HISTORICAL PERSPECTIVES
on Property and Land Law

Edited by
Elisabetta Fiocchi Malaspina
and Simona Tarozzi

Historical Perspectives on Property and Land Law

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Historical Perspectives on Property and Land Law

An Interdisciplinary Dialogue on Methods and Research Approaches

Edited by
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INTRODUCTION

This volume is the result of the interdisciplinary workshop entitled *Historical Perspectives on Property and Land Law – An interdisciplinary dialogue on methods and research approaches* that took place at the University of Zurich on 11th and 12th April 2019.[1] The dialogue between legal historians, historians, and scholars of Roman and comparative law was established around central themes: property law, transfer and registration of property. Topics that, in every time and place, have played a significant role in the organisation of society, in establishing legal relations, but which have also caused discussions and conflicts.

The interdisciplinary approach enriches scientific research, giving several impulses to academic disciplines, but it is also relevant in searching for different methods and perspectives, which contribute to the examination of legal historical implications in current problems. The era of globalisation has created global interconnections, global circulation of ideas, models and institutions. New technologies enabled by digitalisation, for example electronic registries for property, allow historians, legal historians, and scholars of Roman and comparative law to formulate or reformulate specific legal questions, in order to understand how the past shapes and determines our present.

This volume aims to investigate how legal property regimes, land law and land registration systems are intertwined with economic, social, and political spheres; to analyse the social functions and legal and political implications of various land registration systems in different contexts and how, for example, they operated in a colonial framework; to scrutinise the relations between politics and property, as well as the transformation of the property concept, in its meaning and function.

In this perspective the concept of property (*dominium*) and possession (*possessio*) in Roman law served as starting point for the interdisciplinary discussion in the workshop. Worth mentioning are the difficulties which occurred in the use of modern language: especially with regard to the translation of Latin texts, difficulties arose with the ambiguity of certain definitions.

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1 We are very grateful to Prof. José Luis Alonso, Prof. Ruth Arnet and Prof. Gisella Bassanelli for their partipation, encouragement and for their fruitful comments during the workshop. Special thanks go to Prof. Gisella Bassanelli for having supported us in pursuing this interdisciplinary project from its beginning.

This is particularly evident in translating Latin expressions into the English language, where literal or respective translation appears to be challenging when referring to concepts of Roman law in the legal language of common law. Moreover, Roman lawyers did not give any definition of *dominium* and *possession*, instead, their case-by-case method privileged rather the examination of concrete problems over theoretical descriptions. This could explain the peculiar lack of clarity in using no Latin words to express Roman law concepts.

Basically, *dominium* diverges from *possessio*, because the latter is not a right, but just a situation. This simple difference is particularly significant in the ways of transferring things. In order to hold a thing, the Roman order required just the condition of using it, without any damage to someone else's right (*bona fides*), whereas to acquire a right over a thing, the same order required the use of prescribed legal ways and the application of specified rules (i.e. *mancipatio* in the case of land situated in Italy and *traditio* in other cases of land purchase). If one of these conditions was not fulfilled, the right of property had not been transferred and one subject had the right, but he did not hold the thing, while another did not have the right, but held the thing.

In late antiquity, ways of transferring things became simpler and preferred solutions granting a right but not *dominium* (i.e. *emphyteusis*), whereas more detailed rules were imposed in the land register system. In the economy of the Roman empire, agricultural lands provided the vast bulk of the revenue of the State. The management of rents, which formed the endowments of the cities and the churches and the incomes of the rentier classes (the senatorial and curial orders), implied careful and scrupulous attention to the land registration system.

The edicts issued by *praefecti praetorio Orientis* during the 5th – 6th century are detailed laws about transfer of immovable property. The chapter by Silvia Schiavo considers five of these edicts and shows how fiscal necessities could push the discipline of land transfer towards a strong request for "solemnity". A combination between ancient and new elements favoured the emergence of a precise system of registration of property transfers. Some of these elements can be recognised in modern legislations, as, for example, in laws enacted in Italy during the 19th century (as the chapter of Alan Sandonà shows).

Paola Bianchi examines fourth-century Egypt, where a land registration system was already known in the Ptolemaic age. She points out in particular

the effects of illegal behaviours, tax fraud and the abandoning of agricultural lands (*agri deserti*) on the late antiquity economy. Bianchi aims to demonstrate the imperial response in the face of evasion, inflation and crisis. This response encouraged the interaction between the Romans and the Goths. Like the Romans, the Goths also dealt with illegal behaviour regarding *patrocinium* in their *Edictum Theodorici*.

Through a comparative perspective the contributors show how some Roman rules are still present in several modern legislations of the long 19th century. Simona Tarozzi aims to point out some similarities between Roman laws of the 4th century regarding the long-standing issue of abandoned lands (*agri deserti*) and Chilean laws of 1866 and 1874 relating to the colonisation of Mapuche's territory.

The Chilean case is examined from a different perspective by Agustin Parise, who focuses his investigation on the Chilean agrarian reform that was enacted during the 20th century. Parise analises the origins of the paradigm of social function of property on both sides of the Atlantic starting from the end of the 19th century. A decisive moment for Chilean legal history was the progressive change of the concept of property from a liberal to a social one, and its implication on legislation. The conceptualisation of the agrarian reform in Chile is examined through its reception in specific law, illustrating how the Chilean normative framework reflects changes in the property paradigm.

Pamela Alejandra Cacciavillani points out that Roman law served as a fundamental source for legislating on the acquisition of real rights in Argentina during the 19th century. From the distinctive features of the study and teaching of Roman law in the Latin American context, her analysis investigates the role of Argentinian Dalmasio Vélez Sarsfield, who was the promoter and creator of the Argentinian civil code. Cacciavillani underlines how Roman law was not only received but also interpreted, selected and adapted for the regulation of land registration, which distanced itself from the consensualist system of property transfer.

A comparative perspective on the modern concepts of land in Latin America is offered by Silvia Bagni's chapter. She explores how the indigenous Andean cosmovision of land and its relationship with nature has recently influenced the national legal systems of some Latin American states. Bagni takes as case studies the constitutions of Ecuador and Bolivia, as well as important judgements of the Constitutional and Supreme Court of Colombia, focusing also on the concept of nature as a legal entity.

Alan Sandonà traces the history of the "*trascrizione*" system in the Kingdom of Italy from the end of the 19th century to the promulgation of the Italian civil code of 1942. His chapter examines how the Italian government, jurists and politicians discussed the attempts to reform the land registration system, proposing its change. The Italian case proves how the historical events that occurred at the end of World War I not only changed the territorial sovereignty of the Italian kingdom, but also had important repercussions and implications on the discussion concerning the reforms of the Italian land register.

On the colonial context, Mariana Dias Paes focused her attention on judicial processes conserved at the National Archive of Angola, concerning a conflict over property rights and possession. After the abolishment of the slave trade and the independence of Brasil, Portugal moved its attention to its African territories, with the aim of establishing a new form of colonialism. The exploitation of land, as well as the establishment of a land registration system, were part of the Portuguese colonial discourse. Dias Paes shows how the introduction of a land registration system in a colonial context operated, changing the dynamics of certain social relations and impacting land conflicts.

Elisabetta Fiocchi Malaspina investigates the mechanisms of land law and land registration systems in African colonial territories between the 19th and 20th centuries, focusing on the relationships between global, international and domestic laws in the imperial expansion and colonial periods. Her chapter examines legal mechanisms of colonial expansion and outlines the discourses between the colonial powers and their implications on the legal concepts of land ownership both in the colonial and the European context.

Addressing questions concerning land law necessarily involves aspects of the intertwined relations between property and politics. In this perspective, the case study of Charles Bartlett on the Kingdom of Sardinia and its politics concerning real property between 1720 and 1848 analyses the political-economic aspects of property and land law. The author investigates different periods throughout which the kingdom regulated property and its administration. On the one hand, the history of corporations offers the possibility of depicting a complete image of the politisation of real property regimes, specifically during the end of the 18th century; on the other hand, the chapter demonstrates that although political forms could be easily changed, this did not occur for real property transfer and its administration.

This volume aims to initiate an open dialogue, a sort of platform, through which the variety and complexity of specific legal phenomena emerge. Ju-

rists, institutions, goverments and states are interwined with each other, in order to create different legal concepts, rules, legislations, edicts, in different times and places, re-defining national, international and colonial contexts.

This dialogue is interdisciplinary and multicultural. The authors come from various countries and their different backgrounds show multifaceted approaches to the same subject, thereby enhancing the perspective of the research. In our own times, the roots of our past are regarded as cumbersome or are sometimes disregarded, but with this interdisciplinary project different research perspectives are presented, through which the past dialogues with the present, in order to understand legal mechanisms today and also to plan for the future.

Elisabetta Fiocchi Malaspina Simona Tarozzi

LAND GRANT IN LATE ANTIQUITY: A PATTERN FOR MODERN COLONIAL REGULATIONS?

Simona Tarozzi

1. Introduction

Although modern colonialism is actually a contingent phenomenon whose causes are determined by different factors and there is no doubt that the circumstances which arose the new colonialism in the 19th were not the same of the roman colonate, it is undoubted that the modern colonialism reflects some roman concepts and in part resumes the meaning of the terms '*colonus*' as a tenant farmer and sharecropper, who paid back landowners with a portion of their crops, in exchange for use of their farmlands. In the literature of the ending of the 19th and beginning of the 20th century, the '*colonus*' was contracted to work for a fixed time and sometimes on imperial lands. He could have never obtained the ownership of the cultivated lot. According to Savigny,[1] the colonate could have three origins: a man could become a *colonus* by birth, by contract or by spending a long number of years as a tenant on the same land. He also added punishment as another possibility. One three sources of colonate appearance seen by Fustel de Coulange[2] was that free colonists (*coloni*) who contracted to work for five years were reduced by debt and overdue rent to serfs bound to the land and its owner. Saumagne,[3] in his study dated 1937, considered that two types of *coloni* existed at the time of the Principate: *coloni* and *inquilini*. This idea was primarily based on the inscription from Henchir Metich in North Africa, that shows that both, a) *coloni* who had *villae dominicae* and who were *in fundo* and b) those who were *ultra fundo, inquilini* in Saumagne's opinion worked on lands belonging to the emperor. Both terms were retained in the later Roman empire: the *colonus* of the earlier period became the *adscripticius* or *tributarius* after Diocletian.[4]

1 Savigny 1850, p. 1 ff.

2 Fustel de Coulanges 1885, p. 35 ff.

3 Saumagne, 1937, p. 487 ff.

4 The problem of the late Roman colonate has been debated since the seventeenth century, but this topic does not interest my paper's object. In a few words, the question is when, how and why the *colonus* of the Principate, a voluntary tenant of land, free to move when his lease expired, became the *colonus* of the later empire, a serf tied to the land by

Saumagne designated the first as *colonus*, while the former *inquilinus* took on the meaning originally held by the *colonus* and is also given the designation *colonus*.

The use of symbols and terms which refer to the Roman empire and other ancient societies is typical for modern empires. For its territorial expansion and its approximately twelve centuries of existence, the Roman empire was a great model from whom it was possible to draw inspiration.

The Chilean experience is especially interesting because Andres Bello, mainly responsible for the Chilean Civil Code, promulgated in 1855, was sent to London in 1810 (with Simón Bolívar) on a political mission for the Venezuelan revolutionary junta and he elected to stay there for 19 years, acting as secretary to the legations of Chile and Colombia and spending his free time in study, teaching, and journalism.

The Chilean Civil Code is of clear neoclassic inspiration and had the same influence throughout South America as that of Code Napoléon had in Europe. Each institution is introduced through an axiom and articles or sections cite examples or consequences of the axiom with a didactic purpose. The indisputable main source of the Civil Code is the *Siete Partidas* of King Alfonso X, perhaps the pinnacle of Spanish *ius commune* and regarding the law of obligations and the law of things, another main source of inspiration for the Chilean Code has been the Napoleonic Code. But, for example, in relating the acquisition of property, the code makes a clear distinction between the *title*

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hereditary bond. The position of a *colonus* in the early third century is clearly defined by the lawyers cited in the Digest. He held a lease, normally for five years, which by the tacit consent of both parties became on expiry an annual tenancy. A *colonus* might, if he were, as he often was, in arrears with his rent, find practical difficulty in leaving; for in such circumstances his landlord would have no hesitation in distraining on his stock. The first clear evidence that *coloni* - or at any rate some *coloni* - were tied to their farms and to their landlords is a law of Constantine (*CTh.* 5.17.1, 332 A.D.) in which any person with whom a *colonus* belonging to some other person is found shall not only restore him to his place of origin but be liable for his poll tax for the period. It will furthermore be proper that *coloni* themselves who plan flight should be put in irons like slave, so that they may be compelled by a servile penalty to perform the duties appropriate to them as free men. The first explicit reference to the hereditary character of the bond is in a Emperor Valens'law of 365 A.D. (*CTh.* 5.19.1, which orders that slaves and *coloni* and their son and grandsons who had deserted imperial estates to join the army or the civil service should be recalled. Worth mentioning works on colonate of A.J.B Sirks, most recent are: Sirks 2008, p. 120-143; Sirks 2012, p. 133 – 143; Sirks 2017 p. 235-243.

and the actual *acquisition* of property, similarly to the Roman Law and the German BGB (a strong by Roman Law influenced modern code) and we can presume, for his studies in London and his knowledge of Latin, he could have direct known these sources, not just through the *Siete Partidas* or *Code Napoléon*. He wrote furthermore a *Manual de derecho romano*.

After the independence from the Spanish Empire, the newborn Republic of Chile should have faced up the question of southern land, regarded by the Government as never been tilled, even if they are populated by native people, the Mapuche This consideration brought the Government to take possession of Mapuche's lands and to give them to European and North American settlers for improving soil's conditions and the country's growth. In the Roman Empire, we have a similar situation in the phenomenon of *agri deserti*, abandoned lands by owners a cause of their infertility or tax pressure.

The means used to solve the problems by Roman emperors are the same used by the Chilean Government: my research would have the aim of comparing the land grant system of both experiences and in the following pages it will be given a brief description of the results.

2. A lexical approach

Most of roman constitutions on (public) land grant were promulgated between III and IV century A.D., some of them were adopted by Theodosius II in his code and after by Justinian.

Unfortunately, the manuscript tradition (MS *Codex Taurinensis II a 2*) of the book of Theodosian Code, the fifth, particularly focused on these topics, shows so many lacunae that let us impossible to know how the matter was exactly regulated.

This is particularly clear in the words used by imperial chancellery to define the different typologies of land grant: what according to Levy[5] *ius emphiteuticum* would be the long term lease on estates of the emperors privy pursue (*res patrimoniales*);[6] *ius perpetuum* would be the permanent lease on possessions of the crown as such (*res privatae*)[7] and *ius privatum* would comprehend *dominium* if the grantee, as a rule, owed the canon and he might

5 Levy 1951, p.43 ff.

6 Patrimonial estates of the Emperor that were held under the regular terms of rental for such estates.

7 Personal estates of the Emperor.

also be subjected to a compulsory "imposition" of unproductive land (*epibolé*) for which he had to contribute a proportional amount of the tax due from it (*perequatio*). As an alternative an *ius privatum* the sources show the expression *ius privatum salvo canone*.[8] On the contrary, Jones[9] believes they are no differences and these terms are interchangeable and concerning the same reality, especially after Constantine's reform which brought together *res patrimoniales* and *res privatae* and created a new position to manage them, the *comes rerum privatarum*.

It is a fact that these lexical differences do not always correspond to substantial variations, sometimes these *iura* were mixed up each other or were joint together. As, for example, in a constitution of Emperor Theodosius I promulgated on 393 (*CTh*. 5.14.33),[10] which assign emphyteutic land estates in perpetuity to possessors, nullifying differences between *ius emphiteuticum* and *ius perpetuum*, but in this case, it was an exceptional situation because the law regards unfertile lands, abandoned by their possessors (*agri deserti*). In the above-mentioned constitution, Theodosius I obliges, or rather tries to oblige, grantees of fertile lands to accept unfertile ones too, with tax charges, ordering to praetorian prefect, Rufinus, to establish for the judges, their offer staffs and the defenders a penalty if they do not "come to the aid of the abandoned and inferior lands by combining them with profitable lands".

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8 The conveyance of the land in private ownership though subject to a permanent canon payable to the emperor. In exceptionable cases, we have a *ius privatum dempto canone*, a conveyance even without such qualification, but ever without ownership (never implied ownership).

9 Jones 1964, p. 812 ff.

10 *Codex Theodosianus* 1904:

CTh. 5.14.33 [Translation by Pharr 1952): The same Augustuses (Valentinian, Theodosius, and Arcadius) to Rufinus, Pretorian Prefect. The emphyteutic right, by which landed estates belonging to Our patrimonial domain or the privy purse are assigned to possessors in perpetuity, is maintained, not only by Our orders but also by those of Our predecessors, as so indefeasible that once an estate has been delivered, it can never be occupied by Us or by anyone else while the others are in possession. 1. But since it has come about through the arrogance of wicked men that all the best lands are serving their greed for gain and profits and such inferior fields in the province are left as none of the aforesaid men deign to hold, Your Sublime Magnificence shall establish for the judges, their office staffs, and the defenders the following penalty, namely, that unless they come to the aid of the abandoned and inferior lands by combining them with profitable lands, they shall know that they must sustain the fine and penalty which has been promulgated. (30 July 393)]

As regards Chilean Law, according to art. 589, third paragraph,[11] of Chilean Civil Code[12] are public goods (*bienes fiscales* o *del Estado*) those goods that do not belong to anyone, but State. The art. 590[13] decrees that estates, which are placed within the country's border and do not belong to anyone, belong to State.

In Chilean laws of 19th-century ancestral territories of different native people are not considered in the same way, depending on the different grades of resistance and consequently on different means used to get control over these lands. Arauncanía (south of Bío Bío and north of Valdivia province) was distinguished from the rest of southern territories, which arrive in the austral region (South Pole); the latter was considered abandoned and consequently belonged to State. The question of Araucania was more intricate: the Spanish did not conquer this region, they did not go over today's metropolitan region, Santiago de Chile and its surroundings. Strong resistance of the Mapuche people and lack of real interest in southern Chile, a territory without noble metals, were causes of this decision.

For resolving the question with the Mapuche people, the Chilean Government tried to acquire their lands in Araucania, by sale or by proof that these lands did not belong to anyone. The Mapuche people should have proved to be owners, by showing property deeds, which should be recorded in Land Office (*Conservador de Bienes Raíces*). The lands, which belonged to native people, are called *tierras indigenas*, the others, belonged to State, are called *tierras fiscales*.

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11 *Código Civil de la Republica de Chile* 1856:

art. 589, 3: *Los bienes nacionales cuyo uso no pertenece generalmente a los habitantes, se llaman bienes del Estado bienes fiscales*

12 The *Código Civil de la Republica de Chile* is the work of Venezuelan-born Chilean Andrès Bello. In 1829 he accepted a post in the Chilean Ministry of Foreign Affairs, settled in Santiago, and took a prominent part in the intellectual and political life of the city. He was named senator of his adopted country—he eventually became a Chilean citizen—and founded the University of Chile (1843), of which he was rector until his death. The Chilean Civil Code was promulgated in 1855 and had much the same influence throughout South America as the Code Napoléon in Europe. Among its sources of inspiration have been considered Roman Law and BGB (*Bürgerliches Gesetzbuch*, the German Civil Code, which has been strongly influenced by Roman Law too).

13 *Código Civil de la Republica de Chile* 1856:

art. 590: *Son bienes del Estado todas las tierras que, estando situadas dentro de los limites territoriales, carecen de otro dueño.*

For both types of land, the Chilean Government, taking different measures, carried out a policy aimed whether at integrating native people in Chilean society or at providing incentives for cultivation.

For the *tierras indigenas*, two years after the establishment of first government assembly, Government and Senate passed regulations[14] for helping the Mapuche people to go out their indigence conditions and for promoting their integration with Spanish origin people. Native people could live in towns, which were specially built for them, where a house with a plot of land was assigned to them. *Tierras indigenas*, those native people left to live in town, became *tierras fiscales* and were assigned through a sale by auction (*remate*); they were mortgaged to guarantee funds for native people's civilization (this civilization was operated especially by Church). In 1819 native people, called by the Spanish, *Naturales*, obtained Chilean citizenship.

3. Land Grant system in Rome and Chile:[15]comparing methods.

The figure of modern colon, who was contracted in order to stay with his family in a lot for a fixed time and to cultivate it, goes back to Roman experience, but it is not so evident that the sale by auction recalls the Roman law too, especially about the question of '*agri deserti*'.[16]

It is generally agreed that there was a decline in agriculture in the later Roman empire and on its causes debate has been inconclusive, whether it was due to the general exhaustion of the soil, to a shortage of agricultural manpower, or partly to German invasion and depredation, but predominantly to over-taxation.

"That the area of land under cultivation shrank considerably cannot be doubted. Unfertile and abandoned lands (*agri deserti*) are a constant theme of imperial legislation from before Diocletian's time to that of Justinian. The problem first appears in the late second century, when the emperor Pertinax issued an edict, inviting all and sundry to cultivate deserted land, whether private or imperial property, in Italy and the provinces, promising them ten years 'immunity' from taxes and full ownership. In the late third century, Au-

14 Boletín 1813, p. 253-258.

15 Essential bibliography: Encina 1949; Ibañez Santa Maria 2013. About the land reform of the 20th century in Chile see the contribution of AugustÍn Parise in this volume.

16 Bianchi 2018, pp. 17-67. See also the contribution of Paola Bianchi and Silvia Schiavo in this volume

relian decreed that the councils of the cities were to be responsible for the taxes of deserted lands in their territories. Constantine renewed this law, but added that, where the councils were not equal to the burden, the tax obligations of abandoned land should be distributed to lands and territories, immunity for three years being granted."[17] Furthermore, lands are abandoned because depopulated by smallpox, Black Death and famine and during the Principate, Marcus Aurelius tried to repopulate the territory with a lot assignment to various German tribes. The pressure at the boundaries of Empire of these people and the persistent problem of *agri deserti* brought next Emperors to assign in emphyteusis these abandoned lands to Germans under certain conditions. The chief tribes should have guaranteed to give back military support and cultivate the land without tax payment.

Unfortunately, the land assignment system to German people, entirely demanded to local governors and army, was not ever so efficient and the assignment did not go out as supposed.

Therefore, as above said, deserted lands could be allocated by authority, but not ever this procedure was practicable and when it was not possible to force the assignment of these unfertile lands, they were sold by auction.

Principal rules for a sale by auction (*licitatio*) provided for assignment of land to whom offered the best bid and best guarantees of solvency in the rent[18] payment for almost three years (*CTh.* 4.13.1[19] by Constantine and *CTh.*

17 Jones 1964, p. 812.

18 Jones 1964, p. 820: "The rent depended obviously on the quality of the land and its agricultural use, as olive groves, vineyards, arable or pasture. In Syria, there was an elaborate system of classification into olives, 'old' and 'mountain', vineyard, three qualities of arable and pasture. The fiscal unity, the *iugum*, was made up of varying areas of each. Syria seems, however, to have been exceptional. In Africa, for example, the system was even rougher and ready, the land being assessed by the *centuria* of 200 *iugera*, apparently without regard to use or quality. In Syria, therefore, the tax would, in so far as the land was correctly classified, vary with the rental value, while in Africa all land would pay the same tax whether it produced a high or low rent. This may partly explain why the proportion of deserted land was so much higher in Africa than in Syria."

19 *Codex Theodosianus* 1904:

CTh. 4.13.1 [Translation by Pharr 1952: Emperor Constantine Augustus to Junius Rufus, Governor of Aemilia. The right to collect imposts shall remain in the possession of the person who was the highest bidder. Thus the contract of letting shall be concluded at the end of a period of not less than three years, and in no way shall the time granted for the collection of imposts be interrupted. When that time has passed, the rights of bidding and of obtaining the contract shall be renewed, and similarly, the concession must be let

4.13.4[20] by Constance). By a law of Valentinian immunity for three years was granted to who started voluntary tilling deserted land (*CTh*. 5.11.8[21]). To favorize and support people who would have voluntarily cultivated abandoned parcels, by law they could immediately get a property right on these because here the grantees were found of trying to fertilize them. In this case, these lands belonged to a private citizen, but it is not so significative if abandoned lands were private and no public, because it there was, however, a public interest that this area was finally cultivated for increasing and improving land productivity and then to obtain fixed income to imperial finances. According to laws, the new farmer obtained on this land *ius privatum* (that means, according to Levy, that he had title of private ownership, but subject to a permanent canon payable to the emperor), after the landlord did not have done anything for a reasonable period of time of two years and past time the landlord could take legal steps within two months (six in the Code of Justinian) against this assignment: he could pursue his title through an *action in rem*. According to *CTh*. 13.11.16[22], part of a law of Honorius, the landlord should have

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to others. If it should appear that any collector of imposts has exacted anything more from the provincials than the amount established by statute, he shall be subjected to capital punishment. ... (July 1, 321)]

20 *Codex Theodosianus* 1904:

CTh. 4.13.4 [Translation by Pharr 1952: Emperor Constantius Augustus to Proclianus, Proconsul of Africa. The payment of the impost contains the utmost utility and it must be guarded with such great diligence that it may be increased by frequent bidding. 1. Therefore Your Gravity shall order that the increases over the old payments of the accounts of the imposts shall be preserved for the resources of the fisc ... (Constantinople, January 19(18), 360)]

21 *Codex Theodosianus* 1904:

CTh. 5.11.8 [Translation by Pharr 1952: The same Augustuses (Valentinian and Valens) to Rufinus, Praetorian Prefect. If any persons should choose to take possession of parcels of deserted land, they shall receive an exemption for three years. 1. But if persons who have obtained some of the deserted fields under a definite tax declaration should declare a smaller amount than the reckoning of such detained, up to three years from the day of issuance of this law, in that kind of possession only which they have voluntarily offered to assume. But after this time has elapsed, they shall know that they will be compelled to pay the entire land tax. 2. Therefore, if any person should judge this to be to his disadvantage, he shall immediately return the landholding, the future burdens of which he declines to assume ... (Milan, August 6, 365)]

22 *Codex Theodosianus* 1904:

CTh. 13.11.16 [Translation by Phar 1952r: The same Augustuses (Honorius and Theo-

supplied to *comes primis ordinis* the necessary documents which proved his title and, if his application was accepted, expenses for improvements should be refunded to a new farmer. This favour shows its maximum effects in a constitution by Theodose I of 24 September 386 (*CTh.* 5.11.11[23]) according to that if owners should have not come back on owns lands within May after the issue of the edict, the free new farmer would have obtained on these lands *ius dominii et perpetuitate* with remission of not paid canons immediately, which means that landowners did not have possibilities to claim against new farmers.

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dosius) to Sebastius, Count of the First Order. The surreptitious filing of partitions shall be barred, and a landholding shall remain firm in the possession of that man to whom it has been established once for all that it was delivered by tax equalizer. We do not allow the fisc to demand from the new master delinquent taxes for time that has already passed, so that one man may not begin to undergo an expense due to the fault of another. If any private citizen, indeed, should affirm either that a landholding is obligated to him which has remained thus far abandoned, or should prove that it is rightfully due him under any title, he must present his allegations before Your Respectability without delay, either through himself or through some other person ordained by law. Thus, if reasons of equity should persuade and the landholding should be transferred to the petitioner, the person who received it from the tax equalizer shall be relieved by the recovery of the expenses that were incurred in improving the estate. But in order that ownership once established shall not be disturbed by specious litigations, We decree that a space of two month must be observed, within which time, if any man should suppose that the property belongs to him by provable reason, he shall institute due action. But if the prescribed time should pass and should remain silent, it is Our will that no suit at all shall be begun for recovery. If any person at the time at which the tax equalizer assigns a landed estate to someone else should not suppose that suit should be brought about his own right, either by himself or by his men, he must, after the statutory period of two months has elapsed, forever hold his peace. ... (Ravenna, March 14, 417)]

23 *Codex Theodosianus* 1904:

CTh. 5.11.11 [Translation by Pharr 1952. ... which have been extended for a long time and are now almost without debtors, the debts shall be remitted. However, the following regulation shall be observed, namely, that first the owners shall be summoned by longer periods of time and very frequent edicts, in order that because of the hope of impunity they may be recalled more easily to their ancestral lares and their own dwellings. Then, finally, if they should not return before the month of May, which is sufficient time for those persons who are at a distance and too long a time for those who wish to return, any person who voluntarily offers himself shall not be obligated for the past burden, but, for the future he shall pay the ground rent of the fixed taxes in kind, according to his portion of such landholding; and he shall be secure in the right of ownership in perpetuity. ...(Constantinople, September 24, 386)]

In the next centuries, methods of achieving this aim remained the same. The deserted lands might be granted or sold or leased on favourable terms,[24] including a firm title and temporary immunity. They might be compulsorily allocated to individual landlords, who made what they could out of them but were responsible for the full tax.[25]

To guarantee stability in southern territories Chilean Government granted *tierras fiscales* to Chileans, at first through permissions of occupation and exploitation (*permisos de ocupación omde explotación*); in a few cases, the generals gave plots of land to whom had helped the soldier, otherwise, the Government gave lands to whom will occupy borderlands.

The decree of 10th June 1823[26] was the first regulation to order the sale by auction of *tierras fiscales* and was carried out by decree of 28th June 1830. According to this, before the auction, the province intendant, together with the land surveyor, had the task of finding out if native people lived still here, then to surveying and to taxing lands left by native people (consequently belonged to State). Each lot could not exceed ten hectares and the sale by auction should be promoted everywhere, in provinces, towns, and *villas* (small country towns). The lands remained in native people's perpetual ownership if they were legitimate owners. These sales by auction were not successful because of the native people's assaults (they were not dominated) and land-scarce size, which aroused any commercial interest.

Afterwards was issued the Law of 4th December 1866[27] "*Fundación de poblaciones en el territorio de los indígenas*" (Foundation new villages in the territory of native people). It stated that the Chilean Government could buy

24 In the fourth century the government used private lands deserted by their owners to provide allotments for veterans, and in A.D. 368 Valentinian gave a general license to veterans to cultivate wastelands, forbidding the owners to appear at harvest time and claim *agraticum*.

25 They issued laws that required the landlord to pay anyway tax on deserted lands [*CJ*. 11.59(58).2 (= *CTh*. 11.1.4 *De annona et tributis*), A.D. 337; *CJ*. 11.59(58).12 (= *CTh*. 11.1.3), A.D. 412 for African landlords]; or compelled landlords to manage fertile lands together with those unfruitful [*CJ*. 11.59(58).9 (= *CTh*. 5.14.34), A.D. 394]. Sometimes it was given a fiscal immunity [*CJ*. 11.59(58)10 (= *CTh*. 13.11.9) A.D. 398] or the loss of fertile lands was inflicted [*CJ*. 11.59(58).5 *sine data*, *CJ*. 11.59(58).6 (= *CTh*. 10.3.4) A.D. 383)].

26 In 1813 the same regulations, which decreed the foundation of towns for the Mapuche people, established a sale by auction for lands abandoned, but they did not take place because of *Reconquista Española*.

27 Boletin 1866, p. 426 - 430.

lands by native people or by private citizens to whom the Mapuche people had sold them before. Or it took ancestral lands when native people did not show property deeds and in this case, the State helped them, with economic support, to go to live in town. Lands, purchased by the Government or left by native people, were lot sold by auction. The best offer price could be extended in fifty years at 2% annual interest. One part of these lots should be set aside for the Chilean or foreign colonies settlement. Eight years after, this law was confirmed by the Law "*Enajenacion de terrenos situados en territorio araucano*" (4th August 1874[28]) (Transfer of public lands located in the Araucanía region), which furthermore regulated transfers of native lands, acquired by private citizens. It was strictly forbidden purchased lands which belonged to the Mapuche people's territory and these lots were confiscated and put out for sale by auction. In the presence of deeds legally recorded, owners could be refunded for expenses and could obtain the equivalent of the bid value. Through sale by auction, Chilean Government allowed private citizens or foreigner to establish a settlement.

At the beginning of the 19th century, the Government of Chile made laws to sponsor Chilean and foreign settlements, but first attempts were unsuccessful.[29] In 1845 was issued the Law of 18th November "*Colonias de naturales I estranjeros*" (Settlement of Chilean and Foreigners) which established assignments of lots to Chilean or foreign families. Detailed rules on settlement were regulated afterwards by the laws as mentioned above of 1866 and 1874.

According to art. 11 of the law of 4th August 1874, the Government drew up contracts with individuals or companies, charging them with the selection of families from Europe and North America for their transfer to Chile. The private citizens, who founded a new settlement, and each family, who came from Europe or the United States of America, obtained a lot; it could be extended until 150 hectares in plain and the double in mountain, and, decreed by the President of Chile Republic, to each son or family member older as ten years was assigned more a half of lot and to each one younger as four a quarter of lot.

For the High Decree of 10th October 1882 an Immigration Office (*Agencia General de Inmigración*) was set up in Paris (till 1888 Francisco de Borja

28 Boletin 1874, pp. 82-87

29 Earlier attempts were unsuccessful. On 10th April 1824, because of O'Higgins abdication, was issued a law which gave guarantees and exemptions either to colons who would install in Chile industrial production or to colons who would devote themselves to agriculture.

Echeverría was at the head of the office). According to the next Immigration Regulation of 24 June 1905, two agencies were set up in Genoa and in Hamburg, the most important harbours for boarding to (South) America.

The *Agencia* was competent to draw contracts with individuals; whereas the companies obtained the land granting and the authorization to conclude an agreement with private citizens by decree of Government of Chile.

Who wanted to go to Chile, should have presented an application (*solicitud*) to Immigration Office with the following certificates: certificate of birth of him and his family members; health certificate; certificate of good morality, good life and conduct and a statement of the skills evaluation.

After the Immigration Office had accepted the request, the contract was drawn. The future colon bound himself to go to Chile with his family, to settle in the designated lot and to stay there at least six years, afterwards he would have obtained the title. The Immigration Office paid travel tickets (either through agreements with shipping companies or tickets purchase). The Government bound itself to give colon and his family, at arrival in Chile, hospitality and a daily allowance of thirty cents of *pesos* for each adult and fifteen cents for each kid older than ten years, until they would have taken possession of the lot, selected by law or by company in agreement with the *Inspección General de Tierras*. The colons knew which lot they would have obtained, before going on the trip. After the colons had taken possession of the lot, they received necessary footage for buying a house, pack animals and tools for soiling (in case of woodland, a deforestation machine for twenty families). Furthermore, a pension of twenty *pesos* for one year and health care and medicines for two years. The government only anticipated all these costs, which the colons would have given back in ten annual instalments. After they had paid one-third of their debt, stayed at the farm for six years (reduced to three with the decree of 12th October 1908) and built a house, the colons obtained the title, which was as mortgaged as if the lot had been sold by auction. After the total payment, title without a mortgage was obtained through a decree (and then through a deed) recorded in *Conservador de Bienes Raíces*.

Foreign settlements were only in part successful, especially German settlements, which, how it is still possible to observe, helped strongly to the development of South Chile territory. And, though to a lesser extent, Italian settlement in *Capitan Pastene* and in the neighboring area, near to Temuco, in the *Araucanía*, the Mapuche people land (*Región de la Araucanía* today).[30]

30 In 1904 and 1905 Sociedad Nueva Italia, assignee of Fratelli Ricci & Co.'s rights,

But some experiences failed and reasons could be as follows: a) breach of contract on company's side: the company did not carry families or did not give tools for settlement or did not give whole assigned lot or defrauded the Government of Chile, because the company obtained more lots compared to the number of families.; b) breach of contract on State's side: as result of bad knowledge of the land map, the Government promised more land what he had or he promised lots which were already granted or sold; c) Exaggerated generosity by State in drawing land granting contracts without knowing the real situation of the country.[31]

4. Conclusion

Some means adopted by the Chilean government in the attempt to taking control over the southern territories and improving soil conditions do not represent new strategies. It is known that the term '*colonus*' was already used in the laws of the Roman empire and since Principate, emperors had to face up with the question of *agri deserti* who shows strong similarity with the Chilean question of native people's land.

But it is interesting - and I think it would deserve more attention than what it has received - to mark how two experiences so distant in the time and space had very similar problems and faced up with the same solutions.

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who was assignee of Sebastián Nicosia's rights, settled down for Decree No. 553 of 30th May 1908 one hundred Italian families from small towns of the Apennines of Emilia-Romagna North-East Italy. They were in a very good relationship with the Mapuche people, improved soil conditions and attended to keep Italian food tradition. Recently, the Italian Ministry of Foreign Affairs gave to ham of *Capitan Pastene* PDO (Protected Designation of Origin) certificate for ham production.

31 There was a spontaneous migration to Chile too. For High Decree of 10th September 1899, these migrants were recognized as foreign colons, if they made a request. Whoever was interested, put in an application to *Ministerio de Colonización* (Office for Settlement) with enclosed certificates as mentioned above. Their skills requested were farm jobs. After the competent office had accepted the request, the migrant (colon) received a lot with variable size (up to forty hectares for each householder (*padre de familia*), more up to twenty for each almost twelve years old son. The colon bound himself to stay there with his family and to soil land in person for five years; furthermore, he had to mark the boundary and to get better his lot, which he could not transfer or sell. He could obtain the ownership such as the foreigner who arrived in Chile by contract. For the High Decree of 13th July of 1903, the possibility to make a request a plot of land was restricted to foreigners who were arrived in Chile within a year.

It is possible to see an analogy between Chilean and Roman experience. Both, Chile and the Roman empire, had problems with the exploitation of some lands in their territory. For different causes: Chilean Government had to face up the question of the Mapuche people lands, whereas the Roman emperors should resolve the question of *agri deserti*, lands which were infertile and abandoned by landlords who could no more pay the taxes (or they did not want to do it). The effects were the same: bad exploited lands and fewer tax revenues for the State.

According to Jones:[32] "The problem of imperial lands was administratively simpler. The government would offer emphyteutic or perpetual leases, with a few years' initial immunities, insisting that grantees must hold good land of their own to guarantee the rent: in A.D. 337 it was enacted that anyone who bought the good private land of an emphyteutic lessee of bad imperial land became responsible for the emphyteutic lease. The emperors also frequently ruled that in any lease, for term o years or in perpetuity, badlands must be mixed with good and that lessees must never be allowed to take productive land only"

The question of ancestral land rights in Chile is still struggling. On December 2013 appeared in "The Independent" an article titled "Chile: The nation that's still waging war on Native Americans".[33] It told the history of a native family who lives in a wooden shack on a plot of land outside the rural town's limits, Ercilla, a seven-hour bus journey south of the Chilean capital, Santiago. This land, one of those lots which Chilean Government sold to foreign settlers, belongs to its rightful owner, but the native family has been occupying it as part of an ancestral land rights claim. This is only an example of the relationship between native people and landowners, which has continued to intensify over the last decade with hunger strikes and violence, until when a married couple burnt to death after their farmhouse was set on fire by a Mapuche leader. The country's refusal to recognize ancestral land claims has sparked a deadly conflict with the Mapuche people.

The dispute has its roots at the end of the 19th century in the so-called "pacification" of the Araucania region, when the territory was incorporated into Chilean State. From the time it became independent, the Chilean Government faced up the problem of these lands. Native people were not inte-

32 Jones 1964, p. 813.

33 www.independent.co.uk/news/world/americas/chile-the-nation-that-s-still-waging-war-on-native-americans-8996336.html

grated, and they had a connection with Nature so different that their lands were considered bad exploited or abandoned. Chilean State tried then to resolve the question through organized colonization of these lands; especially inviting foreigners from Europe and the United States of America to settle down in Chile, where they would have received a plot of land to cultivate.

Chile, adopting the solution found by Roman laws, acquired the native people's lands (in the Roman empire, abandoned lands belonged to the emperor or landlords) and sold them by auction to whom was good to till the soil and to improve it. The Chilean Government went further and decided to give these sold lots for founding foreign settlements. From Europe and the United States of America came many families to settle down in Chile and to help the growth and development of the country.

They did it and for that, the solution taken by the Government can be considered as the best, but unluckily instead of working out the question of the Mapuche people, settlements of their ancestral lands have made it worse.

In both experiences, Roman farmers and foreign settlers in Chile became owners of these lands, after a fixed period, but was this title legitimate? Could Roman emperors or the Chilean Government transfer these lands? We can affirmatively answer for the Roman empire: the emperors made and were the Law, so they could decide what they wanted and apart from this, these were land abandoned by their owners, who could anyway claim them within a fixed term. Of course, we could say the same for the Chilean Government and the transferred title was legitimate, but here the question is that these lands belonged to other people who had a different mother tongue, different culture, different laws and who probably did not understand what it was happening to their lands, and, although in many cases the Mapuche people left their lands or sold them without conflicts, their descendants assert that the whole question of foreign settlement in Chile was not legitimate, but that is another question.

My paper does not talk about ancestral land rights and their political implications,[34] but just shows Chilean colonialism's historical roots and its strong connections with the later Roman empire's experience, when Roman emperors used the same means to resolve similar land problems in some territories of the empire.

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34 The Chile Government set up a body to resolve the Mapuche land dispute: the Conadi (*Corporacíon Nacional de Desarrollo Indígena* - National Corporation for Indigenous Development). The organization is allotted a yearly budget to buy properties from landowners if they want to sell. It has no power to fix prices or expropriate.

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