo suffers from two. The first one was "re kutxan", a physical ailment of one of the body's organs, and which literally means "pure illness" or better still "illness and nothing more".[\[17\]](#) And the second one was described as "mapu kutxan", meaning "land illness" or "earth illness", but which also, and this is important, means "Mapuche illness", which is to say an illness imbued with a cultural quality. In other words it is untranslatable in terms of biomedical terminology and its anatomical universality.

Three other illnesses exist: "wingka kutxan", a Chilean or Western disease, which the machi shamans have no ability to treat; "kisu kutran", which only affects persons of authority such as the longkos [chiefs] and machis, and is attributed to the relationship with the spirit associated with their position; and, finally, "wesa kutxan", or the evil disease or "evil", caused by supernatural attacks, or directly through poisoning, carried out by a specific person. This last can be translated as "witchcraft", an issue that is indeed highly present in Mapuche ethnography, and that Maliqueo argued was the final cause of his crime, but that wasn't confirmed by the machi.

Now, if we examine the second of these, "mapu kutxan", we can see that the double meaning of Mapuche illness and earth illness contains the ambivalence of the same Mapuche ethnonym. This is because the word Mapuche has acquired at least three forms, corresponding to three possible positions of enunciation of the Mapuche used in Chilean legal

and political discourses throughout its history.

First: Mapuche as people of the land (in former days known as *reche*, pure people, or “people and nothing more”), which may have meant “people of this place” or “we the locals”, where the word ‘mapu’ refers to a limited territorial specificity.

Second: Mapuche as a people of a nation like Chile or the Basque Country, passing from a limited territorial reference to the idea of a political territory at national level.

And third: the Mapuche as a synonym of an indigenous people, a globally recognized category, defined by their prior relationship before a national State who can, having been transformed in the second half of the twentieth century into subjects of law at the international level, claim to be inhabitants of the Earth, but this time in capital letters, that is to say as a planet, and with all the romantic connotation of the pre-modern subject, imbued with community, ecological and, of course, spiritual values.

This is why when explaining what “mapu kutxan” consists of, the machi did not only refer to the cultural nature of the illness, but also, and especially, its “energetic” and “environmental” nature. In his words:

“Mapu kutxan ultimately has to do with the whole concept of the strength and the energy that exists in nature. (...) The other element of mapu kutxan has to do with energy or forces that are within the earth and which can cause some form of alteration in a person, and in the specific case of the person I went to examine, it was ... He had a lot of difficulty getting to sleep, he didn’t sleep well; he had certain feelings of persecution, nightmares, and basically that was a situation that, at that time on the 15 November, led to his instability within his dwelling.”[\[18\]](#)

One interesting point here is that the forces and energies of nature seem to be more determinant than the Mapuche (cultural) character of the illness. As the Machi explained:

“Only the Mapuche health system is ultimately able to understand what mapu kutxan means, due to the religious view we have of our surroundings, of the environment; this does not mean that only the Mapuche are affected by such illnesses.”[\[19\]](#)

The force of nature, then, is a cause of illness, but are its quirks enough to explain its appearance? Apparently the ultimate cause finally lies in the behavior of the sick person, as the forces of nature or the earth upon the sick person depend on certain cultural transgressions. Again quoting the machi:

“For us, and from the point of view of our religious beliefs, all visible or invisible beings that exist in nature have life, have a spirit, have a master, and provide in some way energy. And their illnesses are caused by ... these things happen when we somehow transgress certain cultural norms, and by transgressing certain cultural norms, these are forces, energies or spirits that in the end approach the body of the person who then begins in one way or another to feel discomfort, in this case referring to spiritual and psychological discomfort.”[\[20\]](#)

Ultimately what reappears as the great marker of Mapuche identity is “religious belief” which can be immediately translated as “cultural norms.” Not only is nature spiritualized, but also the culture itself which cannot be understood except from a spiritual perspective as synonymous with religion. Hence, over the course of the trial the use of this spiritual supplement was a way of expressing cultural untranslatability. And, as we can see, once the discourse becomes spiritualized, the translation appears transparent. When the judge sought to contrast the first version of the accused, which justified his actions due to the intervention of a third party that had exposed him to “the evil eye”, and asked the machi whether Maliqueo suffered from the fifth kind of illness (“wesa kutxan”), the machi replied:

“No, in this case, no evil has been caused by a third party. Rather it mainly depends on the behavior of people, basically with regard to their surroundings, with the earth, the waters, etc. Often the spirit begins to weaken the spirit of the person himself, and in this case that’s what was happening according to the diagnosis made at the time.”

Judge: It’s like saying the energies were not aligned within him and it was because of that that he became unbalanced.

Machi: Exactly.[\[21\]](#)

Exactly. The Judge understood perfectly the meaning of “mapu kutxan”: that in the absence of matter, spiritual energies take over.[\[22\]](#) The same can be said of indigenous peoples, who once they are deracialised lose the material reference of the body as a mark of their untranslatability. Thus culture rises up as an heir of this function, which not having the material reference of a race, has no other choice but to resort to the spiritual reference as the only way to translate their untranslatability. In fact this is even outlined by the same machi, when asked by the defense about the translatability of their categories:

Defense: Is it easy or difficult, and this is specifically for you to answer, to translate Mapuche concepts into Spanish?

Machi: There are concepts that have no translation, as they would lose their essence, their idea, (but) there are concepts that are easy to translate, such as 'püllü' – to assimilate to the spirit, for example.[\[23\]](#)

Thus we can see how the cultural supplement sought by the defense, the same supplement marked by the "mapu" of "mapu kutxan," can only be "materialized," that is to say translated, by the spiritual. Here there is no great difference with what happens in terms of international instruments used for the protection of indigenous peoples. Many articles in both ILO Convention 169 (1989) and the UN Declaration on the Rights of Indigenous Peoples (2007) refer to this spiritual dimension as part of the heritage of such peoples that must be protected.[\[24\]](#) However, every time they do so, the spiritual appears supplemented by other rights, and not only those that are economic and political, but also cultural, symbolic or religious rights. Or rather, the spiritual always appears as an effort to highlight those untranslatable features that all other categories fail to contain.

Between the universality of Chilean law and the specificity of the judicial case, we come across the ethnographic case, that is, the figure of the accused as an informant of a particular culture, which in turn acts as universal, i.e. as a collective category represented within an indigenous individual. However, unlike the universal of Chilean law, the universality of Mapuche culture lacks the formal recognition of its own autonomous judicial apparatus which would mediate, through the legal decision, the step that is always contingent between that cultural universal and the particular case.

Devoid of this political body that would allow for the realization of cultural (but also, and above all, social and historical) content in an effective practice of Mapuche judicial decisions, culture remains floating as a pure spirit, a spiritual supplement that the accused must prove (ethnographically, that is to say in a representative fashion) before the Chilean courts.

Thus the multicultural spiritualization of differences can immunize decision-making structures established by the laws of Chilean sovereignty, relegating the political dimension of the indigenous condition, that is the problem of formal and territorial-or even national -autonomy, to a problem between individuals, i.e. a condition which, although invoking a collective dimension, does not cease to be individual.

In this context, the only way to affirm the indigenous status of the individual is to fall back on the legal argument of diminished responsibility by invoking forces outside of their will, in other words, removing individual agency. Perhaps that explains why the defense has symptomatically

resorted to Article 10 No. 1 of the criminal procedural code,^[25] that is to say, one that exempts (a person) from criminal responsibility due to insanity. But what insanity could this be, if the purpose was to prove cultural rather than psychiatric motivations for what took place? Perhaps it was the colonial, multicultural or anthropological insanity of assigning to each gesture and each thought of the subject the obligation to represent a collective, to be authentic, in other words, the insanity of the informant.

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Notes

[1] This article is based on the results of the Project Fondecyt 1140921.

[2] Lévi-Strauss C., “Lettre au I Congrès d’artistes et écrivains noirs”, *Présence Africaine*, nº 8-9-10, (1956) 384 -385.

[3] International legal instrument promulgated by the International Labour Organisation (ILO) in 1989 which outlines the rights of Indigenous Peoples and the ensuing obligations of States.

[4] Oral Criminal Court of Temuco. Case of Moisés Maliqueo Quidel. Femicide trial. R.I.T.:107/2013. 17 August 2013.

[5] The Chilean State signed in 1994 the “Inter-american convention on the prevention, punishment and eradication of violence against women convention of belem do Para”, and since 2008 the SERNAM (the State office devoted to the defense and promotion of Women rights) developed a campaign for preventing and denouncing violence against women, informing about the number of femicides committed in the country which are about fourteen every year. In this context, and along with public campaigns for denouncing the acts of violence against women, the cases of femicides are normally denounced in the media.

[6] Forming part of the Criminal Justice Reform, the Mapuche Public Defender's Office was created in 2001. It represents the first specialized mechanism for the criminal defense of indigenous defendants, and has been implemented only in the Araucanía region of Chile. The body is staffed by lawyers who have specialized in the defense of native peoples, along with intercultural facilitators that provide translation and cultural services and who, like the accused they defend, share the same Mapuche ethnicity.

[7] The aforementioned "Indigenous Law" for criminal matters requires the accreditation during trial of indigenous customs that is carried out to prove that the unlawful conduct of an individual, recognized as indigenous, would have been influenced by the socio-judicial impact on that person of rules of conduct within the community to which he or she belongs. Said indigenous custom must be accredited by an anthropological investigation, carried out by an expert in that field, and then submitted to the court as judicial evidence (Article 54 of the aforementioned law). Furthermore, as a result of the Criminal Procedural Reform, the investigation of such anthropological experts "...cannot be presented solely in a written report. Rather its main form of presentation should take place in an oral hearing during the trial." (Le Bonniec, 2014)

[8] Transcript of the statement made by psychiatric expert Sergio Duran during the second day of the oral hearing. Criminal Court of Temuco: Case of Moisés Maliqueo Quidel, Femicide Trial. R.I.T.: 107/2013.

[9] Here I'm working with the Derridean notion of the supplement in the sense of a paradoxical (and eventually empty) feature that can both function as the supplement for a lack, and as an extra element added to the whole.

[10] Idem.

[11] I don't have room here, but it would be important to develop all the legal and anthropological implications of the conflict of rights that such a case involves, as far as the cultural rights claimed by Maliqueo's defense based on the international conventions signed by the Chilean State, collide with the human rights of her victim. The victim's rights are also based in a specific international convention, the "Inter-american convention on the prevention, punishment and eradication of violence against women convention of belem do Para," as the prosecutor argued in his accusation.

[12] Here it is also important to note that citizen organizations, including Mapuche political organizations, denounced this legal strategy as a misuse of the Convention 169. As I'll try to show in this text, the possibility of this type of legal "misuse" is based on a rather esoteric use of the

category of culture, instead of providing institutionalized spaces (that is autonomously produced and officially recognized spaces) for the Mapuche people to elaborate, discuss and perform their legal solutions.

[13] Transcript of the statement made by the anthropological investigator, Paulo Castro, in the court hearing on the second day of the trial. Criminal Court of Temuco. Case of Moisés Maliqueo Quidel. Femicide Trial. R.I.T.: 107/2013.

[14] Transcript of the opening statement by Maria Salamanca for the defense on the first day of the trial. Criminal Court of Temuco. Case of Moisés Maliqueo Quidel. Femicide Trial. R.I.T.: 107/2013.

[15] Transcript of the statement by the witness Victor Caniullán on the second day of the trial. Criminal Court of Temuco. Case of Moisés Maliqueo Quidel. Femicide Trial. R.I.T.: 107/2013.

[16] Idem.

[17] Which is symptomatic of a system that distinguishes between a pure illness and one that includes a cultural supplement that differentiates it from some universal organic illness.

[18] Idem.

[19] Idem.

[20] Idem.

[21] Idem.

[22] Augé, Marc 1988, *Le Dieu Objet*, Paris: Flammarion.

[23] Idem.

[24] Within *ILO Convention 169*: Articles 5, 7, 13 and 32. Within the *UN Declaration on the Rights of Indigenous Peoples*: Articles 11, 12, 25 and 34.

[25] “Art. 10: Those exempt from criminal responsibility are: 1. the mad or insane, unless they have acted with lucidity during an intervening period, and who, for whatever cause independent of their will, have been completely deprived of all reason.” Código Penal de la República de Chile [Criminal Code of the Republic of Chile].

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