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Privatisation and dispossession in the name of indigenous women's rights

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Introduction

The restructuring of the neoliberal state has had important effects on indigenous communities. On the one hand, it has opened up the space for the recognition of indigenous rights. On the other, recognition has reinforced the authority of the state and produced zones of legal dissonance. Although the recognition of indigenous rights at the national and international law levels has been unprecedented, continued intervention in indigenous life calls attention to the strategies used by the state to blame indigenous peoples for their 'backwardness' while intervening to improve their lives.

In this chapter, I consider how the simultaneous recognition of indigenous 'culture' as a set of practices for asserting land rights and the representation of indigenous 'customs' as 'inconsistent' with state laws and international human rights shapes how the neoliberal state relates to indigenous peoples. Focusing on the Family Homes and Matrimonial Interests Act in Canada and the Indigenous Electoral Reform 2014 in Mexico, I analyse how indigenous women's rights are contentiously mobilised by the respective states in order to intervene in indigenous communities. While the first

example is concerned with the introduction of private property on reserve land, the second one focuses on using indigenous women's rights to further limit indigenous self-government. In both examples, the vulnerability of indigenous women is conceived of as an inherently indigenous cultural problem that is remedied by introducing changes that 'improve' their lives. This chapter argues that, as a strategy of governance, 'culturalising' problems depoliticises patriarchy and histories of dispossession and demands that indigenous peoples take responsibilities for increasing risks. From this perspective, the indigenous neoliberal subject is vulnerable and resilient: vulnerable to 'improvement', yet resilient to risks.

Governance, privatisation and the neoliberal state

Theorisations of neoliberalism have often treated it exclusively as an economic project involving deregulation, regulation, privatisation, individualisation and transformation of state-citizen relationships. Similarly important are theorisations of neoliberalism as a governance process that is not primarily focused on the economy but rather on desired political, social, cultural and environmental effects (Brown 2001). The concept of neoliberal governance assemblage captures how the economy, society and the environment are governed by networked interactions between states, financial institutions, non-governmental organisations, political elites and communities, producing specific outcomes. Larner warns that although hegemonic, neoliberalism is not a unified entity and requires that we pay attention to its variance and to the contradictory nature of its policies (2003: 510). Others (Peck 2004, Howitt 2009) have noted that although local contexts determine outcomes, it is important to identify the commonalities within the apparent differences.

Despite the importance of these contributions, often scholars have failed to consider how neoliberalism interacts with colonialism. As has been argued elsewhere, neoliberal policies emerge from and are rooted in specific colonial, social, political, cultural and economic contexts, shaping their locally contingent form (Altamirano-Jiménez 2013). A limited body of scholarship has focused on the reshaping of the relationship between the state and indigenous peoples under neoliberalism in North America (Altamirano-Jiménez 2004, 2013, Macdonald 2011, Pasternack 2015).

More recently, a critical body of scholarship has drawn attention to how dispossession has continued under historically changing capitalist forms of accumulation (Altamirano-Jiménez 2004, 2013, Coulthard 2014, Pasternack 2015).

In settler contexts, neoliberalism has been considered part of the same structure of domination (Strakosch 2015) that drives indigenous dispossession. Although historically colonial states have systematically dismantled indigenous nationhood, neoliberal state policies blame indigenous peoples for their conditions of life. In other words, neoliberal state policies not only blame indigenous peoples for surviving colonisation, but also force them to be responsible for the effects of colonisation. By conceiving of colonialism and neoliberalism as separate yet articulated processes, it is possible to track the forms dispossession takes and the current ways through which dispossession is managed.

In Canada, indigenous peoples have been resisting dispossession and privatisation of their lands since the mid-19th century, with the Enfranchisement and Assimilation Acts and later the White Paper 1969. While indigenous rights have been recognised, indigenous peoples have been granted a form of precarious citizenship that is tested every day. Individualisation, self-caring and pathologising discourses have served to rationalise indigenous communities' precarious living conditions as a product of dysfunctional cultural traditions and lifestyles and not as a result of dispossession (Howard-Wagner 2012, Altamirano-Jiménez 2013, Strakosch 2015). The promotion of private property on reserve to combat poverty and extent matrimonial property rights to First Nations women not only erases the history of land dispossession but also legitimises the state as the grantor and distributor of property rights.

In Mexico, on the other hand, while indigenous land has been alienated, the recognition of indigenous 'normative systems' as an extension of indigenous peoples' rights to political autonomy has created legal dissonances. Moreover, the characterisations of indigenous laws as backward, illiberal, 'customary' practices that discriminate against indigenous women has justified state intervention in indigenous communities affairs to contain indigenous self-government.

The Family Homes and Matrimonial Interests Act

In a 30-year span, the Canadian state created government commissions and legislation to advance women's rights. However, the Canadian Government began to eliminate funding for women's organisations in the late 1990s with the intention of reducing its deficit. When the Harper Conservative government was first elected in 2006, it continued to undermine human rights and the status of women under the assumption that gender equality has long been achieved in Canada (Brodie & Bakker 2008, Altamirano-Jiménez 2009). These assumptions are not only at odds with the reality of women's lives, but also disregard those, such as indigenous women, whose rights were never fully realised. Indigenous women are the most marginalised and impoverished in Canadian society: they have borne a gendered burden because of the Indian Act. The Indian Act defined who was an 'Indian', created the reserve system and transformed indigenous peoples into wards of the state. In defining who was and was not 'Indian', the government took away the self-determination from indigenous nations, and inflicted racist and sexist consequences on affected First Nations women and their children. Gendered colonial policies created differences between indigenous men and women and between Indian and non-indigenous women, positioned indigenous women's rights as being in conflict with the inherent and constitutional rights of First Nations to self-determined citizenship, and have important implications for other policies regarding traditional marital practices, housing and justice (Green 2007, Green & Peach 2007).

In 1986, the Supreme Court of Canada ruled that provincial and territorial laws on matrimonial real property do not apply on reserve land, which falls under the federal government jurisdiction. This decision created a gap in the law between First Nation men and women, and between indigenous and non-indigenous women. Lack of matrimonial property rights on reserve has resulted in the women having little recourse in cases of domestic violence. If colonial laws and policy changed communities' forms of social organisation and the boundaries of inclusion and exclusion within indigenous communities, neoliberal policies bring indigenous lands into the market while claiming to extend human rights to property for women.

When prime minister Stephen Harper came to power in 2006, he implemented a new Aboriginal policy whose main focus was to alleviate indigenous poverty. He rejected the Kelowna Accords signed by premiers and indigenous leaders to close the gap between indigenous and non-indigenous Canadians. Harper noted that the Kelowna emphasis on reserves did not reflect the fact that the majority of the indigenous population lives in cities (Carlson 2011). His indigenous policy focused instead on strategies to alleviate poverty and programs based on supposed common sense and the acceptance of everyone's responsibility. The then Minister of Indian Affairs suggested that the federal government would never be able to meet the housing needs of First Nations people unless they took responsibility for themselves and utilised an inactive asset: their land (Department of Indian and Northern Affairs Canada 2010).

Unlike previous governments, the Harper Government dismissed the need to establish a new relationship with indigenous peoples, noting all that was needed was to make the existing relationship work (Altamirano-Jiménez 2011: 116). The government's commitment to indigenous peoples focused on empowering those indigenous citizens who were 'ready' to assume their place in the economy, while protecting the vulnerable (Carlson 2011). At the core of this major policy was the creation of new legal mechanisms to title and privatise property land on reserve. With the support of prominent indigenous leaders, Bill C-63, the First Nations Property Ownership Act (FNPOA), was introduced in the House of Commons on 10 December, 2009 'to enable participating First Nations communities to request that the Government of Canada make regulations respecting the establishment and operation of a system for the registration of interests and rights in reserve lands'.¹

This Bill was represented as an opportunity for First Nations to finally become property owners and entrepreneurial subjects: a gesture of inclusion that is only possible when erasing the history of land dispossession (Pasternack 2015: 184). The production of ideas concerning the privatisation of reserve land resulted from a powerful alliance among think tanks, indigenous leaders, politicians and some academics like Thomas Flanagan, adviser to prime minister Harper. Flanagan and Alcantara (2002, see also Alcantara 2005) rationalised privatisation as an opportunity to alleviate poverty and allow First Nations people to

1 For the full text of the Bill, see www.lop.parl.gc.ca/Content/LOP/LegislativeSummaries/40/2/c63-e.pdf.

become more productive members of Canadian economy. Inspired by 'successful' experiences of privatisation in countries of the global south, including Mexico, and by the World Bank's recommendations on land administration and poverty reduction (1994), these authors advanced the idea that while there are advantages to customary property rights, the disadvantages are many, including the lack of legal recognition (Flanagan & Alcantara 2002: 4). The authors argued that customary land tenure was subject to political management and did not provide tenure security, leaving individuals little incentive to pursue economic development projects on reserves. Flanagan and Alcantara argue that customary land holding and other 'cultural' practices such as relying on kin relations and in-kind contributions were fuelling unemployment and consequently poor housing conditions that exist on many reserves (2002: 9). In their view, capitalising on land is encouraged, not as a way to honour treaties, but rather because property makes land more productive (Pasternack 2015: 180). In 2011, Conservative members of parliament proposed changing the reserve system and advocated for private property. The FNPOA became the site of convergence among state and non-state actors, and some indigenous leaders, supporting privatisation on reserves. Others, in contrast, opposed, seeing the Bill as a version of the White Paper 1969.

While privatisation on reserve was being debated, the Harper Government's concern with 'protecting' the vulnerable was translated into Bill S-2, Family Homes on Reserves and Matrimonial Interests or Rights Act (FHRMIRA). The Bill aimed to increase protection for the spouse who was not named in a certificate of possession. In pushing for the Bill, the Minister of Aboriginal Affairs and Northern Development (as the ministry was then known), Bernard Valcourt, noted: 'It is unacceptable that in this day and age people living on reserve are not afforded the same rights as those living off reserves' (Parliament of Canada 2013). The Conservative Government in power relied on female MPs to advance the Bill, which they represented as a basic issue of gender equality. The Bill provisions prevented the person entitled to the allotment (i.e. named on the certificate of possession) from selling the land without permission and from evicting their spouse from the family home. If the introduction of private property on reserve was cast as a way to empower indigenous communities who are ready to be part of the economy, Bill S-2 was justified as a way to extend rights to First Nations women. In this case, the right to property is granted to First Nations women to rectify civil and political rights violations. However, this construction conceals the violence of imposing private property on reserve *de facto*.

The Native Women's Association of Canada (NWAC) consultation showed that First Nation women do indeed experience greater disadvantages and are allocated less property certificates than men. NWAC's study showed that a greater percentage of women live off-reserve and that the differences between on- and off-reserve suggest that matrimonial real property has an uneven impact on where a child resides. While the report acknowledged that matrimonial property rights would greatly benefit women, the report recommended the adoption of a more holistic approach based on indigenous peoples' traditions and that accommodates human rights, and acknowledges the leading traditional role of First Nations women in their communities (NWAC 2008).

The FHRMIRA ultimately received Royal Assent in June 2013. In the end, NWAC did not support the Bill. The Assembly of First Nations (AFN) also rejected the Bill, arguing it was a unilateral decision that interfered with First Nations' land title and treaty rights (AFN 2014). Both NWAC and AFN alleged that the government consultation process had not been comprehensive and that many of their recommendations had not been adopted. The organisations claimed the government had omitted two important recommendations. One, the limited access to courts and lawyers in remote communities and two, the need for resources to help First Nations develop their own codes and dispute resolution (AFN 2014).

FHRMIRA allows bands to enact their own matrimonial property codes. It states that when a relationship ends, each partner is entitled to half of the value of the interest in the family home. I have noticed elsewhere (Altamirano-Jiménez 2012) that FHRMIRA also has substantial problems. For example, in order for FHRMIRA to apply, applicants must have access to lawyers and the court systems, which is difficult in remote rural communities. Further, it operates with the assumption that the family homes are occupied by a nuclear family, ignoring the fact that a 'family home' may be occupied by multiple family members, who may not have the ability to actually pay mortgage or rent. A 2006 census conducted by Canada Mortgage and Housing Corporation found that 53 per cent of indigenous people on reserves live in homes that needed major repairs or were overcrowded, or both (Canada Mortgage and Housing Corporation 2011).

Moreover, FHRMIRA does little to mitigate the potential homelessness of either of the parties involved in a marriage breakdown. Although the extension of matrimonial property rights to indigenous women on reserve

was justified as the inclusion of indigenous women in the enjoyment of citizenship rights, FHRMIRA does not address the current housing and shelter shortages that complicate the division of property. MacTaggart points out that the application of FHRMIRA will likely produce gender discriminatory outcomes as a result of the historical gender disparities and current housing shortages (2015: 2). As a fundamental pillar of colonialism, property is a modality through which Canada continues to be produced as a white settler society. Dispossession of indigenous lands was central in creating property in Canada, the extension of property rights to indigenous people is crucial for the neoliberal state to delegate its fiduciary obligations and responsibilities to First Nations communities.

Recognising indigenous law, alienating land

While in settler societies private property is entwined with colonial practices of land dispossession, the privatisation of collectively held indigenous and peasant lands while the North American Free Trade Agreement (NAFTA) was being negotiated in Mexico provides some insights about one of the cases Flanagan and Alcantara consider a ‘success story’ in advancing private property on reserve in Canada. In the early 1990s, the Salinas Government introduced a series of neoliberal changes aimed at liberalising indigenous and peasant control over their lands and other resources. Following Igoe and Brockington (2007), the concept of ‘re-regulation’ is used here to illustrate how the Mexican state transformed previously untradeable entities such as the *ejidos* (plots of land that could not be sold or bought, granted by the state to indigenous people and peasants who had been dispossessed) and communal fishing grounds into tradeable commodities through privatisation. While the recognition of property was represented as a way of protecting indigenous landholdings, transferable property also allows capital to access different types of resources. As NAFTA was being negotiated, a reform package aimed at liberalising different types of resources was passed. Article 27 of the Mexican Constitution not only liberalised indigenous peoples’ and peasants’ control of their lands but also made it possible to buy fishing grounds and coastal land for aquaculture purposes. With this change, indigenous and peasant communities were no longer considered impoverished and egalitarian communities in need of government’s help, but instead were seen as entrepreneurial petty producers who needed to use their resources more efficiently (Leslie 2000: 41). Indeed, narratives

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of old, backward and unsustainable livelihoods justified 'trade not aid' and promoted neoliberal policies as the salvation strategy in rural areas (World Bank 1990). Moreover, while land plots were previously granted mainly to males, women had historically participated in agricultural activities and accessed resources informally (Altamirano-Jiménez 2013: 83). Privatisation effectively excluded women from having access to the resources they used and from the customary inheritance rights they enjoyed before the counter reforms (Deere & León 2000).

Besides Article 27, Article 4 of the Constitution (now Article 2) was also changed to recognise the 'pluricultural' nature of the Mexican state and the right of indigenous peoples to self-determination and to exercise their customary laws in the internal regulation of their communities, while protecting individual rights, human rights and particularly indigenous women's rights. The ratification of the International Labor Organization Convention 169 (the Indigenous and Tribal Peoples Convention) by the Mexican Government in 1989 was central to defining the ways in which indigenous internal normative systems were recognised. According to Article 1 of Convention 169:

tribal peoples in independent countries are those whose social, cultural, and economic conditions distinguish them from other sections of the national community, and whose status is ruled wholly or partially by their own customs and traditions or by special laws or regulations.²

Article 8(2) states that tribal and indigenous peoples 'have the right to retain their customs and institutions, where these are not incompatible with fundamental human rights defined by the national law and with internationally recognized human rights'.

Although the Mexican national constitution recognised indigenous peoples' rights in 1992, states were given the option to implement these rights on an individual basis. Oaxaca became the first state to change its internal constitution. In 1995, it recognised indigenous normative systems, a longstanding claim of the indigenous movement; later, in 1998, it recognised the collective right to indigenous autonomy. Oaxaca is located in southwestern Mexico, next to the states of Puebla, Chiapas, Guerrero and Veracruz. Oaxaca is Mexico's most culturally diverse state and has the largest indigenous population. According to official data

2 For the full text of the Indigenous and Tribal Peoples Convention 1989, see www.ilo.org/dyn/normlex/en/?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C169.

(Instituto Nacional de Estadística y Geografía 2016), 48.8 per cent of the population belongs to one of the 16 indigenous peoples inhabiting this state. Oaxaca has 570 municipalities, more than any other state in the country. Historically, the creation of municipalities has been one way for indigenous communities to maintain their territorial and political autonomy, as they constitute a third level of government in Mexico (Velásquez Cepeda 1998: 15–114, Recondo 2001).

State recognition of indigenous customary law fostered a heated debate on the nature of the rights granted to indigenous peoples. While indigenous opposition to the privatisation of indigenous land was ignored, the recognition of indigenous customary law became the site of contestation over the status of indigenous communities. In this polarised discussion, supporters of indigenous customary law tended to idealise the indigenous past and communities' harmonious norms and practices, while opponents reproduced colonial discourses portraying indigenous communities as residues of primitive cultures. In this debate, violence and discrimination against indigenous women became the ultimate measurement of the 'backwardness' of indigenous cultures. Stories of women being sold into marriage, discriminated against and exploited justified questioning the ability of indigenous peoples to govern themselves in light of such illiberal practices (Newdick 2005: 74). Although certain practices that discriminate against indigenous women have been justified as being 'customary', the assumption that national and international law are neutral conceals the ways in which the limited recognition of indigenous rights frees state financial resources while restructuring indigenous communities. Moreover, the characterisation of indigenous customary practices as being incompatible with human rights, specifically the rights of indigenous women, has been used by political elites to oppose and limit indigenous autonomy (Sierra 2009: 4, Kuokkanen 2012: 44). By mobilising this definition of 'customary', states and international organisations have attempted to justify gender inequalities as inherent to indigenous cultures and not as a result of colonialism or of structural power relations.

The economic restructuring of the country was marked by the elimination of tariffs and import permits for agricultural goods, the end of subsidies and the dismantling of state-run agricultural institutions. The consequent contraction of domestic market prices, along with cuts in the state's support for agriculture, made traditional rural livelihoods extremely challenging, fuelling massive international and urban migration as families struggled to make ends meet. Although the introduction of private property was to homogenise relations to property and to create a land market, indigenous

ejido holders have responded differently. Some maintain indigenous principles of collective land holding, others conceive of land in economic and exclusive terms, exacerbating conflict (Torres-Mazuera 2016: 60). Moreover, the simultaneous privatisation of *ejido* lands and the recognition of indigenous normative systems created a situation where the territorial jurisdiction of indigenous peoples and that of self-government become legally dissonant as a result of coexisting legal systems. Furthermore, indigenous legal principles have become blurred as a result of the contestation of rights, and individuals drawing on different interacting legal regimes. This blurring, I argue, is used productively by the state to regulate its relationship with indigenous peoples. Constitutionalism and recourse to law have been essential to the reconfiguration of the neoliberal state and indigenous peoples' resources. As Povinelli has noted, rather than taking away resources from the national colonial state, the primary purpose of recognising indigenous customary law has been 'to provide the symbolic and affective conditions necessary to garner financial investment in the global economy' (2002: 42). I would add that by recognising indigenous customary law, the state has downloaded the risk of land dispossession onto self-regulated indigenous communities, which are under constant state surveillance.

The notion of autonomous internal regulation represents the state as a neutral entity fostering good governance and the community as a space of relationships—instead of a geographical or political space—where the behaviour of its members needs to be regulated according to its own values (Li 2011: 101). The notion of internal self-regulation is thus central to how indigenous traditional normative systems are recognised and can be measured according to various indicators, including universal human rights. Therefore, indigenous normative systems are seen as 'naturally present yet potentially deficient' (Li 2011: 105), requiring constant intervention from the state. Poole notes that the perceived deficiency of indigenous traditional normative systems is in fact productive (2006). Legal recognition in Oaxaca created a grey area in which the legitimacy of indigenous customary law is always in question (Velásquez Cepeda 1998: 150). Unlike the liberal state that sought to expand its power and control over the national territory, the neoliberal state seems to seek to create zones of illegibility where marginalised populations take responsibility for themselves under the constant threat of being misrecognised by the state (Poole 2006: 19). Both the colonial and the neoliberal state strategies, however, constitute attempts to legitimise authority through the distribution of inclusion and exclusion.

While property rights were not extended to indigenous women as part of the neoliberal land reforms, the Oaxaca Indigenous Law included an article on the rights of indigenous women without clearly specifying them. Article 46 affirms that the state government will promote, within the framework of indigenous traditional norms, the recognition of women in their communities and their full participation in activities not defined by tradition. The way indigenous women's rights and tradition were articulated in this article reinforces the idea that indigenous traditions are inherently illiberal. From this perspective, indigenous women's experiences of domestic violence, poverty and discrimination are understood as exclusively cultural problems hindering women's ability to exercise agency. By deploying a static and essentialised definition of 'customs' and 'tradition', the state attempts to situate gender inequalities as a product of indigenous cultures (Merry 2003).

By constructing indigenous law as illiberal and national law as objective, neutral and protecting rights, the state has become the arbiter of what practices are acceptable, while moving away from issues of distribution and social programs. The linking of self-regulated communities, development and indigenous women's rights have constructed a field of governance that enables the state and its experts to intervene in indigenous peoples' everyday lives. While the law attempts to create the perception that the state is absent from the sphere of indigenous normative systems, it is very much part of it (De Marinis 2011: 482–3). The law also conceals how processes of state formation and market involvement have already produced specific constellations of governance practices in specific places (Li 2001: 159).

Conclusion

In this chapter, I have explored the role of private property in reorganising indigenous communities under neoliberalism. Specifically, I have shown how indigenous women's rights are mobilised by the state as a technology of inclusion with the purpose of containing self-government and indigenous resistance to changes in property rights. I argued that this technology of inclusion operates in new flexible ways, moving away from categorical recognition and instead focusing on the indigenous neoliberal subjects' capacities to behave in expected ways.

Property is a modality through which Canada has been and continues to be produced as a white settler society. If dispossession of indigenous lands was central in creating property, the extension of property rights to indigenous people is crucial for the neoliberal state to delegate its responsibilities and potentially its fiduciary obligations to First Nations communities. Moreover, the extension of matrimonial property rights to indigenous women living on reserve has de facto introduced private property on reserve. In Mexico, on the other hand, the privatisation of *ejido* lands became a mechanism for reorganising and transforming indigenous communities into petty producers who needed to utilise their resources more efficiently. Furthermore, privatisation downloaded the risk of dispossession directly onto indigenous communities. While property was not extended to indigenous women, their rights became a site of intervention in indigenous self-government.

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