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Pluralistic Legal Thought in Chile: A Critical Overview

This essay is an invitation to think critically about the law.[1] It reconstructs the development of legal pluralism within the Chilean context and history of the interaction between formal discourse, on the one hand, and alternative narratives and worldviews about law on the other. In so doing, my main objective is to show in what ways and settings even non-state entities or social groups can be regarded as de facto lawmakers.

Four basic premises are useful for exploring the notion of pluralistic legal thought.

Firstly, pluralistic legal thinking – used here synonymously with legal pluralism – refers neither to *ley*, *legge*, *loi*, nor to the coexistence of substantive or written law; instead, it deals with *derecho*, *diritto*, *droit* and relates to questions of group identity and culture, legal autonomy and rights. These questions, as Seinecke points out, are central to debates on diversity.[2] By viewing legal systems from a non-state-centric legal perspective, it becomes evident that both the *state* and its '*formal rule*' are subject to the *law*. In this sense, thus, law is part of a much larger universe, one dominated by an intersubjective dimension, which is characterized by its "social dimension".[3]

Secondly, it is necessary to highlight that in presenting pluralistic legal thinking, I am concerned more with the phenomenon of coevality and coexistence of a society, its citizens and institutions, in effect with how they actually *live together*, or choose to do so. In other words, legal systems as such are not at the centre of this study. To that extent, this study reflects on how different modes of conducting social relationship or how different conceptual understandings of '*histories*' coexist within a single legal system.[4]

1 For a more detailed account on this topic, see Wolkmer (2003a).
2 See the contribution by Seinecke in this volume.
3 Grossi (2012) 12.
4 For more on this account, see Halliday (2013).

Thirdly, the tradition of pluralistic legal thinking in Chile emanates from the colonial era of *legal particularism* in Latin America, and thus derives from colonial law. For that reason, it is difficult to delineate the *histories* that coexist in Chile without taking into account the context in which the history of pluralism spread across Latin America. If national histories are to be understood within the transnational frame, this article raises questions about the "different spatial configurations" of such legal histories that are forced into imperial structures by the colonizing power.[5]

Finally, as understandings of '*diversity*' are highly contingent on time,[6] the starting point of this study is the conviction that the concept of pluralism is subjective, in that it depends on the type of history legal scholars choose to tell. As such, legal pluralism is subject to the critical perspective (and personal sensitivity) of each scholar. Thus, far from being a neutral term, legal pluralism bears a strong connection to the scholars' individual or personal moral values and ideas of the law.

This essay is divided into two sections.

Part 1 focuses on the analysis of the counter-model to the concept of state legislative monopoly in Chile mainly through the study of the evolution of custom as a source of law. This section argues that the hegemony of legal formalism in Chile posed a formidable obstacle to the implementation of other *histories* or *narratives* exceeding the realm of the written law.

Part 2 studies the scientific and non-state forces that changed, or at the very least challenged, the hegemonic concept of law in the Chilean legal culture. This section presents some cases drawn from the Chilean jurisprudence that show how the idea of law has been changing over time. Moreover, this part also illustrates the relevance of labour movements, of economic-interest groups and of the indigenous people, especially in legislative change. In this regard, the notion of pluralistic legal thinking interrogates the set of truths that have dominated the concept of law in Chile since its independence.

Needless to say, this study does not represent an exhaustive analysis of legal diversity. Rather, it highlights aspects of comparative private law and is aimed to stimulate critical reasoning in areas where little theoretical attention has thus far been paid to legal pluralism.

5 Duve (2017).

6 See the introduction by Collin and Casagrande in this volume.

1 From pluralism to monism

1.1 Customary law in colonial era

Legal pluralism was an alien concept to the Chilean jurists at least until the 1990s. Only recently, as an echo of foreign theories and significant legal changes in the region, there has been a growing interest in the theoretical and operative implications of this subject.[7] However, while the academic research on legal pluralism has largely been ignored, Chilean jurists and legal historians have implicitly analysed the countermodel concept of a state legislative monopoly by looking at the foundations of the colonial and republican law. In this regard, *custom* has been used to refer to any form of non-written or autochthonous law in the indigenous or Creole rule, without regard for provenance, and thus, for instance, irrespective of whether the origins of a custom lie in America or in Spain.[8]

It is evident that in any context the history of the evolution of custom is to some extent connected to the legal system's ability to navigate pluralism.[9] In this sense, it is worth remembering that the issue of customary law in the last two hundred years of the republican Chile has had a rather narrow application when compared to what was established under the Spanish rule.

In fact, following the European trend from the Middle Ages to the Modern Age, custom in colonial Chile was a formal source of law. It is well known that the *Siete Partidas* (a statutory code which includes Roman law in the version provided by the glossators of the 12th century) recognised custom as an enforceable non-written law.[10] As a source of Castilian law, this code played a subsidiary role during the colonial era. Furthermore, from the time of *Leyes Nuevas* (1542–1543), indigenous customs have received special treatment within the formal legislation and coexisted within a pluralistic

7 In fact, between 1978 and 2008, fifteen constitutional texts recognizing indigenous peoples' rights, new forms of democratic participation, and the pluralistic character of society were enacted. This trend goes hand in hand with the influence of Boaventura de Sousa Santos and Gunther Teubner's essays on the debate about legal pluralism in Latin America. See García Villegas (2012) and Ocampo (2018).

8 See Míguez Núñez (2016).

9 See Bederman (2010).

10 "Se llama costumbre al derecho o fuero no escrito, el cual han usado los hombres largo tiempo ayudándose de él en las cosas y en las razones por las que lo usaron." (Partidas 1,2,4).

legal framework.[11] This structure was maintained by the *Recopilación de Leyes de las Indias* (1680), which recognised custom as a source of law by allowing a wide range of indigenous applications.[12] Hence, an essential aspect of colonial legislation was the adaptation of the Castilian law and institutions to the existing customs in the New World. Besides, multiple interrelated social and institutional orders interacted: the Law of the Indies (either created in the peninsula or in the Americas), the Laws of Castile and the indigenous customs.[13] This lack of a centralised lawmaking process guided and controlled by Spain shows that the colonial framework was pluralistic with respect to the sources of law, as it recognised different notions of the law. In other words, the colonial law was fully immersed in the theoretical framework of the '*alternative law*'. It entailed interactions between the official (centralised) and the alternative law in a structure that, following Seinecke's assumptions, can be defined as "legal-interlegality"[14] or "pluralism of colonial origin".[15] For all practical purposes, from an ideological perspective, the colonial state sought to ensure unity based on differences by allowing interaction between different social orders.

1.2 The republican era: Civil code and legal classicism

The affinity towards a pluralist model is interrupted in the 19th century with the emancipation of America. It is well known that the republican law is nothing other than legal unity, or the concentration of lawmaking processes in the centralised state. Accordingly, legal pluralism or '*normativism*' that developed during the colonial era bears comparison to the idea of rationalism, which implicates the notion of '*monism*'.

From the perspective of private law, three observations on the introduction of the civil code (1855) should be linked to this phenomenon.

Firstly, custom was almost entirely excluded from the code as a source of law. Chilean civil code defined what should be understood as *ley* (art. 1), but

11 Notably, the *Tasa de Gamboa* (1580) contains a first example of recognition of indigenous custom in the Chilean territory.

12 See, for instance, L. 4, tít. I, lib. II.

13 On the reciprocal influence of pre-Hispanic and Castilian law during colonial times, see González de San Segundo (1995); Mariluz Urquijo (1973).

14 See the contribution by Seinecke in this volume.

15 See Santos (2007) 97. See also Seinecke (2018).

omitted any concept of custom, thus erasing the pluralism of the Castilian legal tradition inherent in colonial law, which recognized custom as a source of law. Besides, art. 2 (following the formula enacted by the Austrian civil code) predicated the validity of custom on its recognition in written law.[16]

Secondly, on the issue of legal interpretation, the code established that when the meaning of the law is clear, the judge shall not ignore its literal tenor (art. 19) and that the words of the law shall be understood in their natural and obvious sense (art. 20). Even if the text of the law is obscure or defective, the judge must not disregard the "general spirit of the law" and the "natural equity" by resorting to external elements such as custom (art. 24). Evidently, these rules limit the role of the judge to a "mere voice" of the written law. The judge, as Andrés Bello said, "should be the slave of the law";[17] and as a result, to put it as Lira Urquieta brilliantly did, "the law and the supreme government replaced the King".[18]

Thus, in a context dominated by the so-called cult of the written law, custom and the tradition of colonial pluralism were considered only a simple relic of a bygone era of legal evolution; legal pluralism was thereby reduced to a simple custom in a primitive society and the role of non-written sources of law was barely subsidiary.[19]

The last notable consideration is that the figure of the Indio did not appear on any page of the civil code. As affirmed by Lira Urquieta, the code "shamefully hid the existence of indigenous people in the region of the ancient Araucanía".[20] This omission not only broke with the pluralist tradition of the colonial times but also with the history of the Iberian Peninsula where the Romans had lived along with Celtiberians, the Hispano-Romans with the Goths, and the Arabs with the Christians.[21] Significantly then, the civil code neglected not only the presence of the Indios and their customs but, thus, also their transformation into model modern citizens.

Clearly, the legal-centric model adopted by the civil code must be read in the context of the consolidation of sovereignty and independence. For

16 On the origins of these rules, see Figueroa Quinteros (1982).
17 See Tau Anzoátegui (1982) 109–110.
18 Lira Urquieta (1956) 25.
19 For a general review on this point, see Baraona González (2010) 434–435.
20 Lira Urquieta (1956) 28.
21 Basadre (1985) 282.

republican authorities, private law represented the most effective legal tool to achieve Chilean independence and to ensure political control; private law reform would then lead to the desired internal order within the new state. Therefore, the civil code was introduced both to strengthen the national unity and to replace the legal pluralism of the colonial era with a rigorous monism.[22] According to art. 14 of the code, written law "is mandatory for all inhabitants of the Republic, including foreigners", and after the code's entry into force (January 1, 1857), all pre-existing laws on matters treated in it shall be repealed (last article c. code). Moreover, it is easy to understand that while the unitary state was still consolidating, there was no room for accommodating pluralism through "state courts" (as it remarkably happened in the case of the New German Reich[23]). In this way, social and regional diversity were also destined to converge in the monist structure imposed by the unique judiciary power.

The impact that this concept of legal order would have upon the idea of legal pluralism in the 20th century requires a brief explanation. Two broad issues can be identified that typically developed in Latin America.

First, a considerable part of the 20th century was characterised by both the late theoretical transplantation of a technique associated with the code (the exegesis) and the reception of the methods of the Romanists and civil law scholars linked to German conceptualism. The combination of both factors increased the sway of the general and abstract current of legal thinking that would go on to dominate the study of the law in Latin America as "legal classicism".[24] This theoretical framework was not hospitable to theoretical analyses based on sociological considerations, for which reason empirical observations of local reality could not yet be fully accommodated. A paradigmatic example of this ideological model can be read in the most

22 Míguez Núñez (2016) 306.

23 The reference is to § 15 of the *Gerichtsverfassungsgesetz* (Courts Constitution Act of 1877). For more on this, see the contribution by Seinecke in this volume.

24 López Medina (2004) 130. See also Baraona González (2010) 433. According to Barros (1988) 109, "ocurre que el positivismo legal en materia civil en Chile es una mezcla de esas dos tradiciones. La primera hace al Código algo así como una expresión de una racionalidad perfecta, simétrica, que es tan frecuente entre algunos profesores de Derecho Civil. Pero, por otra parte, goza de la legitimidad republicana dada por el hecho de haber sido una ley de la República." For more on positivism and formalism in the Latin American legal education, see Courtis (2003).

outstanding commentary of the Chilean civil code. In his *Explicaciones de Derecho civil chileno y comparado*, Luis Claro Solar (1857–1945) declared that "in a country like Chile, where the law is the result of the constitutional powers, which exercise the sovereignty entrusted to them by the nation, the law cannot be at the same time the result of the work of the community of citizens". Therefore, he added, "written law is a source of law; custom is not".[25]

On the other hand, the dogmatic formalism of the Vienna School, headed by Hans Kelsen, outlined the culmination of centralisation of the legal order in the state in what can be called 'cultural legal monism'. During the 20th century, no other legal theorist had as much influence in Latin America as Kelsen.[26] Notably, the Latin American reception of his *Pure Theory of Law* has been fundamental to the belief that the state is the only institution through which a nation might create law. This belief establishes the primacy of scientific rationality that postulates the process of creation and application of law without any ideological contamination. Kelsen's influence in Chile is widely known, and its positivism, as Baraona González has pointed out, found a good ally in Chile's legal environment, which was then partly influenced by the legalism of the school of exegesis.[27]

As a result, from the birth of the republic to the first decades of the 20th century, the Chilean legal system tended to privilege *apolitical* judges and legal operators. They represented voices of a law which has been understood as a manifestation of the centralised executive power, while the most outstanding legal doctrine has limited itself to applying, in an acritical way, the – transplanted – principles (whether of European or North-American origin) on which the national codes founded the unitary state.[28]

25 Claro Solar (1979 [1898]) 42–43.

26 For a first – critical – overview of such influence, see Esquirol (2009) 705 ff.

27 Baraona González (2010) 436. The establishment of the Constitutional Court at the beginning of the 1970s, and the pyramidal conception of the legal system are clear examples of that influence. For more on this, see Montt Oyarzún (2005) 271–273.

28 For an indispensable analysis of this phenomenon, see Hilbink (2014). See also Bravo Lira (1998) 92 ff.; Squella Narducci (2001) 552–555.

2 From monism to pluralism

2.1 Legal pluralism in Chilean jurisprudence

Coming up with a history of legal pluralism in Chilean jurisprudence is arduous owing to the structural complexity described above. From the dawn of Chilean independence to much of the 20th century, what prevailed in the minds of most legal operators was a greater concern with the consolidation of the nation state (and the proper functioning of its institutions), rather than with any criticism about a state-centric idea of law. As noted by Edmundo Fuenzalida, Chile's early and exceptional institutional stability gave its legal system a degree of centralism uncommon in Latin America, and its legal operators developed a significant commitment to maintaining that stability. These facts explain the absence of a different ideological path to the Chilean nation-building.[29] Civilisation and progress, the ethos of a promising nation, demand uniformity of law and the integration of indigenous groups. In order to achieve that, law and jurisprudence had to meet the needs of a unitary state. As a result, the criticism of Chilean legal operators of such a stable rule of law could only be quite *tame*.

Accordingly, the discussion concerning legal pluralism in Chilean jurisprudence cannot be compared with that of the great dogmatic debates that arose in European countries during the 19th and 20th centuries.[30] In fact, for much of the 20th century, legal pluralism in Chilean academia could only be understood as a limited attempt to remove one or more of the hypotheses that have characterised the domestic legal culture, that is, the excess of rationalism and the exegetical method.

Identifying such efforts is a subjective act since it depends on the personal sensitivities and on the theoretical perspective from which legal pluralism is observed. In my opinion, legal jurisprudence has challenged the conventional view of the law by introducing four theoretical perspectives: conceptualism (or scientific positivism), legal evolutionism, the reform of legal education, and Marxism.

29 On Fuenzalida's analysis, see Squella Narducci (2001) 555.

30 See, for instance, the developments of legal pluralism in German legal thought analyzed by Seinecke in this volume.

2.1.1 Conceptualism in civil law scholarship

As in other legal systems, once the foundations of the new political order were laid down, Chilean civil law scholars devoted themselves to the *elementary exposition* of the civil code (i. e., José Clemente Fabres, *Instituciones de Derecho Civil Chileno*, 1863; José Victorino Lastarria, *Instituta del derecho civil chileno*, 1863). This strand of legal literature was followed by a *commentary* (or explanation) of the code that does not possess the characteristic of an autonomous *system* yet (i. e., Jacinto Chacón, *Exposición razonada y estudio comparativo del Código Civil Chileno*, 1868; Robustiano Vera, *Código Civil de la República de Chile comentado y explicado*, 1892–1897). In that period, scholars offered an analysis of the civil code in what was regarded as a "transparent way", which meant it was aimed to be safeguarded against personal biases and a subjective interpretation of the law.[31] Subsequently, in a phase that marked the birth of a critical review of the code and the "fetishism of the written law",[32] civil law scholars took to articulating their methods of Interpretive methodology by means of *treatises*.[33] The most representative example of this kind of literature is Luis Claro Solar's *Explicaciones de Derecho civil chileno y comparado* (1898–1945). In a departure from the exegetical method, Claro Solar's analysis went beyond the study of the code and its structure. Instead, for the first time, Claro Solar used comparative analysis to render an explanation of the civil code by making extensive use of colonial sources of law and legal materials from European countries. From then on, a *scientific approach* based on concepts and general principles has been used to teach law as a logical system and to criticise the rules that were inconsistent with the *system*. Thus, it follows that the dogmatic structure of the civil law had to be articulated in *general theories*.

It is beyond the scope of this study to explain the roots and consequences of these new methodological approaches for the Chilean legal culture (which could be found in the introduction of German conceptualist jurisprudence in Latin America[34]). Instead, I would note that Claro Solar's treaty

31 López Medina (2004) 160.

32 Expression coined in 1936 by Eduardo Zuleta Ángel, quoted by López Medina (2004) 290 ff.

33 See, generally, Guzmán Brito (1992).

34 See López Medina (2004) 162–165.

represents not only the first time the legislator's role as the sole voice of the *system* is questioned but also the first time law is claimed to embody diverse *narratives* or *worldviews*.

2.1.2 Positivism and legal evolutionism

In a second effort to counter the *fetishism of the written law*, philosophical positivism was introduced into legal discourse. The assumptions underlying positivism were basically used to propose an analysis of society's laws through comparative histories and in dialogue with other branches of knowledge.[35] The effort consisted in establishing fluid interaction between legal science and the notion of law as a socio-juridical phenomenon. Although this method did not reach the same level of intensity in Chile as in other Latin American countries (with Argentina as a notable example[36]), it is necessary to point out that positivism had been introduced by Valentín Letelier (1852–1919), a prominent intellectual, considered the most outstanding representative among the heterodox group of positivist thinkers in Chile.

Letelier introduced the study of sociology through a systematic presentation of historical theory.[37] This approach was further developed in his *Génesis del derecho*, which provided, for the first time, a scientific synthesis of the social origins of the law.[38] Letelier's attempts to interpret the origins of the main institutions of legal systems (such as family, property, inheritance) brought the legal discourse closer to social sciences. In this regard, the law must be understood as an '*ecology of knowledge*' derived from history and local ethnographic sources. In conclusion, Letelier's work can be said to mark the introduction of the multidisciplinary language into law. Hereafter, the historical and ethnographical method became an apt instrument to overcome the dogmatic rationalism of the 19th century.

35 See, notably, Álvarez (1900). On the implications of these ideas for the Chilean legal academia and society, see Bastias Saavedra (2015).

36 See Tau Anzoátegui (2007) 19 ff. The same phenomenon can be observed in the Peruvian legal culture of that time. See Míguez Núñez (2012) 279 ff.

37 For more on Letelier's positivism see Lipp (1975) 53 ff.; Jaksić (1989) 41 ff.

38 Letelier (1919) 6.

2.1.3 The 1960s: an attempt to reform legal education

A third attempt to introduce alternative narratives on Chilean law concerns the *method* of legal education. At the end of the 1960s, structural changes were introduced in Chile owing to international pressure. In this regard, for the first time, Chile's legal academia was confronted with questions about *how* the law should have been taught. Funded by the Ford Foundation and based on ideological foundations of the Alliance for Progress, the "Chile Law Program" showcased the law and development movement to modernise Chilean legal education and legal research.[39] This initiative, as Merryman states, "was an Action program in support of efforts by Chilean law faculties to transform ('modernize') Chilean legal education and legal research in order to build a corps of legal professionals and a tradition of legal scholarship that would help provide the legal infrastructure thought by Chileans to be necessary for the nation to achieve its social and economic ambitions".[40]

Although this attempt may have spawned diverse political opinions, it is worth underlining that the program proposed an idea of law (albeit a *tame* one) as "social practice" (as opposed to a normative order) and an answer to the question of the role of law as instrument of social change.[41] Thus, legal education and its didactics were subject to a collective and systematic review, which lead to the introduction of several aspects, such as the American case law and the Socratic method, as well as the incorporation of other branches of the social sciences in legal training. Accordingly, Chilean scholars established the *Instituto de Docencia y Investigaciones Jurídicas* in Santiago (1969–1975) to ensure that some of the initiatives in legal education would be carried out, and in July 1970, the first issue of the Bulletin of the Institute was published. The 29 issues that appeared between July of 1970 and March of 1975 addressed a large number of topics relating to the didactics and the theory of law and offered a serious analysis of virtually all subjects of law education.[42]

The Chilean government, under both Salvador Allende and Augusto Pinochet, grew increasingly suspicious of U.S. involvement in law schools,

39 Cooper (2008) 538.
40 Merryman (2000) 481.
41 Squella Narducci (2001) 556.
42 Benfeld Escobar (2016) 151.

and government pressures forced the program to close. Several scholars went on to incorporate what they had learned in their own courses, but the political climate did not allow for much progressive change in legal education. As a consequence of political and military events, the Chilean government once again forced most of its legal operators to adopt an even more cautious attitude than in the 19th century. This kind of attitude began to be challenged towards the end of the military government, when the *Corporación de Promoción Universitaria* again called into question the most outstanding features of the Chilean legal culture.[43]

Despite its failure, it is important to underline that this first attempt to reform legal education introduced a new 'narrative' with political aims that were obvious, namely, to clear the way towards establishing an economic cooperation between the U.S. and Chile. Accordingly, since *ideology* demanded an alternative concept of law, the *ideological* dimension of legal pluralism came to fruition.

2.1.4 Marxism in legal academia

The same conclusion can be drawn through a succinct analysis of the Marxist legal-philosophy, which the outstanding work of Eduardo Novoa Monreal (1916–2006) undertakes. Novoa Monreal's study is characterised by its critical approach to specific obsolete and inefficient legal mechanisms that produced "principles, concepts, and values of capitalism and conservative liberal-individualist ideology". In his *El derecho como obstáculo para el cambio social*,[44] he explains the delay in introducing the Latin American law in the face of changing social conditions as being due to the "petrification" of the law in the individualistic and liberal principles of 19th-century legislation (written law in "codes"). As an alternative to this framework, the author underlines the relevance of the modern legislation that has emerged from Latin American social movements (since the Mexican Revolution of 1910). The main criticism that Novoa Monreal raised was that this legislative dimension had been obstructed by the bourgeois law that inhibits any

43 On the work developed by the *Corporación de Promoción Universitaria*, see Squella Narducci (ed.) (1988) and (1994).

44 Novoa Monreal (1975).

change in the social structure. Thus, given that suggestions to adapt the legal system to the Latin American needs and idiosyncrasies came from the left, *ideology* – again – had permeated the debate for a much needed *alternative law*.

2.2 Non-state groups and legal change

Three social forces can be regarded as leading lawmakers outside of the state in republican Chile: labour movements, indigenous people, and economic interest groups.

My concern with these three forces is related to the establishment of three legislative milestones in Chile: the enactment of social legislation, the privatisation of public enterprises, assets and services, and the formal introduction of legal pluralism (or '*legal interlegality*').

It is outside the scope of this study to analyse in detail the political history of each of those social-economic developments. It has, however, engendered a different understanding of what constitutes legal pluralism and its functions in the Chilean context.

The concern with *La cuestión social* (1880–1920), that intensified in the early decades of the 20th century, represents the first area of study on the reconstruction of social and legal change in Chile (1880–1920). In the light of this, when it comes to legal pluralism, the main challenge is understanding how labour movement and intellectuals got together to create an alternative legal discourse to that of the ruling class.[45] The discussion about a labour legislation that would leave behind the colonial regime and lead to the consolidation of a liberal and capitalist republic, in turn, brought forth new philosophical, political, and ideological discussions on legal pluralism.[46]

A second line of thought on non-state lawmaking is related to the effect of establishing a liberal economy that was based on the neoclassical paradigm during the Chilean military dictatorship.[47] This phenomenon is linked to the influence of a group of economists (known as Chicago Boys) and the

45 For an indispensable analysis in this respect, see Grez Toso (1995); Cruzat / Tironi (1987).

46 See, notably, Bastias Saavedra (2015) 42 ff.

47 See Gárate Chateau (2012).

gremialista sector (led by Jaime Guzmán Errázuriz), who took control of the economy in the second half of the 1970s. As now confirmed, the process of implementing the economic reforms introduced between 1975 and 1989 led to the privatisation of companies and public services. The neoliberal economic model, influenced by the so-called Washington consensus, endured even after the return to democracy (1990–2003). The neoliberal economy required the guarantee of the rule of law as well as a transparent, efficient and functioning judicial power.[48] Significantly, clear examples of that were the criminal procedure reform, intensified human rights protection, increase in access to justice and implementation of dispute resolution mechanisms. These facts demonstrate how legal reforms have been used to further political (and economic) gains in recent Chilean history.[49]

Finally, I would like to offer a few points for reflection on the most obvious issue related to Chilean legal pluralism, namely the recognition of indigenous rights.

Four factors must be taken into account to gain a better understanding of this issue.

Firstly, it is worth remembering that in this context legal pluralism is to be understood as the coexistence of systems of social regulation that can be differentiated along cultural or ethnic lines. Thus, the general condition underpinning this legal pluralism is cultural plurality.[50] Secondly, legal pluralism in Chile was formally introduced through the Indigenous Act, *Ley Indígena* (n. 19.253), of 1993. This Act marked a real milestone in the Chilean legal tradition, as this was the first time Chile was officially declared a multi-ethnic country. Besides, the Indigenous Act is the first instrument to have recorded indigenous customs in writing.[51] Thirdly, the second major legal instrument, referred to above, concerned the ratification of ILO Convention 169 (1989) in 2008. The Convention adopted a minimal regulatory standard regarding indigenous groups that states should recognise. As a result, since its entry into force (2009), the Chilean legal system has been challenged by the implementation of the different matters of the Conven-

48 See, generally, Dezalay/Garth (2002) 141 ff.

49 Cooper (2008).

50 Yrigoyen Fajardo (1995) 9–10; Cabedo Mallol (2001) 307.

51 For more on this see Míguez Núñez (2016) 310. See also, critically, Boccara/Seguel-Boccara (1999) 700 ff.

tion, mostly on issues relating to indigenous customs.[52] Fourthly, and last, since the Chilean Constitution of 1980 has not been modified to introduce the ILO Convention, the absence of a multiculturalism clause has generated a *special* situation of legal pluralism when compared to the constitutional standards of the region.[53]

As a result of the above, the recognition of a so-called conservative pluralism,[54] or unfinished pluralism, as I prefer to refer to it, prevents the formal organisation of indigenous groups and hinders its systematic inclusion in the lawmaking process. Thus, the problem that arises with the introduction of ILO Convention concerns the requirement of full compliance with the international and comparative standards of legal pluralism. In this respect, the current debate on the new constitution, the implementation of the indigenous right to prior consultation, and the recognition of indigenous jurisdiction are three majors issues in the ongoing discussion on legal pluralism in Chile.

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52 See, for instance, the juridical mechanisms for the recognition of ancestral water rights analysed by Yáñez / Molina (2011) 139 ff.

53 See Yrigoyen Fajardo (2011).

54 Wolkmer (2003b).

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