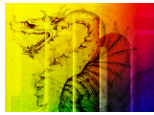


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## A Kaleidoscopic Reflection on Territory and Property

Histories, Cultures and Inequalities

by

Patricia Urteaga Crovetto



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### Section 1: Articles

#### Special Issue / Numero spécial: On Nature and Property

1. *Introduction* (R. Míguez Núñez)
2. *On Universalizing Nature and Property: the Unravelling of a Master Narrative* (M. Graziadei)
3. *A Kaleidoscopic Reflection on Territory and Property: Histories, Cultures and Inequalities* (P. Urteaga Crovetto)
4. *Nature, Bodies, and Land: Reframing Ownership and Property in Early Modern Spanish America* (M. Bastias Saavedra, A. Rodríguez Sánchez)
5. *Les vagabonds. Entre humains, chiens et loups* (S. Vanuxem)
6. *Propriétarisation: la voie pour une gestion raisonnable et durable de la nature?* (P. Crétois)
7. *Inappropriate Nature: Natural Resources as Common Goods* (I. Ortiz Gala, C. Madorrán Ayerra)

### Section 2: Reviews

8. *History, Interests, and Groups: Some Remarks on Two Recent Books on Adam Smith; Essay-Review* (M. Santarelli)
  9. *Book Reviews* (V.M. Di Mino, E. Pasini)
- .....

# A Kaleidoscopic Reflection on Territory and Property

## Histories, Cultures and Inequalities

Patricia Urteaga Crovetto \*

*The multiple meanings of Indigenous territory and property are explored here by means of a multidisciplinary lens. An ethnological journey through different geographies and times is undertaken to explain some property formation processes and illuminate how they unfold in the Andean region and, particularly, in Peru. Based on four core notions of anthropology—time, space, culture and power—Indigenous territory and property are described showing how land commodification has imposed detrimental effects on indigenous peoples.*

Some things seem too terrible to tell.  
Yet watching while History quietly forgets them  
seems even more terrible.<sup>1</sup>

### 1. Introduction

Territory and property entail a wide range of meanings and manifestations. While for some people the territory is a crucial space for survival, for others it is mostly a commodity. This conceptual antagonism was reflected particularly in land struggles with detrimental consequences for the more vulnerable. Throughout history, the precarious land situation of millions of persons, such as indigenous peoples, have worsened due to colonialism, migration, commodification, looting, and lately, climate change. These processes need to be analyzed

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<sup>1</sup> Anna Tsing, “Land as Law: Negotiating the Meaning of Property in Indonesia”, in *Land, Property and the Environment*, ed. John F. Richards (Oakland: Institute for Contemporary Studies, 2002), 94.

as they not only impose unbearable conditions and suffering on these peoples, but also force them to imagine the space differently.

In understanding territory and property, it is important to consider a multidisciplinary lens. This is especially clear in the case of indigenous territories and property, whose intricate formation processes reclaims that the historical, cultural, legal and economic dimensions are revised. In this paper, I undertake an ethnological journey through different geographies and times to explain the complexity of indigenous territories and illuminate how property unfolds in the Andean region and particularly, in Peru.

The article has been organized as follows. The first section emphasizes the importance of a historical vision of territory and property, while the second section includes an anthropological reflection on both concepts including ethnographic examples. The third section develops a comparative socio-legal approach to understand how dispossession was legally sedimented in colonial contexts, and how this process occurred in former viceroyalty of Peru. Finally, the last section describes the international economic forces that characterize the global demand for land and the pressure they mean for indigenous peoples in Peru.

## 2. On the concepts and method to explore the kaleidoscopic character of territory and property

Anthropology defines the territory as a network of social relations between humans, between humans and nature, and between both and the cosmos which produce and reproduce a bundle of rights and obligations. Politically, a territory is “a fabric in constant reconstitution” which is usually under the control of a people.<sup>1</sup> In this article, I refer to Indigenous territory.

<sup>1</sup> Alexandre Surrallés and Pedro García Hierro, eds., *Tierra adentro. Territorio indígena y percepción del entorno* (Copenhagen: IWGIA—Grupo Internacional de Trabajo sobre Asuntos Indígenas, 2004), 22. While the territory is a space related to a people, the land is an area within the territory that may be owned by an individual or legal person. Pedro García, Personal Communication, 2005. See also: Alberto Chirif Tirado, Pedro García Hierro, and Richard Chase Smith. *El indígena y su territorio son uno solo. Estrategias para la defensa de los pueblos y territorios indígenas en la Cuenca Amazónica* (Lima: Oxfam América, COICA, 1991).



The concepts of territory and property have undergone mutations that respond to specific cultural and political contexts.<sup>1</sup> Understanding these transformations is possible only if space is not dissociated from time.<sup>2</sup> In consonance with this idea, anthropologists and legal scholars have questioned the hegemony of a Western concept of property emphasizing the need to consider culture and history.<sup>3</sup> Historian Rosa Congost warns us about the risks of uncritically assuming a universal concept of property:

If we accept the current definition of certain property rights as unique and indisputable, we are assuming a simple and linear view of history; as if there had been no other property rights than those that have ended up being imposed in the codes of the nineteenth and twentieth centuries. Consequently, and almost unconsciously, we have often denied the status of property rights to those rights that disappeared. But, in addition, by accepting as good and unique the definition of property in our codes, we have tended to consider unique and indisputable the property rights protected and secured by the State

<sup>1</sup> For an institutionalist classification of forms of property, see Elinor Ostrom, *El gobierno de los bienes comunes. La evolución de las instituciones de acción colectiva* (Mexico, D.F.: Instituto de Investigaciones Sociales, Universidad Autónoma de México, Fondo de Cultura Económica, 2011). From legal geography, see Nicholas Blomley, "Landscapes of Property", *Law and Society Review* 32, no. 3 (1998): 567. For a fascinating history of property from comparative law, see Paolo Grossi, *Historia del derecho de propiedad* (Barcelona: Ariel, 1986).

<sup>2</sup> Michel De Certeau, *The Writing of History* (New York: Columbia UP, 1988).

<sup>3</sup> In this regard, see: Marcel Mauss, *The Gift. The Form and Reason for Exchange in Archaic Societies* (1950; New York, London: W.W. Norton, 2000); Caroline Humphrey and Katherine Verdery, eds., *Property in Question: Value Transformation in the Global Economy* (Oxford: Berg, 2004); Veronica Strang and Mark Busse, eds., *Ownership and Appropriation. ASA Monograph 47* (New York: Berg, 2011); Chris Hann, "The embeddedness of Property", in *Property relations: Renewing the Anthropological Traditions*, ed. Chris Hann (Cambridge, UK: Cambridge UP, 1998); Frank Benda-Beckmann and Keebet Benda-Beckmann, "A Functional Analysis of Property Rights, with Special Reference to Indonesia", in *Property Rights and Economic Development: Land and Natural Resources in Southeast Asia and Oceania*, ed. Toon Meijl and Frank von Benda-Beckmann (London: Paul Kegan International, 1999); Frank Benda-Beckmann, Keebet Benda-Beckmann and Melanie Wiber, *Changing Properties of Property* (Oxford, New York: Berghahn, 2006).

and to identify the protective function of these rights as a basic function of the modern liberal State.<sup>1</sup>

In order to unpack its connection to specific interests and socioeconomic formations, the liberal conception of the right of property shall be demystified. Accordingly, property rights should be conceptualized not as a relation between a subject and an object, but as a mirror of social relations whose diachronic study might help to understand how property has been constituted.

In this article, I attempt to review historical, anthropological, legal, and economic secondary sources. From anthropology, I borrow four core notions that may contribute to study the territory and property: time, space, culture and power. The first notion is *time*. History is key to understand the genealogy of such social formations. Processes of landownership may show the relationship between state formation, post-coloniality, and transnationalization.<sup>2</sup> The second notion is *space*. The geography of property is key particularly crucial in the case of indigenous peoples. In fact, the space where the contents, aesthetics, functions, processes and consequences of property are transformed is essential for the analysis.<sup>3</sup> Moore<sup>4</sup> analyzes the unique history of space and land rights in an area called Kaerezi, on the eastern border of Zimbabwe, where multiple conflictive spatialities converged<sup>5</sup>. How spaces intertwined with cultural poli-

<sup>1</sup> Rosa Congost, *Tierras, leyes, historia. Estudios sobre "La gran obra de la propiedad"* (Barcelona: Crítica, 2007), 15.

<sup>2</sup> Alonso develops an interesting ethnography on the historical process whereby the land rights to the *Namiquipa* people were recognized by the Mexican state in the midst of the *caciquista* rebellion in the early twentieth century. See: Ana María Alonso, *Thread of Blood: Colonialism, Revolution, and Gender on Mexico's Northern Frontier* (Tucson: University of Arizona Press, 1995). On the Miskito land claims in Nicaragua see also Charles Hale, *Resistance and Contradiction: Miskitu Indians and the Nicaraguan State, 1894-1987* (Stanford: Stanford UP, 1994).

<sup>3</sup> Nicholas Blomley, "Landscapes of Property", *Law & Society Review* 32 (3), (1998): 567.

<sup>4</sup> Donald S. Moore, *Suffering for Territory: Race, Place and Power in Zimbabwe* (Durham and London: Duke UP, 2005).

<sup>5</sup> During the 1960s, racist resettlement policies and violent evictions displaced the *kaerezi*, who were forced to seek refuge in Mozambique. Two decades later, a new state policy succeeded in getting them back to their lands in Zimbabwe. The *Gaeresi* ranch bought by the government from white landowners had been the territory of an African chiefdom that was considered a "place to make it rain", and was also meant to be a coveted space for a National Park for conservation purposes. See: Donald S. Moore, "Contesting Terrain in Zimbabwe's Eastern Highlands: Political Ecology, Ethnography, and Peasant Resource Struggles", in *Economic Geography* 69, no. 4 (1993), 380.

cies and the ways government projects were shaped by historical contingencies are part of his ethnographic account. The third notion is *culture*. For Indigenous peoples “the importance of the land is not restricted to purely economic reasons, it is related also to the essential sense of identity and culture of the Aboriginal peoples who live by the land”.<sup>1</sup> In this task, myths shall be understood as cultural accounts of indigenous history that give sense to their own identity.<sup>2</sup> In the cultural canon of the group every element of nature has an explanation.<sup>3</sup> Nonetheless, as these meanings are historically transformed, understanding these transformations allows us to decipher contemporary formations.<sup>4</sup> *Power* is the fourth notion. Historical and anthropological studies show that the history of property is linked to power.<sup>5</sup> Focusing on power may reveal not only the layers of social organization<sup>6</sup> but also the asymmetrical contests around property and territory.<sup>7</sup> Anthropologist Tsing<sup>8</sup> defines property as a set of social relations that unearths conflicts between claims and property regimes: “The study of property rights has the potential to call attention to social inequal-

<sup>1</sup> Paul L. A. H. Chartrand, “Land Claims and Self-Determination: Assessing the Past and Looking to the Future”, *Schweizerische Amerikanisten-Gesellschaft Bulletin* 53-54 (1989-1990): 11.

<sup>2</sup> For an account of the close relationship between myth, history and power, see: Jonathan D. Hill, ed., *Rethinking History and Myth: Indigenous South American Perspectives on the Past* (Urbana: University of Illinois Press, 1988).

<sup>3</sup> The myth of origin of the Tukano depicts the occupation of their territory between the Colombian northeast and Brazil. See Gerardo Reichel-Dolmatoff, *Amazonian Cosmos: The Sexual and Religious Symbolism of the Tukano Indians* (Chicago and London: University of Chicago Press, 1971).

<sup>4</sup> This is the case of the *Kukama Kukamiria* and their current struggle for the defense of the Maraño River. See Patricia Urteaga, Frida Segura and Mayra Sánchez, *Derecho humano al agua, petróleo y pueblos Indígenas en la Amazonía* (Lima: Departamento Académico de Derecho, CICAJ, 2019).

<sup>5</sup> See: Congost, *Tierras, leyes, historia*, 6. See also Philip Corrigan and Derek Sayer, *The Great Arch. English State Formation as Cultural Revolution* (Oxford: Basil Blackwell, 1985), and Ugo Mattei and Laura Nader, *Plunder: When the Rule of Law is Illegal* (Oxford: Blackwell Publishing, 2008).

<sup>6</sup> Benda-Beckmann, *Changing Properties of Property*, 5.

<sup>7</sup> The absolute centrality of power in land processes is shown in eighteenth-century England, where the sacralization of private property was consubstantial to the transition to industrialization. This meant the destruction of the system of commons, the dispossession of the peasants, the emergence of the working class, the formation of the English state, and the sedimentation of capitalism. See Corrigan and Sayer, *The Great Arch*, 15.

<sup>8</sup> See Tsing, “Land as Law”.

ities, regional idiosyncrasies, and political struggles”.<sup>1</sup> In looking at the way power dynamics unfold to structure property, a diachronic perspective shall be considered to disclose the provisional character of the notion of property and the dynamic nature of territory.<sup>2</sup> From this perspective, understanding what property *does* is more important than defining what property is. This requires a method that sees space as a provisional assemblage of cultural, social and, political and economic factors that are being constantly structured. Next, a reflection on the historical dimension of territory and property follows.

### 3. The historical dimension

Ethnohistorical analyses in the Andes have shown that during precolonial time the discontinuous and shared character of land tenure defined forms of possession. Far from being enclosed, the territory was conceived as porous with functional and symbolic meanings that responded to the environment. Eight ways to access the land among the Incas have been reported, yet it was likely that they reached fifteen or twenty procedures: “there is no reason to suppose that these patterns of land tenure were uniform throughout *Tawantinsuyo*; they must have been very different on the irrigated north coast if we contrast them with the case of the *Chupaychu* corn farmers or the *Lupaqa* shepherds”.<sup>3</sup> Murra<sup>4</sup> argued that while the Incas had rights to all lands, ethnic and kinship groups had “effective and simultaneous access to some of the same crop fields”.

The ecological diversification and complementarity that characterized the land in the Inca empire<sup>5</sup> explain precisely the discontinuous character of the territory. In describing the “vertical archipelagos” as part of his concept of vertical control of ecological floors, Murra<sup>6</sup> refers to the ethnic groups of Huánuco and the way they conceived of their territory in the mid-sixteenth century:

<sup>1</sup> Tsing, “Land as Law”, 18, 98.

<sup>2</sup> See, Moore, *Suffering for Territory*, 9. See also: Anna Tsing, “Inside the Economy of Appearances”, *Public Culture* 12, no. 1 (January 2000): 115.

<sup>3</sup> John Murra, *El mundo andino. Población, medio ambiente y economía* (Lima: Fondo Editorial de la Pontificia Universidad Católica del Perú, IEP, 2002).

<sup>4</sup> Murra, *El mundo andino*, 21, 461.

<sup>5</sup> Murra, *El mundo andino*, 21.

<sup>6</sup> Murra, *El mundo andino*, 21.



Above the nucleus there were at least two floors where *yacha* or *chupaychu* populations worked: the salt flats of *Yanacachi* and the pastures around the *Chichaycocha* lagoon (...) Both salt and pastures were shared with the salt workers, shepherds and herds of other ethnic groups, some coming from much greater distances from their respective nuclei than the *yacha* or the *chupaychu*.<sup>1</sup>

The ethnic groups that inhabited the region of *Huánuco*, controlled cotton and crops of *Uchu*: “they had land down the valley of Cayra where cotton was planted”.<sup>2</sup> In the southern Aymara territory, the *lupaqa*

had oases on the Pacific coast—from the *Lluta* Valley in *Arica* to *Sama* and *Moquegua*. There they grew cotton and corn; they collected *wanu*, not to mention other marine products (...) the use of the oases was multi-ethnic, similar to the exploitation of peripheral areas in *Huánuco*: the *Pacaxa*, another *Aymara*-speaking lake kingdom, had possessions on the Pacific coast, apparently interspersed with those of the *Lupaqa*.<sup>3</sup>

Among the various Andean groups coexisting in the Inca empire, the rule was to share spaces and resources. The collective management of space was not arbitrary but responded to an eco-logic. Land and resources, such as salt and pastures, were shared by ethnic groups from diverse regions yet this did not prevent struggles. De La Puente describes the concept of “property” in the pre-colonial Andes:

its members (of the Andean lineages) did not own the land *per se* (...) The land was used and shared on the basis of various ritual mechanisms. Natural waters, forests and pastures were, at least in theory, open to the use of any ethnic group. Similarly, uninhabited and unworked land, as well as resources above and below it, were available to any group that cultivated and protected them, introducing into them the improvements necessary for agriculture or livestock.<sup>4</sup>

<sup>1</sup> Murra, *El mundo andino*, 21, 90.

<sup>2</sup> Murra, *El mundo andino*, 21, 91.

<sup>3</sup> Murra, *El mundo andino*, 21, 95.

<sup>4</sup> José Carlos De la Puente Luna, “Cuando el ‘punto de vista nativo’ no es el punto de vista de los nativos: Felipe Guaman Poma de Ayala y la apropiación de tierras en el Perú colonial”, *Bulletin de l’Institut français d’études andines* 37, no. 1 *Dinámicas del poder: historia y actualidad de la autoridad andina* (2008): 129.

After the colonial conquest, land disputes and struggles over meanings on property were not uncommon. Felipe Guaman Poma de Ayala's chronicles show how different meanings of property were in flux during the 16<sup>th</sup> century. As a mestizo, Guaman Poma was more aware of the gap between the Andean and Spanish concepts of land. In the face of land struggles between Spanish landlords (*encomenderos*), ethnic groups and colonizers, each individual interpreted differently the pre-Hispanic "type of property" to his/her own advantage.<sup>1</sup> In Guaman Poma's case, the chronicler reaffirmed that the Inca had agreed on allocating him the lands that his family had long possessed in Huamanga in recognition of his loyalty. Nonetheless, access to land among the Incas was based on ethnicity and kinship rather than on inheritance or merit. As De La Puente points out,

Western concepts of land tenure, including that of individual and exclusive property, do not apply to the *Huamanga* region before the arrival of the Spaniards (...) the Inca family did not reward loyal lords with pieces of land or clearly delimited land, as the King of Spain would do.<sup>2</sup>

In fact, while in precolonial Andes land possession was discontinuous, in the Spanish logic it was typically a "continuous territoriality".<sup>3</sup>

The dynamic, open and porous character of territory before colonization is evident in other spaces, as Newfoundland in Canada. In a context of colonial violence that snatched away part of their territory, in 1823 three Beothuck women (Red Indian) were captured by British settlers. At the request of her captors, one of the women named Shanawdithit (1801-1829) drew a map of the Beothuck territory representing it as an open and borderless space.<sup>4</sup> Even though historical processes have modified the precolonial land tenure, indigenous conceptions and their symbolic universe, the evidence shown emphasizes that the historical

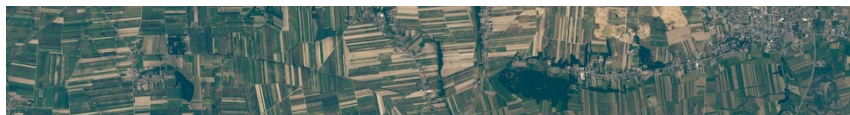
<sup>1</sup> Jorge Armando Guevara Gil, *Propiedad agraria y derecho colonial: los documentos de la hacienda Santotis, Cuzco (1543-1822)* (Lima, Fondo Editorial de la Pontificia Universidad Católica del Perú, 1993).

<sup>2</sup> De la Puente Luna, "Cuando el 'punto de vista nativo' no es el punto de vista de los nativos", 127.

<sup>3</sup> De la Puente Luna, "Cuando el 'punto de vista nativo' no es el punto de vista de los nativos", 128.

<sup>4</sup> See: Matthew Sparke, "Between Demythologizing and Deconstructing the Map: Shanawdithit's New-found-land and the Alienation of Canada", *Cartographica* 32, no. 1 (1995): 1-21. The map also described the British control of their territory and the Beothuck escaping upstream to avoid annihilation.

approach is crucial in grasping processes of land and property formation. Using a comparative approach, in the next section I explore the cultural dimension of territory and property.



#### 4. The cultural dimension

Some scholars agree that the term ‘property’ is alien to the worldview of Indigenous peoples. Historians and anthropologists have consistently reported a collective land use based on kinship both in the Andes and the Amazon.<sup>1</sup> Chirif, Hierro, and Smith argue that in the Amazon “reciprocal distribution based on kinship relations” is the rule, rather than individual appropriation<sup>2</sup>. The concept of property as known might inaccurately explain indigenous relationship with nature. Here, I will describe the cultural meaning of territory according to some indigenous peoples.

Each indigenous people has a particular conception of the territory, yet all share the idea that the territory has a collective significance with both material and symbolic dimensions. Their past is inscribed in the territory and their future as people depends on preserving it. To the extent that the relationship with the territory predates the nation-state formation, it is called ‘ancestral territory’. It is also transgenerational as it transcends specific people or individuals. The territory is the space the ancestors shared, the place they identify with, and part of their identity. It is also the habitat that provides their means of livelihood. Peoples are holders of a collective right over the territory, while each person enjoys individual land rights.

<sup>1</sup> See: Murra, *El mundo andino*, 21. See also: Surrallés and García, *Tierra adentro*, 2.

<sup>2</sup> Chirif Tirado, García Hierro, and Chase Smith, *El Indígena y su territorio son uno solo*, 2, 30.

The uses of the territory and its elements are intimately related to the group's identity and their relationship with the environment. Indigenous groups know well the geographical features of their territory. In order to respectfully travel through it most indigenous peoples 'mark' it and enforce rules of moral economy to protect it.<sup>1</sup> Thus, a lake or lagoon can be the space where certain spirits live; a waterfall, the sacred place where young people learn to develop their own 'vision'; a mountain, the abode of gods; a river may symbolize the social stratification of the group; a pongo or a valley, a space where the remains of the ancestors lie and where their history and identity have been inscribed; the rain, an announcement of visitors coming or leaving; the singing of a bird, the warning that something good or bad will happen; etc. Such transactions on the territory know no limits or material and economic conditions.<sup>2</sup> How can a lake be valued as an environment for living beings? What value can be assigned to a waterfall under which *ayahuasca* is taken to acquire visions for life? How can the forest and its functions be assessed? A definition of indigenous territory that encompasses these dimensions may be as follows:

The mountains, valleys, rivers and lagoons that are identified with the existence of an indigenous people and that have provided them with their livelihoods; the wealth inherited from their ancestors and the legacy they are obliged to give to their descendants; a space in which each small part, each manifestation of life, each expression of nature is sacred in the memory and collective experience of that people and which is shared and intimately interrelated with the rest of living beings.<sup>3</sup>



<sup>1</sup> See: Surrallés and García, *Tierra adentro*, 2; Beatriz Huertas and Mauricio Chanchari, *Agua, cultura y territorialidad en el pueblo Shawi del Río Sillay* (Lima: AATO "Laguna di Venezia", Profonanze, Corpi, Terra Nuova, 2011).

<sup>2</sup> Neumann calls this feature "flux and fluidity". See: Roderick Neumann, *Making Political Ecology* (London: Hodder Arnold, 2005).

<sup>3</sup> Chirif Tirado, García Hierro, and Chase Smith, *El Indígena y su territorio son uno solo*, 2, 27.

Indigenous knowledge about the forest and the habitat responds to the experience diachronically accumulated and intergenerationally transmitted. These practices are reinforced by their symbolic universe.<sup>1</sup> Chirif, Hierro, and Smith<sup>2</sup> describe the indigenous conception of territory and points out the logic that represents their territories as open and shared spaces. Thus, for indigenous peoples several bonds attach them to their territory where they not only share the same language, recognize their kinship, enforce similar rules, reciprocate, and share with other peoples who occupy the same space. They also acknowledge their relationship with other human beings and between humans and non-humans.

Comparable ideas about the territory are found among hunter-gatherers in Africa. For the Kun San of the Kalahari Desert, South Africa, property does not consist of rights to things but rather of obligations between people with respect to things. Therefore, it is more important to know the kinship system than the extension of a territory, since the latter will depend primarily on the former. During the 1980s, anthropologist Edwin N. Wilmsen asked a Kun: “Is it good and just to say that people live in a defined country?”. Ssao replied:

if a person separates from his relatives, it is not right to call that place his. Yes. This I will call my land (...) this land is mine, the whole of it. That is to say it belongs to everyone, the community. Like when we are here, that is to say where these people stay (...) my land, it is that of the community.<sup>3</sup>

This does not mean that tenure is exclusive, because at some point another group may settle near the main sources of water and use those waters to feed their own livestock and the Kun will not oppose. Wilmsen<sup>4</sup> points out that the flexibility of the San Kun’s spatial organization “rests on a fluid and negotiable social field in which a repertoire of rules is constantly activated and continually reassessed by individuals in the course of everyday interaction”.

<sup>1</sup> See: Adriana Hurtado and Enrique Sánchez, “Introducción”, in *Documento de reflexión y síntesis. Situación de propiedad, aprovechamiento y manejo de los recursos naturales en los territorios Indígenas en áreas bajas de selva tropical. Derechos territoriales indígenas y ecología en las selvas tropicales de América* (Bogotá, Fundación Gaia, CEREC, 1992); and Surrallés and García, *Tierra adentro*, 2.

<sup>2</sup> Chirif Tirado, García Hierro and Smith, *El Indígena y su territorio son uno solo*, 2.

<sup>3</sup> Edwin N. Wilmsen, *Land Filled with Flies. A Political Economy of the Kalahari* (Chicago and London, The University of Chicago Press, 1989), 180.

<sup>4</sup> Wilmsen, *Land Filled with Flies*, 40, 167.

Among the Yolngu people in the Yirrkala area of Australia an analogous conception of the territory was found during the 1980s. The land of the Yolngu covers approximately 8500 km<sup>2</sup> northeast of Arnhem and its islands. From the 1930s a religious mission was imposed on them. From the 1960s onward mining activities impacted their land and resources. The Yolngu contend that their rights to their territory were established by sacred donation of spiritual beings and validated through ritual:

During the mythic past spirit-beings bestowed land on the first ancestors, rights to the land now inhere in their living descendants who expect the rights to continue in future generations. Furthermore, the rights inhere in groups that Yolngu define and symbolise in a number of ways but which they define primarily in relation to each other in terms that we can call kinship. Yolngu are precise in the principles by which they allocate and understand these kin-labelled rights in land. The rights entail a set of responsibilities: sacred duties as well as the secular protection and management of specific lands and resources. The rights include those of ownership, occupation, and use. Integral to the system are provisions for succession to ownership as well as subsidiary rights of occupation and use.<sup>1</sup>

The evidence shows the mythical origin of Yolngu's land rights.<sup>2</sup> Research conducted in the mid-1990s in the territory of two Aboriginal peoples in Western Australian, confirmed that "the Aborigines possess a spiritual relationship with the land that is tied to their ancestral heritage, which is markedly different from the white perspective of land as a natural resource".<sup>3</sup> Each clan's totem inhabits a specific place of the territory. They manifest in newborns and leave the bodies of death people to return to the land of that clan. They are also found in animals, rocks, trees, plants, water sources, etc. In mythical times, spiritual beings guided the Yolngu and shaped the earth giving meaning to the forms of things. They traveled across the sea and the coast, and in this transit, they named and gave the halo of life to the first humans on earth.

<sup>1</sup> Nancy M. Williams, *The Yolngu and Their Land. A System of Land Tenure and the Fight for its Recognition* (Canberra: Australian Institute of Aboriginal Studies, 1986), 20.

<sup>2</sup> Ronald Paul Hill, "Blackfellas and Whitefellas: Aboriginal Land Rights, The Mabo Decision, and the Meaning of Land", *Human Rights Quarterly* 17 (1995): 303-322.

<sup>3</sup> Hill, "Blackfellas and Whitefellas", 43, 320.

The Yolngu believe that their land tenure originates from these spirits and their land rights underpinned on religion, myths and rituals. The territory is not marked by clearly defined boundaries as in Western cartography; nor is it exclusive. The size of the Yolngu territory is determined by myths that differentiate its place from other groups' spaces. A rock that prevented a fish from following its path symbolizes the beginning of the land of another moiety. A bee which did not find honey indicates another people's space. These apparent boundaries are flexible and negotiable. People do not own the land, but are related to it materially and spiritually.<sup>1</sup>

The conceptions of territory among South Africa hunter-gatherers, and Australian aborigines are similar to those found in the Shipibo Konibo cosmology. For the Peruvian Shipibo Konibo of the Arawak family, the cosmological, natural and human universes are inextricably linked. The cosmos is made up of the world of waters, the world of the sun, the yellow world and the inner world of humans.<sup>2</sup> The art of *Kené*, the Shipibo Konibo design, includes the patterns of this cosmological order. By drinking ayahuasca, shamans may perceive these celestial patterns invisible to the senses and through dreams and hallucinogenic trances, transmit to the Shipibo weavers the shape of the designs. The river is the entity that connects the human and the celestial worlds and Shipibo designs represent the paths between these dimensions. The Ucayali River represents the great boa which symbolizes the milky way that links all beings. The Ucayali River is also the axis of the space.<sup>3</sup> García<sup>4</sup> explains that the Shipibo Konibo territory extends practically along the entire course of the Ucayali close to the confluence with the Marañón River. Along this area, some spaces of the territory are shared with other indigenous peoples and *mestizos*.

The need to protect their habitat forced indigenous peoples to think in terms of a delimited territory so that they could legally demarcate and protect it. An interesting story about conflicting conceptions of land ownership occurred in

<sup>1</sup> Williams, *The Yolngu and Their Land*, 42.

<sup>2</sup> Eli Sánchez, "Su Brazo se Enrosca Como una Boa", in *El Ojo Verde. Cosmovisiones Amazónicas* (Lima: AIDSESP-FORMABIAP, Fundación Telefónica, 2004).

<sup>3</sup> Clara Cárdenas, *Los Unaya y su mundo: aproximación al sistema médico de los Shipibo-Konibo del Río Ucayali* (Lima: Instituto Indigenista Peruano, 1989).

<sup>4</sup> Pedro García Hierro, *Análisis de la situación del pueblo Shipibo Konibo* (Lima: Oficina General de Epidemiología, Perú, Ministerio de Salud, 2002), 32.

the 1970s in Yukon, Canada.<sup>1</sup> Paul Nadasdy<sup>2</sup> describes that, the Kluane had undertaken the task of obtaining land titles. Once, a chief had gone to the forest to inspect a plot of land that the Kluane wanted to claim as their own. To his grandmother's concern, he replied that he was working and explained her about the land claim his people would make to the government. The troubled grandmother replied "that was crazy thing to do, for no one can own the land—neither white men nor Indians. The land is there, we move around; we die. How can anyone own it".<sup>3</sup>

Various indigenous understandings of landownership have been described here as culturally specific. Some argue that the term property should be decolonized since it cannot accurately describe all the social and cultural complexity of indigenous people's relationship with the habitat. The concept of property should not be exclusive to a single culture.<sup>4</sup> However, indigenous peoples have been forced to use a univocal notion of ownership inherent to modern law to pursue land claims. Next, I will develop a comparative approach to colonial property regimes in various regions.

## 5. The legal dimension

Through a comparative approach, in this section I will show how colonial landownership regimes that dispossessed indigenous peoples of their territory were the rule rather than the exception in many regions of the world. It is not unknown that one of the main objectives of the colonial conquest was the accumulation of land and water which the stark use of the force made possible. In the processes of land appropriation, the epistemological strife was a preponderant

<sup>1</sup> See also Niezen's analysis on the Crees' concept of land tenure. Ronald Niezen, *Defending the Land. Sovereignty and Forest Life in James Bay Cree Society*, Cultural Survival Studies in Ethnicity and Change (Boston: Alyn and Bacon, 1998).

<sup>2</sup> Paul Nadasdy, "'Property' and Aboriginal Land Claims in the Canadian Subarctic: Some Theoretical considerations", in *American Anthropologist* 104, no. 1 (2002): 247.

<sup>3</sup> Nadasdy, "'Property' and Aboriginal Land Claims in the Canadian Subarctic", 50, 247.

<sup>4</sup> Minow questions the use of the term 'rights' to claim recognition of excluded groups to the extent that it expresses its acquiescence with the dominant system. Martha Minow, "Rights and cultural difference", *Identities, Politics and Rights*, ed. Austin Sarat and Thomas R. Kearns (Ann Arbor: University of Michigan Press, 1995).



factor. The indigenous conceptions of territory as an open, porous and non-exclusive space were interpreted by the colonizers as ‘no man’s land.’<sup>1</sup> Subsequently, the concepts of “unused, wastelands, unoccupied lands” would legally justify the dispossession of indigenous territories affecting not only their material world but also transforming their cultural universe<sup>2</sup>. Evidence around the world demonstrates how these processes ensured circles of poverty among indigenous peoples.<sup>3</sup> In this section, examples from Australia, Canada, and the United States will illustrate how doctrines from Common Law were used to justify land seizure in the colonial context.<sup>4</sup> I will then compare these legal regimes with the Spanish colonial legal framework, particularly, the doctrine of eminent dominium.

Colonial policies largely justified land appropriation upon legal doctrines that naturalized dispossession<sup>5</sup>. Klug<sup>6</sup> mentions how colonial regimes generally developed three legal standards regarding the recognition of indigenous tenure rights. The first consisted of the total denial of indigenous land rights by the colonizers, who maintained that the land was *terra nullius*. This is the case with the Kun San nomads of Botswana. The second pattern involved the colonizers’ initial recognition of indigenous land rights which they later denied. This pattern is characterized by an evolutionist view of local populations that

<sup>1</sup> See Kent McNeil, “Las Primeras Naciones, Soberanía y Derechos sobre la Tierra: el Legado del Colonialismo Británico en Norteamérica” in Workshop: “*El Derecho comparado indígena en América*” (Quito, Ecuador: 1990), 31-39.

<sup>2</sup> In the Peruvian Amazon, missionaries created reductions for indigenous peoples who were separated from their ancestral territories by force or persuasion. In some cases, indigenous people who were not evangelized or who were deemed ‘uncivilized’ were granted small plots of land or denied access to land.

<sup>3</sup> See Hill, “Blackfellas and Whitefellas”, 43. See also Surrallés and García, *Tierra adentro*, 2.

<sup>4</sup> Although the legal doctrines of the Common Law legal system differ from the Civil law legal system of the Andean countries, I approach them as politically situated discourses, which will unveil commonalities.

<sup>5</sup> See, for example, the Doctrine of *Plenary Power* (‘Right of Christian Discovery’) established in 1903 in Supreme Court Decision *Lone Wolf v. Hitchcock* to uphold full authority over Indians and their lands. Similarly, see the *Trust Doctrine*. See Peter D’Errico, “Yankton Sioux Challenges ‘Plenary Power’ Doctrine in DAPL Case”, *Indian Country Today*, February 27, 2017, <https://ictnews.org/archive/yankton-sioux-challenges-plenary-power-doctrine-dapl-case> (last accessed February, 20, 2023).

<sup>6</sup> Heinz Klug, “Defining the Property Rights of Others: Political Power, Indigenous Tenure and the Construction of Customary Land Law”, *Journal of Legal Pluralism* 35 (1996): 119-147.

is expressed in most legal rulings. Here, an example: “some tribes are so low in the scale of social organization that their usages and conceptions of rights and duties are not to be reconciled with the institutions or the legal ideas of civilized society”.<sup>1</sup> The third pattern consisted in recognizing a devalued property right. The courts did not consider full property rights but only rights to occupation and use.

During the early nineteenth century in Australia the colonial government promoted the establishment of British settlers in eastern Australia conquered lands for livestock breeding. Besides productive reasons, the commodification of lands was essential to the formation of the state as dealings between the colonizers and the Indians were null and void if they lack the recognition of the king. The formation of the colonial state was based mainly on land appropriation and disposition.<sup>2</sup> To this end, English Common Law endorsed the doctrine of *terra nullius* (meaning nobody’s land, territories without owner or uninhabited country), which supported the power invested in the monarchy to decide on landownership.

This was clearly a fiction, since the aborigines were already here (...) they had their own system of laws and of land tenure. So, the notion that Australia was *terra nullius* had to rest on another construct. This was the notion taken from Vattel, the leading international lawyer of the Enlightenment, according to which no people had any right to any territory which they did not cultivate.<sup>3</sup>

The representation of the aborigines as nomadic people who ignored agriculture, together with the doctrine of *terra nullius* provided the “justification for depriving the aborigines of their land”.<sup>4</sup>

The argument about the nomadism of local peoples was taken to the extreme since seasonal migrations were interpreted in the sense that Aborigines were not only primitive peoples but they could do without land. Thus, the British colonial government refused to recognize the Aboriginal people’s rights to land.

<sup>1</sup> Klug, “Defining the Property Rights of Others”, 58, 125

<sup>2</sup> A. Davidson and A. Wells, “The Land, the Law, and the State: Colonial Australia 1788-1890”, *Law in Context*, 2, (1984): 89.

<sup>3</sup> Davidson and Wells, “The Land, the Law, and the State”, 60, 98.

<sup>4</sup> Davidson and Wells, “The Land, the Law, and the State”, 60, 100.

Rather, based on various laws enacted by the crown, indigenous lands were considered Crown lands and sold or leased to British settlers placing the Aborigines in special reserves.<sup>1</sup> “In many areas, Aborigines were encouraged, persuaded, or forced onto special Aboriginal settlements and reserves as closer settlement encroached on their traditional territory. As the White settlers’ demand for land increased, the land reserved for Aborigines was whittled down”.<sup>2</sup> This trend continued and the discovery of energy resources in Australia brought in international companies opposed to the recognition of aborigine’s land rights in the northwest.<sup>3</sup>

During the 1970s, Judge Blackburn rejected the Aboriginal title of the Yolngu of Yirrcala because it had not been expressly recognized by Australian law and because “Aboriginal concepts of property could not fit within common law notions of property law”.<sup>4</sup> After centuries of affirmation of the doctrine of *terra nullius*, jurisprudence changed diametrically in the case of Eddie Mabo and other members of the Meriam people (1992). Justice Brennan J. stated that

to maintain the authority of those cases would destroy the equality of all Australian citizens before the law. The common law of this country would perpetuate injustice if it were to continue to embrace the enlarged notion of *terra nullius* and to persist in characterizing the indigenous inhabitants of the Australian colonies as people too low in the scale of social organization to be acknowledged as possessing rights and interests in land.<sup>5</sup>

Afterwards, Australia’s regional governments tried to legally nullify territorial claims similar to the Mabo case, and in 1993, the national government proposed its own national legislation regarding indigenous land tenure.<sup>6</sup>

<sup>1</sup> This practice replicated in Africa and America. See: Wilmsen, *Land Filled with Flies*, 40; Hurtado and Sánchez, “Introducción”, 38.

<sup>2</sup> Barrie A. Pittock, *Aboriginal Land Rights* (Copenhagen: IWGIA, 1972), 3-24, 13. See also, Chartrand, “Land Claims and Self-Determination”, 11.

<sup>3</sup> Pittock, *Aboriginal Land Rights*, 64. See also: Bradford W. Morse, “Land Rights Now. The Aboriginal Fight for Land in Australia”, in *IWGLA Document 54*, 183-208 (Copenhagen: IWGIA, 1985).

<sup>4</sup> Morse, “Land Rights Now”, 65, 193.

<sup>5</sup> See: Klug, “Defining the Property Rights of Others”, 58, 142. See also, Hill, “Blackfellas and Whitefellas: Aboriginal Land Rights”, 43.

<sup>6</sup> Hill, “Blackfellas and Whitefellas: Aboriginal Land Rights”, 43. See also: Jon Altman, “Indigenous Rights, Mining Corporation, and the Australian State”, in *The Politics of Resource Extraction. Indige-*

A similar pattern occurred in the United States and Canada. McNeil<sup>1</sup> describes how in nineteenth century US Judge Marshall developed the theory of limited sovereignty of the so-called 'First Nations', according to which sovereignty was exclusive to the Federal State. Therefore, indigenous peoples were called 'Dependent domestic nations'. The British Crown "acquired title to indigenous lands (...) But the indigenous nations nevertheless retained a right of occupation".<sup>2</sup> The lack of definition of indigenous landownership contributed to a 1955 judicial ruling establishing that theirs was not a right of property, but amounted to a right of occupation that could be terminated by decision of the crown without the right to compensation<sup>3</sup>. In Canada, indigenous peoples were denied the right to self-determination, so that "their aboriginal rights could be extinguished unilaterally by validly enacted legislation or covenants".<sup>4</sup> With regard to the title, the case-law did not clearly define it either. For the courts, theirs was not a property right but a "personal or usufructuary" right, an inalienable "*sui generis* interest" that may be administered by the crown. In *Calder v. Attorney General of British Columbia*, Justice Hall stated:

This is not a claim in fee but is in the nature of an equitable title or interest, (...) a usufructuary right and a right to occupy the lands and to enjoy the fruits of the soil, the forest and of the rivers and streams which does not in any way deny the Crown's Paramount title as it is recognized by the law of nations. Not does the Nishga claim challenge the federal Crown's right to extinguish that title. Their position is that they possess a right of occupation against the world except the Crown and that the Crown has not to date lawfully extinguished that right.<sup>5</sup>

In the early 1990s, Indigenous people in northern and western Canada claimed to the government the lands they had never ceded in treaties.<sup>6</sup> In response, the government used the notion of 'comprehensive claims' as an opportunity to

*nous Peoples, Multinational Corporations, and the State.* ed. Suzana Sawyer and Edmund Terence Gomez (New York: Palgrave Macmillan, UNRISD, 2012), 45-74.

<sup>1</sup> McNeil, "Las primeras naciones, soberanía y derechos sobre la Tierra", 53.

<sup>2</sup> McNeil, "Las primeras naciones, soberanía y derechos sobre la Tierra", 53, 38.

<sup>3</sup> Ibid.

<sup>4</sup> McNeil, "Las primeras naciones, soberanía y derechos sobre la Tierra", 53, 37.

<sup>5</sup> Morse, "Land Rights Now", 65, 195-6.

<sup>6</sup> Chartrand, "Land Claims and Self-Determination", 11.

resolve these claims so that the rest of the northern territory could be opened up for oil and mining investments.<sup>1</sup>

Comparison may be useful to understand what happened in the Andes where the scenario has not been extremely different. Colonial legal doctrines, such as the *dominium eminens*, were aimed at legally justifying plunder. Roldán<sup>2</sup> argues that

the traditional legal thought and political opinion of the South American States have been oriented almost unanimously to consider and catalog the lands occupied since time immemorial by these (indigenous) populations as fiscal or vacant assets or goods that would lack another owner other than the State through the half-enigmatic figure of property called 'eminent domain' by law professors.

The doctrine of eminent domain, which dates back to the middle age in Europe, granted the Crown (or the state) the authority to dispose of private property within the territory of the state in case of public necessity. In the colonial context, this doctrine was associated to the right of sovereignty. Under this doctrine, wastelands, deserted lands, uncultivated lands, unproductive lands were legal figures used to configure dispossession.<sup>3</sup> Although the Spanish doctrine spread throughout Hispanic America, it was not unchallenged. In Colombia, the Council of State issued a ruling on July 6, 1972 where it stated that no historical or legal evidence had proved the eminent domain of the Spanish crown and of the Colombian State over territories that their ancestral owners had never abandoned or lost in war.<sup>4</sup>

A similar example occurred in Peru in the early twentieth century, when no one dared to defend indigenous peoples.<sup>5</sup> Lawyer Víctor J. Guevara published an

<sup>1</sup> Morse, "Land Rights Now", 65.

<sup>2</sup> Roque Roldán, "El problema de la legalidad en la tenencia de la tierra y el manejo de los recursos naturales de territorios indígenas en regiones de selva tropical de Suramérica", *Derechos territoriales Indígenas y ecología en las selvas tropicales de América* (Bogotá, Fundación Gaia, CEREC, 1992), 55, 56.

<sup>3</sup> For a contemporary use of these legal figures, see Patricia Urteaga-Crovetto, "Between Water Abundance and Scarcity: Discourses, Biofuels and Power in Piura, Peru", *Antipode: A Radical Journal of Geography* 48, no. 4 (2016): 1059-1079.

<sup>4</sup> Roldán, "El problema de la legalidad en la tenencia de la tierra", 75.

<sup>5</sup> Hill (1995) mentions the same concern in nineteenth-century Australia. Hill, "Blackfellas and Whitefellas: Aboriginal Land Rights", 43.

article in 1953 where, based on an evolutionist discourse common to that time, he exhorted the state authorities to integrate the Harakmbut and Machigüenga (Matsigenka) and recognize their lands:

Peru will give a glorious example if declares the official reintegration of its Mashcos and Machigüengas nationals into the bosom of its national community; it would be a work of true and practical humanity in homage to the primitives of the species”.<sup>1</sup>

Through a sophisticated legal argument, Guevara argued that the birth of the Indians in Peruvian territory granted them a *de facto* Peruvian nationality, and, the possession of their lands since time immemorial granted them rights to these lands or titles of dominion based on the civil law and international legislation. Guevara cleverly argued that the General Law of Mountain Lands of 1909 did not recognize indigenous land ownership; nonetheless, it should not be applied because it was approved “after the possession and legal domain of Mashcos and Machigüengas occurred, and, by great precept of the Constitution, laws do not have retroactive effect and cannot damage or impair acquired rights”.<sup>2</sup> Not only legal reasons advised state’s recognition of indigenous land rights. Indigenous land possession would imply that the State exercised its dominion over its territory “which is one of the juridical-political sources of the right of sovereignty of the States over their territorial belongings”.<sup>3</sup>

In the 1960s and 1970s, the law sought to insert indigenous people into the market while simultaneously protected their lands. During the 1990s the (dis-) regulation of indigenous property became the rule, particularly enshrined in the 1993 Peruvian Constitution which included a less protectionist conception of indigenous landownership. With regard to the elaboration of the constitutional text, a debate on the recognition of indigenous property was held in 1992.<sup>4</sup> The underlying question was the inclusion of these communities into the market. I have classified the positions of academics at that time:

<sup>1</sup> Víctor J. Guevara, “La importancia del nacionalismo de los Mashcos y Machiguengas”, *Perú Indígena* 4, no. 10-11 (September 1953): 110.

<sup>2</sup> Guevara, “La importancia del nacionalismo de los Mashcos”, 79, 106.

<sup>3</sup> Guevara, “La importancia del nacionalismo de los Mashcos”, 79, 106.

<sup>4</sup> Máximo Gallo, ed. *Comunidades campesinas y nativas en el nuevo contexto nacional* (Lima: CAAAP, SER, 1993).

1. The so-called ‘romantics’, among whom some argued that peasant and native communities should not be touched and protectionist legislation should continue.
2. The ‘liberals’, who argued that private property rights over the soil and subsoil should be granted to all indigenous communities and their members to create a dynamic land market.
3. The ‘egalitarians’, who indicated that rights to equality rather than property rights should be recognized, so that everyone is equal before the law with the same rights.
4. The ‘developmentalists’, who proposed that rather than protect, the legislation on indigenous communities should promote development. Prohibiting communities to dispose of their land and resources was an obstacle to development.
5. The ‘realists’, who showed that the communities were in a vertiginous process of parceling, since many areas inside the community were held by individuals/families<sup>1</sup>, while only some were collective. For this reason, their lands should be titled in a way that reflected this reality. This problematic exercise of metonymy extended the situation of one group to all indigenous communities.

Some expressed a very sincere concern for the well-being of the communities and their possibility of future existence in the impoverished conditions in which they lived. However, the solution was the deregulation of ‘protectionist’ legislation since it was identified as a factor of backwardness that prevented progress.<sup>2</sup> Some argued that the issue was not so much “whose cow it is but who takes the milk”.<sup>3</sup> This saying would be very important several years later.

<sup>1</sup> In this regard, see: Gallo ed., *Comunidades campesinas y nativas*, 82. See also: Alejandro Diez, “Organización y poder en comunidades, rondas campesinas y municipios”, in *¿Qué sabemos de las comunidades campesinas?*, ed. P. Castillo, A. Diez, Z. Burneo, J. Urrutia, and P. Del Valle (Lima: Allpa. Comunidades y Desarrollo, 2007), 107-151; Alejandro Diez, “Interculturalidad y comunidades: propiedad colectiva y propiedad individual”, *Debate agrario* 36 (2003): 71-88.

<sup>2</sup> Gallo, ed., *Comunidades campesinas y nativas*, 82.

<sup>3</sup> *Ibidem*.

The proposal to deregulate indigenous property regime that was passionately discussed among academics reverberated in the political sphere, which led to include the ideology of the “modernization of communal property” in the Constitution of 1993. Therefore, indigenous lands were considered imprescriptible, but the attributes of inalienability and non-seizure, as established by the 1979 Constitution, were eliminated. In the midst of the neoliberal context, Convention 169 of the International Labour Organization (ILO) was enforced in Peru in 1995, which opened up a horizon of hope for the recognition of indigenous lands.<sup>1</sup> However, legalizing indigenous ownership faced many obstacles, such as bureaucratic red tape, corruption, biases, and different conceptions of property and territory.<sup>2</sup>

Domestic legislation on native communities changed according to the market’s needs. By the end of 2000s, the attempt to reduce the legal requirements to dispose of communal lands caused a tremendous indigenous unrest in Bagua,<sup>3</sup> northern Peruvian Amazon, where 11 policemen and 5 indigenous people died, in addition to several injured and a trial that lasted several years. Afterwards, the state approved the Law of the Right of Consultation. Nonetheless, the trend towards the promotion of private investment and land deregulation continues to affect indigenous peoples. Approximately, one fourth of recognized native communities still lack land deeds.<sup>4</sup> In addition, the total number of hectares titled to the communities is misleading because only a meager part of their lands can be properly used, due to the extractive activities that take place in their lands or nearby.

<sup>1</sup> In a kind of reverse process, both jurisprudence and international law have tried to adapt Western legal property notions to embrace the characteristics of indigenous property. See Ricardo Ferrero Hernández, “Protección de la propiedad comunal indígena por la corte interamericana”, *Revista IIDH* 63 (2016) 65-104.

<sup>2</sup> Anthony Stocks, “Too Much for Too Few: Problems of Indigenous Land Rights in Latin America”, *Annual Review of Anthropology* 34, no. 1 (2005): 85-104.

<sup>3</sup> See W. De Jong and D. Humphreys, “A Failed Social Licence to Operate for the Neoliberal Modernization of Amazonian Resource Use: the Underlying Causes of the Bagua Tragedy of Peru”, *Forestry: An International Journal of Forest Research* 89, no. 5 (2016), 552-564. Also see: Patricia Urteaga, “La sentencia de Bagua y las densidades de la justicia”, in *La sentencia del caso Baguazo y sus aportes a la justicia intercultural* (Lima: Coordinadora Nacional de Derechos Humanos, 2017), 43-60.

<sup>4</sup> According to the *Dirección General de Saneamiento de la Propiedad Agraria y Catastro Rural* from the Ministry of Agriculture, by 2020 30% of the native communities recognized by the Peruvian state lacked title deeds.



This brief review has shown how legislation contributed to perpetuate the vulnerability of indigenous peoples while facilitating the commodification of land. Albeit differently, colonial and postcolonial laws and legal doctrines sought to strip indigenous peoples of their territory. In Peru, colonial and republican policies following economic booms transformed the relationship of indigenous people and their lands. The global demand for commodifying indigenous lands is crucial to understand the current predicament of indigenous peoples. Next, the economic dimension of the problem shall be described.

## 6. The economic dimension

One of the most dangerous threats to indigenous land lately is the global drive to commodify it. This material transformation usually implies subsuming diverse meanings<sup>1</sup> of land into a homogeneous concept that portrays land as a commodity.<sup>2</sup> The transformation of the land into a valuable resource and commodity configures a contemporary pattern of the “economy of appearances”<sup>3</sup> which may explain the phenomenon of “land rush”, as well as scenarios of social conflict. As a resource, land may be understood as a “provisional assemblage of heterogenous elements including material substances, technologies, discourses and practices”<sup>4</sup>.



<sup>1</sup> Li, “What is Land? Assembling a Resource for Global Investment”, *Transactions* 39 (2014): 589-602.

<sup>2</sup> See, Li, “What is Land?”, 89. See also: Urteaga and Segura, “Transforming Nature, Crafting Irrelevance: The Commodification of Marginal Land for Sugarcane and Cocoa Agroindustry in Peru”, in *Political Ecology of Industrial Crops*, ed. Abubakari Ahmed and Alexandros Gasparatos (London: Routledge, Taylor and Francis Group, 2021).

<sup>3</sup> Tsing, “Inside the Economy of Appearances”, 20.

<sup>4</sup> Li, “What is Land?”, 89, 589.

During the 1990s and 2000s the problem of the commodification of land for large-scale agriculture spread exponentially. As of 2000, 80 million hectares of land were acquired in developing countries for agribusiness alone.<sup>1</sup> In various regions of the world, agriculture for food and energy generation affected millions of hectares of land.<sup>2</sup> Along with Brazil, Argentina and Colombia, Peru is considered one of the countries with the highest availability of exploitable land, where land accumulation occurs mainly to produce fruits, vegetables, sugarcane, palm oil, cocoa, minerals and petroleum. Evidence on land grabbing in Latin America and Peru shows the national and international impacts of land grab on local populations.<sup>3</sup>

Main causes of land appropriation are colonization, food security, biofuel and agricultural production with high rates of return, extractive industries, political reforms for land acquisition, and speculation.<sup>4</sup> Six trends promote accumulation mechanisms through land investments:<sup>5</sup> the global anticipation of food insecurity, new forms of resource extraction for energy security, new imperatives and environmental tools, the establishment of large infrastructure and special economic zones, new financial instruments, and the rules, procedures and incentives that the international community provides. An important mechanism in this regard is the virtual economy, whose technologies streamline financial transactions. Certainly, land business is not always geared towards promoting agricultural or livestock development, but usually negotiating in the stock mar-

<sup>1</sup> HLPE, *Tenencia de la tierra e inversiones internacionales en agricultura. Un informe del Grupo de expertos de alto nivel sobre seguridad alimentaria y nutrición* (Rome: UN Food and Agriculture Organization, 2011).

<sup>2</sup> See: S. M., Borras, J. C. Franco, and C. Wang, "The Challenge of Global Governance of Land Grabbing: Changing International Agricultural Context and Competing Political Views and Strategies", *Globalizations* 10, no. 1 (2013): 161-179; Ben White, Saturnino M. Borras Jr., Ruth Hall, Ian Scoones and Wendy Wolford. "The New Enclosures: Critical Perspectives on Corporate Land Deals", *The Journal of Peasant Studies*, 39 no. 3-4 (2012): 619-647; J. Franco, L. Mehta, and G. J. Veldwisch, "The Global Politics of Water Grabbing", *Third World Quarterly* 34, no. 9 (2013): 1651-1675.

<sup>3</sup> See: Fernando Eguren, *Acaparamiento de tierras. Reflexiones a partir de estudios de casos* (Lima: Food and Agricultural Organization—FAO, 2011); and Juan Luis Dammert Bello, *Acaparamiento de tierras en la Amazonía Peruana: el caso de Tamshiyacu* (Lima: WCS, OXFAM, 2017).

<sup>4</sup> See: Lorenzo Cotula, *Addressing the Human Rights Impacts of 'Land Grabbing'* (Belgium, Directorate-General for External Policies. Policy Department. European Union, 2014).

<sup>5</sup> White, Borras, Hall, Scoones and Wolford, "The New Enclosures", 94.

kets.<sup>1</sup> According to Li,<sup>2</sup> a component of virtual/a-spatial spectacularity characterizes the promotion of transnational investments in land grabbing projects for production which consists of describing the investment as the best, the land resource as scarce, the need or opportunity for investment as urgent, and exorbitant profit margins. White, Borras, Hall, Scoones and Wolford call these propaganda discourses “crisis narratives”<sup>3</sup>. The World Bank publications used to project these types of investment features, although recently it has recommended land registration as a mechanism to prevent land accumulation. For the Bank, however, the problem is not the real inequality between vulnerable people and large land investors, but the lack of use of institutional mechanisms (the land registration system) to protect the vulnerable and prevent land evictions.<sup>4</sup>

While in many cases land grabbing takes place outside the legal framework, large land acquisitions generally require a cloak of legality. This implies that legal arguments for land transactions are produced, the characteristics of land purchase contracts are defined, and the nature of land transfers is established.<sup>5</sup> Yet, under this legal appearance may lie layers of corruption, inequalities, racism, violence and dispossession. An analysis of trade agreements for the acquisition of large expanses of land proved that they are very general documents which grant long-term rights, preferential rights over water, none or very little profit for the State, the promises of investment and /or jobs are very vague or randomly calculated, socio-environmental protections are usually unclear, local people are generally excluded from decision-making processes, negotiations are made under time pressure, transactions lack transparency, inequality is unacknowledged, and local or customary land rights are insecure.<sup>6</sup> All these

<sup>1</sup> HLPE, *Tenencia de la tierra*, 93; Tsing, “Inside the Economy of Appearances”, 20; Li, “What is Land?”, 89; Cotula, *Addressing the Human Rights Impacts*, 96. This being the case it is difficult to imagine how self-regulation proposed by the World Bank and some international actors could prevent the negative impacts of global land accumulation.

<sup>2</sup> See: Li, “What is Land?”, 89.

<sup>3</sup> White, Borras, Hall, Scoones and Wolford, “The New Enclosures”, 94.

<sup>4</sup> White, Borras, Hall, Scoones and Wolford, “The New Enclosures”, 94. See also: Lorenzo Cotula, *Land Deals in Africa: What is in the Contracts?* (London: International Institute for Environment and Development—IIED, 2011).

<sup>5</sup> Cotula, *Land Deals in Africa*, 101.

<sup>6</sup> Cotula, *Land Deals in Africa*, 101.

features are carefully crafted to make sure that the investment maintains its calculated profitability.

Since the 2000s, an aggressive agricultural policy in Peru, coupled with widespread corruption, has promoted land accumulation or “land grabbing”<sup>1</sup> dispossessing local farmers of their land usually for agroindustry investments. The global demand of land for agribusiness has also led to human rights violations.<sup>2</sup> In the mid-1990s, several domestic and foreign companies acquired thousands of hectares of land on the Peruvian coast and Amazon to develop biofuels. These new owners transformed the land and water resources for large production, affecting small farmers, peasant communities and pastoralists.

Between 2004 and 2008 oil concessions covered three-quarters of the Amazon basin mainly affecting indigenous territories, water sources, and wetlands.<sup>3</sup> OXFAM (2014: 20) warned that “in the rainforest of eastern and northeastern Peru, there is substantial overlap between land ceded for usufruct to oil and gas companies, and lands reserved for native communities. Overlap occurs predominantly between oil exploration concessions and communal land, although drilling itself also overlaps with native land”. Likewise, a significant percentage of hydrocarbon concessions overlap in protected natural areas and reserves for indigenous peoples in voluntary isolation has been identified.<sup>4</sup> Amazonian indigenous peoples face contamination of water sources and soils due to unsustainable oil activity, whose infrastructure remains obsolete despite the sanctions imposed for constant oil spills. Similarly, many water sources can no longer be used due to contamination with hydrocarbons and heavy metals.<sup>5</sup> As a consequence, the actual extension of land that indigenous peoples can use without restrictions represents a small percentage of their titled land. Despite the fact that they have contested the brunt of global land commodification,

<sup>1</sup> Li (2014) points out that this phenomenon should be called ‘land rush’ instead of ‘land grab’, because in this way the intensity that differentiates current land rush phenomena from past interventions is emphasized.

<sup>2</sup> Lorenzo Cotula, “Property in a Shrinking Planet: Fault Lines in International Human Rights and Investment Law”, *International Journal of Law in Context*, 11 (2015): 113-134.

<sup>3</sup> OXFAM, *Geografías de conflicto. Superposiciones de mapas de usos de la tierra para industrias extractivas y agricultura, en Ghana y en el Perú* (Boston: Oxfam, 2014).

<sup>4</sup> OXFAM, *Geografías de conflicto*, 106.

<sup>5</sup> Urteaga, Segura and Sánchez, *Derecho humano al agua*, 14.

they have not been able to put a halt on it. In these contexts, clearly “the needs and interests of the extractive economy have been prioritized over the interests of other livelihoods”.<sup>1</sup> The economic imperatives for land accumulation have imposed detrimental effects on indigenous peoples. The narrative of progress under this international trend has mostly contributed to worsen indigenous peoples’ vulnerable position in the global scenario.

## 7. Conclusions

In this article, a multidisciplinary and comparative perspectives were crucial to the analysis of territory and property as it allowed to understand space as an assemblage of different cultural, social, political and economic elements constantly in flux. The multiple dimensions of territory and property were considered to explain similar processes in different regions of the world. In order to understand the significance of territory, the transcendent and culturally specific meaning of territory for some indigenous peoples was described. Evidence showed that during colonization, local meanings of territory and property were gradually transformed along with the imposition of a particular landownership system that served for dispossessing the original inhabitants. In these processes, indigenous peoples were forced to adopt a new conception of territory to prevent encroachments. From a shared and opened territory, indigenous people saw themselves compelled to assume a conception that enclosed and delimited the land. Here, the role of legal discourses in determining the imposition of dominant legal systems on conquered lands was crucial. The commonalities found in legal discourses that undergirded colonial land property regimes allowed the comprehension of similar phenomena in the Andean region, thus revealing the centrality of colonial policies to determine the current predicament of indigenous peoples. Finally, I went over the international economic processes that have since the 1990s led to increasing land accumulation while deepening social inequities. Understanding the complexity of the challenges affecting indigenous peoples without a kaleidoscopic reflection of territory and property would be fragmented at best.

<sup>1</sup> OXFAM, *Geografías de conflicto*, 106, 24.

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*Astronaut photograph, Agriculture Fields in Central Poland, 2016 (bottom right, the Jeziorsko Nature Reserve) <https://earthobservatory.nasa.gov/images/146593/agriculture-fields-in-central-poland>.*