

# EASTER ISLAND LAND LAW

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*L'île de Pâques, se trouve à l'une des extrémités de la Polynésie et fait partie intégrante du Chili.*

*Assez peu connue internationalement sauf pour être le lieu où se trouvent ses exceptionnels et fascinants monuments archéologiques (Moai), une particularité retient l'attention du juriste lorsqu'il s'agit de considérer les relations étroites et particulières qui existent entre le peuple Pascuan et ses terres.*

*Les développements qui suivent, ont pour objet de fournir au lecteur non averti, une première ébauche sur la nature du régime foncier en vigueur dans l'île de Pâques.*

*Ce faisant, en marge des règles imposées par le droit chilien, seront successivement évoquées non seulement l'histoire récente de la manière dont les Pascuans ont été amenés à utiliser leurs terres, mais aussi quelles sont les règles spécifiques qui depuis la fin du XXe siècle régissent aujourd'hui le droit foncier sur l'île de Pâques.*

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## **I INTRODUCTION**

Easter Island<sup>1</sup> is a distant outlier of Polynesia which, as an integral part of Chile, is little known internationally other than as the home of spectacular archaeological monuments (moai). Another aspect of the island's story relates to the indigenous people and their land.

It is the purpose of this comment to present, for non-Spanish speakers, an overview of the law relating to the land of Easter Island. The general land regime of Chile, the recent history of land use on the island, the special legislation for indigenous people in the late 20th century will be considered in turn.

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1 The official name is Easter Island (Isla de Pascua, in Spanish language). Rapa Nui, which means big island, is the name in the Rapanui language used by the islanders. The form 'Rapa Nui' refers to the island itself. The form 'Rapanui' refers to people, culture, language, etc.

Easter Island is located at 3,800 km from the Chilean coast and at 2,200 km northeast of the nearest island of French Polynesia. It has a population of 4,000 inhabitants; the land area is 166 square km. General bibliography consulted for this paper: *Las Islas Oceánicas de Chile*, Gloria Echeverría Duco y Patricio Arana Espina (Instituto de Estudios Internacionales de la Universidad de Chile); *La Tierra de Hotu Matu'a*, *Historia y Etimología de la Isla de Pascua* (P Sebastian Englert, 8 ed, 1998).

## II CHILEAN LEGAL SYSTEM

The basic law of Chile is found in the Constitution of Chile of 1980.<sup>2</sup> According to this Constitution, Chile is a unitary democratic republic. Its territory is divided into regions and the regions into provinces.<sup>3</sup> These divisions facilitate administration but do not constitute a decentralisation of sovereignty. The Head of State is the President elected through direct ballot by absolute majority of votes.<sup>4</sup> The President has broad powers and appoints and removes Under-Secretaries, Administrators, Governors and Mayors.<sup>5</sup>

Chile has adopted a Romanist style legal system derived from the French.<sup>6</sup> Following that, the Chilean Civil Code defines ownership in general as 'the right ..., to enjoy and dispose of things freely, provided that they are not used in a manner forbidden by law or contrary to the rights of another'.<sup>7</sup>

It follows that a person owns land in the allodial sense. Nevertheless, the concept of ownership cannot be said to be absolute. Encumbrances like easements and other restrictions justified on public interests, such as regulations protecting the environment, are limitations on a land owner's rights. Further, there is a special legal regime for property title over indigenous peoples land.<sup>8</sup> Limitations on indigenous land dealings imply a more restrictive concept of ownership for them than the Code definition.

## III RAPANUI AND SPECIAL LAND LAWS

### A 1888 — 1966 Deed of Cession and Leases of Land

Easter Island lies between the west coast of South America and Pitcairn Island. Its population is of Eastern Polynesia descent, most probably travellers from the Marquesas, who settled on the island in approximately the 4th century AD. There is uncertainty as to the exact date the first ancestors of Rapanui people arrived to the island. Various legends tell that the king (ariki) called Hotu Matu'a was the first to arrive and divided the land among his sons, who started the tribes. Like most Polynesian cultures, the social organisation was hierarchical. The society was divided between the Miru tribe (royal family descendants) and the *uru manu* tribe (non royal family descendants).

2 Constitución Política de la República de Chile de 1980. DO de 24.10.80.

3 Constitución of Chile, Art 3.

4 Constitución of Chile, Art 26.

5 Constitución of Chile, Art 32.9.

6 Unlike English Common Law, ownership of land is not different from ownership of chattels. There is no doctrine of tenure, doctrine of estate or legal and equitable estates.

7 Civil Code, art 582. "El dominio (que se llama también propiedad) es el derecho real en una cosa corporal, para gozar y disponer de ella arbitrariamente; no siendo contra la ley o contra derecho ajeno."

8 Including Rapanui land.

Fish and agriculture were the basis of the economy. These activities were developed by the *uru manu*. The *Mini* were warriors, priests or king servants and wise men.

The first confirmed European landing was by the Dutchman Jacob Roggeveen on Easter Day in 1722. In 1862 Peruvians commenced slave raids which, by 1877, almost extinguished the population. Chilean ships had called from 1830s but frequent contacts began only in 1870.<sup>9</sup> During this period several missionaries from the Catholic Church of Chile visited the island, but most of them had died by 1877.

Easter Island was annexed to Chile by deed of cession signed on the 9 of September 1888 by Capitan Policarpo Toro Hurtado representing the Government of Chile and by the chiefs of the island.<sup>10</sup> The Treaty was in both Spanish and in a kind of Rapanui (mixture of Rapanui and Tahitian). In the Spanish language version the chiefs ceded the sovereignty over the Island in favour of the Republic of Chile whilst in the Rapanui version Chile offered to be a 'friend of the island'. Neither version mentioned cession of property title. On the contrary, the oral tradition of Rapanui people records that Atamu Tekena, the *ariki*, grabbed a portion of land with grass in his hand, gave the grass to Policarpo and kept the land. This gesture meant that although sovereignty may have been ceded, Rapanui people retained their inalienable property rights over the land of their island.<sup>11</sup>

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9 Comisión Verdad Histórica y Nuevo Trato de Chile. *Informe de la Comisión Verdad Histórica y Nuevo Trato de Chile, Primera Parte, III El Pueblo Rapanui* (Chile, 28 Octubre 2003) ('Informe') <[http://www.gobierno.cl/verdadhistorica/Primera\\_III.html](http://www.gobierno.cl/verdadhistorica/Primera_III.html)> The Comisión Verdad Histórica y Nuevo Trato de Chile (Commission of Historic Truth and New Treaty of Chile – 'The Commission') was created by presidential decree in January 2001. The Commission has the purpose of researching and reviewing the history of Chilean indigenous people with the aim of developing the basis for a more fair relationship and treatment. The Commission's president is the Chilean ex-President, Patricio Aylwin, who submitted to the Parliament the law proposal for the Indigenous Law during his time in office (Ley 19.253 DO 05.10.93). The Commission has 25 members, half of them are leaders of the indigenous people recognised by the Indigenous Law and the other half are academics and representatives of the Catholic Church, of the Evangelist Church, trade unions and of political parties.

10 The validity of the document of 9 September 1888 was questioned, particularly, by some Rapanui leaders who demanded self-determination for Rapanui people. They argued that research by the Commission has shown that the document known as 'acuerdo de voluntades' (literally translated as agreement of wills) was not ratified by the Chilean government so it was not valid. Thus the cession of sovereignty had never taken place and still lay with the Rapanui leaders. In practice, the Chilean State has exercised its sovereignty over Easter Island for many years and sovereignty is not an issue. However, in the last few years, the majority of Rapanui people and the authorities of the Island have sought a more autonomous form of political administration. A law proposal has been submitted to the Parliament seeking the establishment of Easter Island as 'special territory.' This would enable the fixing of social, cultural and economic policies in the Island while reserving defence and foreign affairs to the State administration based in Santiago. As at June 2004 the proposal was still under consideration by the Parliament. Yanez Fuenzalida, NA, *El Acuerdo de Voluntades de Chile —Pueblo Rapa Nui. Bases Normativas para Fundar la Demanda de Autonomía Rapanui*, Sep 2003. <<http://www.derechosindigenas.cl/modules.php?name=Content&pa=showpage&pid=5>>.

11 Informe, above, n 9, 16

Policarpo Toro and his brother leased from the Government a great part of the island and ran a sheep farm engaging the whole island in the activity. The lease lasted from approximately 1888 till 1892. In 1892 Enrique Merlet bought the land interest from the Toro brothers and a new period for the natives started under Merlet's leadership. Rapanui people's freedom of movement was restricted to a small part of the island which was not leased. They suffered many abuses and were prisoners on their own island. The last Rapanui king was killed by poison and any opposition ended by murder or deportation. Years later, a Chilean company called Compañía Explotadora de la Isla de Pascua, owned mainly by English-Scottish investors took over the lease.<sup>12</sup> The abuses to Rapanui people continued in this period.

In 1917 the Government of Chile passed Law 3.220<sup>13</sup> in an attempt to put an end to their suffering. Easter Island was declared part of the maritime territorial jurisdiction of Valparaiso and placed under the Naval Authority and the naval law. Law 3.220 created a school and reserved 2000 acres of land for the use of Rapanui people. However, Rapanui people's constitutional rights, such as citizenship, were not recognised<sup>14</sup> and the lease to Compañía Explotadora was renewed despite claims against it.

In 1933 the Naval Authority decided to register title over the totality of land on Easter Island in the name of the State in the Land Register of Valparaiso. The decision was made by order dated 11 November 1933 and justified under article 590 of the Civil Code<sup>15</sup> on the ground that the lands were *res nullius*.

This decision was made without consulting the Rapanui people who inhabited the land and in disregard of their rights.<sup>16</sup>

In January 1935 the Government of Chile declared the whole island to be a National Park in order to protect natural and archaeological resources. Conversely, a year later a new lease covering a great part of the island was executed with Compañía Explotadora. The Rapanui people continued to live with serious restriction of movement within the island, poor work conditions and with no possibility to travel abroad until the end of the lease.<sup>17</sup>

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12 *Pacific Islands Yearbook* (17th ed, Norman & Ngaire Douglas, 1994) 124.

13 Ley 3220. DO 9.02.17.

14 Above n 9, 20-21.

15 Art 590. Son bienes del Estado todas las tierras que, estando situadas dentro de los límites territoriales, carecen de otro dueño. [Ownerless land situated within the territorial limits of the country belongs to the State.]

16 Above n 9, 26.

17 Above n 9, 26-27.

### ***B 1966-1972 The Easter Island Law***

Law 16441 of 1966 was known as the Easter Island Law.<sup>18</sup> It created the Municipal Government of Easter Island Province and its implementation resulted in the setting-up of public service offices such as a court, a police office, a bank. It also recognised the right of Rapanui people to vote, and to Chilean citizenship.

The law empowered the President of Chile to grant title to lands on Easter Island to Rapanui people. Defined boundaries had to be specified by the title grants. Some lands, which remained the State's property, were administered by state companies or state societies. Only a permit for exploitation could be granted over such lands.

The Easter Island Law helped development of the island in many ways, but it did not prevent claims by Rapanui people against unfair dispossession of land. In fact, some lands were expropriated for the construction of schools, roads and other public works with the promise of compensation which was never paid. There was no long-term consistent policy for the implementation of the Easter Island Law. Although some attempts to develop participatory policies, especially for the protection of archaeological resources, traditions and cultural heritage, were made by the creation of several commissions between 1967 and 1971, such attempts came to an end in 1972 when the military Government took over in Chile.<sup>19</sup>

### ***C 1972-1990 Military Government - Decree-Law 2.885***

In 1973 the Easter Island Municipal Government was suspended and a Military Governor was appointed. It was the first time in history that a person of Rapanui origin was the head of the Government of Easter Island. His name was Sergio Rapu Haoa.

In 1979 Decree-Law 2.885<sup>20</sup> provided for the donation of land and the transfer of title over such lands to their 'regular occupants.' The implementation of this law generated conflicts among Rapanui people who then decided to re-establish their Elders Committee, with representatives of each tribe, in order to facilitate the solution of land related conflicts.<sup>21</sup>

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18 Ley 16411 DO 01.03.66.

19 Above n 9, 37-39.

20 Decreto-Ley 2.885 DO 22.10.79. Under Decree-law 2.885 'regular occupants' meant persons born in Easter Island and their children who, although not born there, had resided and worked in the Island for not less than five years. The Decree-law recognised the exclusive property right over land of Easter Island in native people. Chilean citizens born on the continent could not acquire title to Easter Island land. The implementation of the decree-law resulted in the donation of land to 600 hundred Rapanui families. Law 19.253 in 1993 suspended the donations temporarily. Although, this law provided for the continuation of Law 2.885, it also provided that the newly created Commission for the Development of Easter Island should intervene in the donation process. The appointment of the Commission's members and the setting of other implementing mechanisms took some time and new donations were not granted until March 2002.

21 Above n 9, 40.

In May 1987 the Elders Committee sent an open letter to the President of Chile with several petitions such as: official recognition of the Elders Committee, annulment of Decree-Law 2885, cancellation of the registration made in 1933 entitling the State to the property of Easter Island lands and the recognition of the people of Rapanui as the only legitimate owners of lands of Easter Island. The Military Government did not respond.

#### **D 1990 - 2003 Law 19.253 Indigenous People Law**

Law 19.253,<sup>22</sup> which applies to all indigenous people of Chile, was passed in response to strong demands that arose in the late 1980s at the end of the Military Government. The demands originated in various indigenous people groups, particularly the Mapuche<sup>23</sup>, and sought the protection of indigenous rights over cultural heritage, land and water. Patricio Aylwin Azocar, who was the favoured presidential candidate at the time, promised to indigenous people the promotion and constitutional recognition of their rights by agreement signed in 1989.<sup>24</sup>

The agreement was not welcomed by some indigenous people who were not prepared to promise unconditional political support in exchange. The Elders Committee of Rapanui divided on these issues: Elders Committee No 1 supported the agreement while Elders Committee No 2 came up with their own proposal seeking autonomy and self-governance.

When Mr Aylwin became president in 1990 he submitted three legislative proposals to the National Congress. These were: Proposal of Law 19,253, Constitutional Amendment Proposal in relation to Indigenous Rights and Proposal of Ratification of Convention 169 of the ILO on people's rights. Only Proposal of Law 19.253 succeeded in the Congress but it suffered important amendments which weakened the protection of indigenous rights.

Law 19.253 known as the Indigenous Law recognised the main ethnic groups of indigenous people.<sup>25</sup> The law applied in general to all of them and special provisions were also made for each community.

22 Ley 19.253 DO 05.10.93.

23 Due to a lack of written history very little is known about the beginnings of the Mapuche people. The Mapuche tribes were part of the greater Araucanian social and linguistic group. They spoke variations of the Araucanian language, and inhabited different regions, particularly the South of Chile and Argentina. The name Mapuche is derived from the Araucanian words Mapu", which means land, and 'Che', which means people. In their own language the Mapuche were the people of the land. The Mapuche people survived several military armed conflicts with the Spanish from the 16th to the 19th centuries and are still claiming their land rights. <<http://ancientmexico.com/chile/mapuches/mapuches.html>> Cruz Farias, Eduardo A. *An Overview of the Mapuche and Aztec Military Response to the Spanish Conquest*. April 5, 2002 <<http://www.xs4all.nl/~rehu/>>

24 Acuerdo de Nueva Imperial, *Informe Final del Grupo de Trabajo Legislación e Institucionalidad*, The Commission, CVHNT/GTDERJ2O3/116,75. <<http://www.fondoindigena.org/comision/listado.htm>>

25 The law did not recognise the status of "indigenous people" as the indigenous groups demanded but instead it recognised the existence of ethnical groups or communities. The communities recognised by the

The Indigenous Law provided that the State and the people of Chile had a duty to respect, protect and promote the development of indigenous rights, heritage culture and traditional lands.<sup>26</sup> Indigenous people's rights over their historically occupied land were recognised and a special system for their legal protection was provided. Although indigenous people were recognised as legitimate owners of their traditional land, to actually acquire title and possession over these lands, they had to make an application, which could be refused.<sup>27</sup>

Only indigenous people who met the strict definition of indigenous people —belonging to a recognised ethnic group —could submit an application. The definition stated that indigenous people as ethnic groups were recognised in one or more of the following situations: came from the same family tree; recognised a traditional headquarters; inhabited or had inhabited traditional lands in common or came from a common ancestor.<sup>28</sup>

The special system provided restrictions on land dealings. Indigenous land could not be transferred, expropriated or be subjected to charge, mortgage or acquired by prescription unless these transactions were performed between indigenous people of the same ethnic group. Lease or transfer of indigenous land was also prohibited. Where indigenous land was subject to charge, the charge could not include the family house or the land used for source of food and maintenance.<sup>29</sup>

Some of these restrictions could be overcome with express authorisation of the authority concerned. The title-holder could exchange the indigenous land for non-indigenous land. They could also charge or lease indigenous land for less than five years. Such transactions were governed by the Indigenous Law and also by the relevant provisions of the Civil Code.<sup>30</sup>

On succession to multiple owned land, the occupiers of the land with inheritance rights and absolute majority of votes could apply to the courts for the division of the land. The judge would divide the land according to customary law or, secondarily, according to the general law. Alternatively, in particular cases, an occupier with inheritance rights could apply for the division of his or her parcel without affecting the undivided status of the rest of the land. Persons with inheritance rights, who were not occupiers or were absent, could apply for compensation for their rights.<sup>31</sup>

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Indigenous Law were Rapanui, Mapuches, Aymaras, Atacama, Quechua, Colla, Kawarskahar and Yamana communities. Article 1 of Law 19.253. Ley 19.253 DO 11.10.93.

26 Law 19.253, art 1.

27 Law 19.253, art 15.

28 Law 19.253, art 2.

29 Law 19.253, art 13.

30 Law 19.253, arts 13 and 14.

31 Law 19.253, Art 15.

The National Corporation for the Indigenous People (CONADI)<sup>32</sup> was created by the law, among other things, to develop and maintain the Registry of Indigenous Land. The Registry was in charge of dealing with applications for registering property title. Title to indigenous land was acquired by registration in the Register and the law provided the registration procedures. Copies of the titles registered at the Registry of Indigenous Land are also recorded at the Public Land Registry.<sup>33</sup> If an application is refused, the applicant could resort to dispute resolution mechanisms or judicial procedures provided by the law. The dispute resolution procedure consisted of a conciliation carried out with no formalities by the CONADI. Alternatively, a fast-track judicial procedure, under the general procedural law before the judge of the place where the land was situated, could be initiated.<sup>34</sup> Customary law was recognised by the courts when it was consistent with the Constitution of Chile. Where the content of customary law needed to be ascertained, all means of proof provided by the general law could be used.<sup>35</sup>

The Indigenous Law provided that state land which was historically used for sanctuaries, cemeteries, cultural and recreational places could be accessed and used by indigenous people. Alternatively, they could apply for donation or 'gratuitous transfer'. The refusal could be appealed to the competent court.<sup>36</sup>

### ***E Particular Provisions for Easter Island***

The Indigenous Law created the Commission for the Development of Easter Island. Its purpose was to increase participation of Rapanui people in the development of policies related to land issues and cultural heritage protection. Some of the members of the Commission were directly elected by Rapanui people and others were representatives of governmental departments.<sup>37</sup>

The Commission could submit proposals related to the use and transfer of property over State lands to the Ministry of National Property. Such proposals should be in accordance with the appropriate plans and projects regarding financial development, environmental protection, and use of natural resources and protection of natural and cultural heritage.<sup>38</sup>

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32 CONADI stands in Spanish language for Corporación Nacional de Desarrollo Indígena. Law 19.253, art 38.

33 Law 19.253, Art 15.

34 Law 19.253, Art 55.

35 Law 19.253, Art 54.

36 Law 19.253, Art 19.

37 The Commission's members were the Governor of Easter Island, the Mayor of Easter Island, four representatives of different ministries and six members of the Rapanui community, one of which must be the President of the Elders Committee.

38 Law 19.253, Art 67.

In relation to the acquisition of title by members of Rapanui communities in possession of land, the Commission would act according to Law 2.885 of 1979.<sup>39</sup> For members of Rapanui communities who possess no land, the Commission could propose the donation or grant of a concession or other form of use according to the Rapanui tradition. Claims against the Government's decision would be heard before the Commission with right to appeal to the court.<sup>40</sup>

Other functions of the Commission involved participating in the administration of national parks and cultural and natural heritage.

The Fund for Lands and Water Regulation<sup>41</sup> implemented the transfer of title over private land to indigenous people. The Fund provided money to "subsidise" the acquisition of land by indigenous people. An indigenous person or an indigenous community with no land, with insufficient land or with land in dispute could apply for such a subsidy. The selection criteria involved: saving capacity; socio-economical situation, and size of the family group. Where the applicant was a community, factors such as antiquity and size were considered. The money, which did not need to be repaid, was paid straight to the seller of the land. Special procedures were set up for the acquisition of land in dispute.

#### **IV OVERVIEW**

The Indigenous Law and its implementation was criticised on several grounds: (1) The tribal jurisdiction and customary law and traditions of Rapanui people were not respected. (2) Individual property was a concept foreign to the Rapanui traditions and introduced by the Indigenous Law. (3) No studies on use planning or impact assessment were carried out prior to the donations. (4) Land had been taken from the National Park and archaeological treasures there were left unprotected, yet the land was no good for farming either. Supporters of the implementing policy pointed out that since the beginning of the restitution of land process almost 1500 acres had passed to Rapanui people.<sup>42</sup>

The level of poverty which affects the great majority of indigenous communities, including Rapanui, is perhaps one reason why the implementation of the indigenous law has been problematic. Some indigenous communities of Chile who survive extensively on farming complain about the ban on the mortgage or sale of indigenous land<sup>43</sup> because once they acquire the land they cannot access the economic resources to work it. Rapanui people, however, depend on tourism which is the main economic source of the island. Therefore, they are more concerned with the management of the

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39 Law 19.253, Art 67.2.

40 Law 19.253, Art 69.

41 Decreto 395 DO 24.11.93.

42 Adrea Seelenfreund et al, *Aportes para una Historia de Rapa Nui*.

43 Eg Mapuche people. *Diario Financiero* (Chilean newspaper). *Ley Indigena cumple una década con escasos resultados*. 3.10.03.

National Park land and about the transfer of National Park lands to individual Rapanui families by the Government than caring for the protection of archaeological treasures which are the main tourist attraction. Land grants they say should be made from other than National Parks.

The Indigenous Law imposes a series of limitations on indigenous people's property rights, which narrows down the scope of 'ownership.' Keeping title over indigenous land within the indigenous communities is sought to be achieved by land transaction restrictions. The more important criticism is perhaps that the issue of access to title cannot be treated in isolation from other issues such as poverty, poor quality of land and water, land use planning and access to natural resources. These should be part of the policies of the law of access to property by indigenous people.

The people of Easter Island and the government of Chile confront an indigenous people's land issue that bears similarities to land rights issues elsewhere. In the South Pacific the Rapanui situation has many analogies. Historically the loss of land rights is a product of colonialism, its land policies and the population losses. Whatever the vehicle - treaty, deed or cession, occupation - the result has often been the same: the local people suffered.

Difference in time, place or coloniser does not seem to have mattered much. Quite apart from any dishonesty, documents were often poorly translated, or mistranslated with the result that the coloniser and the colonised had dramatically different understandings of the relationship that had been entered into.<sup>44</sup>

The 21<sup>st</sup> century grapples with the awkward inheritance. The Universal Declaration of the Rights of Indigenous Peoples is stalled. For those people dispossessed long ago, there is the dilemma of repossession, illustrated by Rapanui, and of protective state policies. For those still in control of the lands the challenge is to find a way to maximise its economic value in a globalised world.

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44 See eg the literature on the Treaty of Waitangi of New Zealand.