

## Mapuche People and Criminal Law

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### Introduction

This article proposes to analyze the relative deficit in Chilean criminal legal doctrine and practice to justly address determined manifestations of conflict and/or violence perpetrated by individuals and groups belonging to the Mapuche indigenous people.

That deficit is especially apparent in the framework of the progressive development of principles and norms of international human rights law applicable to indigenous peoples and ethnic minorities. Those principles and norms have special binding force since Chile ratified Convention 169 of the ILO, which impelled a revision of the various branches of our judicial system, as well as criminal law, to examine their consistency with the standards. The deficit of our criminal norms and practices became apparent when compared with these principles and norms, along with significant perspectives for overcoming this situation.

This version forms part of a larger work that is in development. In this paper I review (in a more abbreviated form than in the original<sup>1</sup>) the form in which Chilean criminal law has addressed two forms of criminal behavior perpetrated by individuals and groups belonging to the Mapuche tribe, and that may be conflicting from an inter-ethnic point of view (I); and I identify certain basic definitions, forming part of the ideological substratum of our criminal norms and practices, and that explain in good measure the limits of our criminal law to address those conflicts justly (II). A third part,

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<sup>1</sup> And dispensing with the greater part of the footnotes, for reasons of space and to simplify the translation to English.

not included in this version, will examine the perspectives for overcoming these limits offered by liberal multiculturalism.

### **I. Two types of cases addressed by the Chilean courts**

#### Criminal treatment of the violence in the vindication/recuperation of lands: context of

##### Mapuche as aggressor (terrorism)

“On December 19, 2001, a group composed by approximately 50 people from the Mapuche communities of Tricauco, San Ramón and Chequenco entered the building known as Poluco Pidenco, property of the company Forestal Mininco S.A, located in the commune of Ercilla, proceeding to light more than 80 fires in two sectors of the interior of the estate. As a product of this action two large fires were formed inside the indicated building

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In this context, personnel from the forest brigade that fought the fire were attacked on the morning of December 19, 2001 by a number close to 40 people, who seized two chainsaws and two portable radios. Chilean police officers that attended to the estate were also assaulted in the interior of the property, by means of rocks and other blunt objects”<sup>2</sup>

In one of the criminal proceedings against the Mapuche community members that had allegedly perpetrated these incidents of violence, in August 2004, the Criminal Trial Court of Angol<sup>3</sup> condemned JHM, PTR, JML, FMS and JMS to ten years and one day of imprisonment for the crime of terrorist fire against the Polunco Pidenco site, property of Forestal Mininco S.A.

This decision<sup>3</sup> supposes identifying in these acts not only the characteristics that make any intentional fire a relatively serious attempt against the security of the people, or, if you wish, in a crime of concrete danger against (the life and health of) the people, but also a special gravity, that of a terrorist attempt. Beyond its danger to persons whose life or health were in concrete danger, a crime of terrorism would or could produce

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<sup>2</sup> Synthesis of the acts by Soto, Nicolás, ...

<sup>3</sup> Ruling of the Criminal Trial Court of Angol ...

“indiscriminate damage,”<sup>4</sup> affecting “the “public tranquility” (for purposes of causing fear)” and “[...]“the inner security of the State” (extracting decisions or imposing demands).”<sup>5</sup>

In effect, as the Court argues in the ruling:

“[...] the fire that affected the Poluco Pidenco estate on December 19, 2001, is precisely a terrorist act, given that the actions deployed on that occasion demonstrate that the form, methods and strategies employed had a painful purpose of causing a state of generalized fear in the area, situation that is public and notorious and that these judges cannot ignore; it deals with a grave conflict between part of the Mapuche ethnic group and the rest of the population, fact that was not discussed or unknown to those involved.

“In effect, the illicit [...] is inserted in a process of recuperation of the lands of the Mapuche people, which has been carried out by means of action, without respect for institutionality and legality in effect, resorting to actions of force that were pre-meditated, concerted and prepared by radicalized groups that seek to create a climate of insecurity, instability and fear [...] These actions can be synthesized in the formulation of excessive demands, made under pressure by groups that were violent to the owners and proprietors, whom they threatened and pressured to yield to the requirements that they established...”

In this decision it is apparent that the context in which the violent actions were produced, the “grave conflict between the Mapuche ethnic group and the rest of the population,” originating in turn from the historical demand –and the current objective– of the Mapuche people for the recuperation of ancestral lands which they consider to have been unjustly seized, played just such a determining role in the decision to treat such deeds as terrorist acts, as that context and this objective serve as a basis for the configuration of the (typical) legal existence of the singular crime being tried. The isolated fire of the Poluco Pidenco building appears to be a simple means for a purpose of greater magnitude, that of creating fear (terror) in part of the population, fear of being a victim of new crimes. The historical political context of the grave ethnic conflict in which the crime was produced, then, far from exonerating or attenuating criminal responsibility (as the principles and norms of applicable international human rights law

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<sup>4</sup> ...

<sup>5</sup> Villegas, Myrna, “El Derecho penal del enemigo y la criminalización del pueblo mapuche”, ... [“Criminal Law of the Enemy and the Criminalization of the Mapuche people”]

might imply), aggravates it. Likewise there was a special pronouncement issued by the parliamentary commission at the time of the actions.<sup>6</sup> It was thus understood by the governments of the center-left *Concertación de Partidos por la Democracia* that dozens of convictions and complaints for infractions of the Law of State Security had been filed, and there were additional implications for the Antiterrorist Law.<sup>7</sup>

The implications for the criminal valuation and treatment of these actions as “terrorist” extend beyond that of the toughening of applicable penalties, also reaching an important reduction in procedural guarantees. As this generally occurs in the legal-criminal regimes, it has come to be known as the “criminal law of the enemy.”<sup>8</sup>

*The Mapuche perspective on the historical context. First approximation*

This manner of assessing the context that consists of defining the violent actions undertaken for the occupation of individual buildings as “terrorism” certainly contrasts with the vision that Mapuche leaders and community members have about the meaning provided by the context of these deeds. Although this claim is of course not argued in criminal proceedings –where the defense usually argues that there is no evidence of the participation of the accused in the deeds<sup>9</sup>– the leaders and community members involved in such proceedings understand that the historical-political context justifies the actions, at least for the following reasons:<sup>10</sup>

i) The Chilean State violently and unjustly displaced the Mapuche people from their ancestral lands, by means of military actions that touched on genocide, to later plant the ancient communities on a very reduced fraction of their land:

“...the so-called “Pacification of la Araucanía” [...] was for the Mapuche a true war of extermination that culminated with the complete occupation of its lands, when it loses

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<sup>6</sup> “Report of the Commission on the Constitution, Legislation, Justice and Regulation...”

<sup>7</sup> “Report of the Commission...”, cit. note n. \*, p. 154.

<sup>8</sup> ...

<sup>9</sup> Thus, for example, in the cause ...\*

<sup>10</sup> \* references

the war for independence in the year 1881. This period of war and violence is succeeded by the period of reduction [in numbers of Mapuche]”<sup>11</sup>

“The historical roots of the conflict are primarily based in “the dispute around ownership of the land,” originating from the first inter-ethnic contact between Mapuche Nation and its conquerors [...]. It is through the passing of the so-called *Títulos de Merced* and the transfer to private landowners of nearly the entire ancient Mapuche territory in la Araucanía at the end of the last century, that the ancient communities are cornered in a tiny part of their lands”<sup>12</sup>

ii) The policy of restitution initiated in recent decades is clearly insufficient, and has not succeeded in reversing the grave situation of poverty and marginalization in which the Mapuche people are found, nor in impeding the rapid process of cultural disintegration and the deterioration of the land:

“Historically the communities have complained about the loss of their territory, however, the attempts to obtain a satisfactory answer to their territorial demands have been fruitless, generating in addition to the loss of their territory the economic impoverishment and degradation of the natural resources within the territory still in their hands. [...] under Pinochet’s dictatorship, the institution in Chile of a state policy of developing forests, that has permitted the institution and growth of this kind of business in the Mapuche territory, to the detriment of the original inhabitants based there, has come to sharpen the conflict. The communities look to both the Chilean justice system (the courts) as well as other administrative authorities such as CONADI<sup>13</sup> in order to find an answer to their demands for the usurped lands, and try to negotiate with the logging companies and with the businessmen adjacent with their lands. Nevertheless, the Courts habitually rule against them, the negotiations with CONADI are trapped in long administrative procedures, do not give answers to their requirements, and the companies refuse to talk to them.”<sup>14</sup>

iii) To reverse this situation of poverty and cultural disintegration it is urgent and critical to reform the ancestral lands in an extension and at a speed that the Chilean State does not demonstrate willingness to assume. The occupation and exercise of effective acts of possession, including those that formally violate Chilean law, are ideal and necessary measures for the recuperation of land, that may possibly and subsequently serve as a basis for a policy of “deeds accomplished,” so that Chilean institutionality is forced to recognize this possession and to regulate it. These measures

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<sup>11</sup> Final Report of the Commission of the Autonomous Mapuche Project...

<sup>12</sup> Case study “Logko Pichun and Norin Case” prepared by María del Rosario Salamanca

<sup>13</sup> *Corporación Nacional de Desarrollo Indígena* (The National Corporation for Indigenous Development), public entity charged with coordinating policies on the subject.

<sup>14</sup> Case study “Logko Pichun and Norin Case”...

do not constitute unjust coercion because they are only performed on lands that are historically Mapuche, and whose occupation by the Chilean State or by “huinca”<sup>15</sup> private owners was only made possible by an unjust and violent dispossession.

“After trying various means to obtain an answer and following decades of failed attempts, the communities that consider lands occupied by the loggers as their ancestral lands have decided to occupy them physically. Although these occupations may be considered by certain Courts to be illegal, the FIDH<sup>16</sup> considers that in many cases they correspond to legitimate occupations. The government should assume its responsibility with respect to this problem and seek a just and viable solution to the fundamental question of the Titles of the lands in dispute.”<sup>17</sup>

This Mapuche vision of the terms of justice provided in this context is directly linked with a couple key aspects of their historical and cultural identity.

First, the Mapuche people are born of, and as such the possibility of their subsistence depends on, their permanent relationship with the lands on which they were originally established. Indeed, for the Mapuche:

“the *che* man is an inhabitant more than the *wajontu mapu*, he is an integral part of nature and of the *newen* spiritual forces that exist in the territory, this being understood in its multiple dimensions.”<sup>18</sup>

Second, this relationship with the land cannot be reduced to the concept of property employed by Western law, and it cannot be legitimately affected or interfered with by acts of private parties, as it is a relationship of the people with the land, that admits various forms of use and exploitation, with collective and individual titles according to the type of use and exploitation in question. It thus follows that, not only was the violent occupation by the Chilean State at the end of the 21<sup>st</sup> century unjust, but

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<sup>15</sup> Denomination currently used by the Mapuche to refer to the Chileans, and that historically (from when it was used with the Spanish conquerors) emphasize their invasive and usurping character.

<sup>16</sup> *Federación Internacional de los Derechos Humanos* (International Federation for Human Rights).

<sup>17</sup> Case study “Logko Pichun and Norin Case... pp.12.

<sup>18</sup> Case study “Logko Pichun and Norin Case in the context of the application of Procedural Penal Reform in the Mapuche territory,” prepared by María del Rosario Salamanca, and in the Final Report of the Autonomous Mapuche Project, in the Report of the Commission on Historical Truth and New Treatment, III, tome III, chap. III, in: [http://biblioteca.serindigena.org/libros\\_digitales/cvhynt/v\\_iii/t\\_ii/capitulo\\_III.pdf](http://biblioteca.serindigena.org/libros_digitales/cvhynt/v_iii/t_ii/capitulo_III.pdf), visited November 30, 2011, p. 1217.

the operations, more or less opportunistic, that the “*huinca*” private parties have performed since then –a relatively recent period in the history of the Mapuche people– are not ideal, from the view of Mapuche normativity, in their effect on the permanent and inalienable relationship between the Mapuche people and its lands and territory. Indeed, for the Mapuche:

“The *wigka* view or in this case the non-Mapuche view that the State and the logging companies share, that views man as the dominator of nature and considers land to be private property, does not contain a concept of territory and grants the owner the potential for arbitrarily disposing of the same. From the historical point of view the Mapuche inhabitants of the territory in conflict feel themselves to be the original inhabitants and therefore with ancestral rights over the same. For their part the logging companies feel themselves to be the legitimate owners as they hold the titles granted by the Chilean State over the land that they occupy.”<sup>19</sup>

Additionally, the Mapuche view begins in good measure to see itself confirmed and legitimated “from the outside” by the fact that, in relatively recent times, Chilean institutionality has tended to recognize its special relationship with its ancestral lands, at least on the level of principles, first with a law (the Indigenous Law, N° 19,253, of 1993) that recognized the concept of “indigenous lands” and declared them not seizable or alienable, and that created a procedure and a fund for returning any part of what has been dispossessed; then, with the revision of the “official history” about the “pacification of la Araucanía” by the Chilean State itself, recognizing the historical injustice of the dispossession and the justice and urgency of the measures for territorial reformation (in the Report of the Commission on Historical Truth and New Treatment<sup>20</sup>); and finally, with the adhesion, on the part of the Chilean State, to the principles and norms of international law that recognize the right of indigenous peoples

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<sup>19</sup> Final Report of the Commission on the Autonomous Mapuche Project, in the Report of the Commission of Historical Truth and New Treatment, vol III, tome III, chap. III, in: [http://biblioteca.serindigena.org/libros\\_digitales/cvhynt/v\\_iii/t\\_ii/capitulo\\_III.pdf](http://biblioteca.serindigena.org/libros_digitales/cvhynt/v_iii/t_ii/capitulo_III.pdf), visited November 31, 2011, p. 1296.

<sup>20</sup> \* references

to subsist as peoples, in their original territories, with their own law and their own culture (as recognized in Convention n° 169 of the ILO, ratified by Chile in 2009).<sup>21</sup>

All of this, from the Mapuche perspective, cannot help but grant a different meaning to the acts of violence destined to (re)occupy and exercise acts of possession over the ancestral lands, one that justifies such behavior, above all if we take into account its perspective of the urgency of these measures to “save” the culture, economy and way of life of the Mapuche people before it is too late. According to many Mapuche leaders, this task would not be possible in a context of stagnation or given the return of the territories “in dribs and drabs.”

Criminal treatment of precocious sexuality and incest among the Mapuches: between the negation of cultural difference and the declaration of a deficiency of personality conditioned by the culture

*Case 1*

“[...] the deeds according to the accusation of the prosecutor occurred on November 13, 2004, during the night, in circumstances that the minor with initials U.C.H.R was found in the home of the accused, who proceeded to maintain sexual relations with the referenced minor of thirteen years of age [...].

[...] [An] anthropologist, who performed an expert appraisal with the objective of verifying the social isolation of the accused and his community, drew upon the findings of the Mapuche defense, attending to the community Bernardo Naneo. It is a community with Pehuenche cultural identity, some 100 families, cultural structure based in patriarchy, exogamy, they speak Mapudungun, there is a strong presence of the Pentecostal church [...] They have two types of access to information: television (3 channels) and radio (3 stations), which do not generally arrive daily.

[...]He concluded that the aforementioned community maintains ancestral cultural patterns, descendance through the paternal line, the family resides in the husband’s place of residence, the arrival of menarche, first menstruation, makes the woman accessible to adult men of the community, Mapudungun is spoken. In the summer the family is transferred to the mountains in November and return between March and April; they remain isolated. From Lonquimay to Naranjo there are between 2 and 3 kilometers. He finished by indicating that the Community was not aware that having relations with the minor had been prohibited and criminalized by Chilean law [...]”

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<sup>21</sup> \* references

During the trial the question was planted of whether, from the cultural point of view shared by the Pehuenche community in which the acts were committed, sexual relations with a minor, biologically already in puberty, are considered licit or not, as background to resolve whether the allegation of the defense, that the perpetrator had acted in error of prohibition, should be well-received. The description and analysis of the anthropological expert, that would give basis to this allegation, did not convince the court, which was convinced, on the contrary, by the testimony of the mother of the victim, and by the evidence that the community had access to means of socialization (church, radio) that would transmit the values of Chilean culture (church, radio). In light of the factual background provided in the proceeding, and rejecting the claim of the defense that the accused had acted in error of prohibition, the Criminal Trial Court of Temuco condemned the accused for the crime of statutory rape.<sup>22</sup>

During the trial, in any case, the potential existence of different cultural values (according to which those in puberty *i.e.*, those of thirteen years of age, may consent), was not used to examine and decide the unlawfulness of behavior, question that was never considered, despite the fact that it had been debated only five years before in the Chilean National Congress, when it raised the age of sexual consent from 12 to 14 years.<sup>23</sup> This question was only considered as a basis to decide whether the allegation on the part of the accused that he acted in error of prohibition was sincere and credible. The lack of conclusive evidence –in the opinion of the court– that the conduct was taken as licit in the cultural values of the perpetrator’s community, then, served as a basis to reject the sincerity of such allegation by the accused.

### *Case 2*

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<sup>22</sup> Ruling by the First Chamber of the Criminal Trial Court of Temuco...

<sup>23</sup> Consideration that the same defense performed...

... In this case (concerning an accusation of incest committed by a Mapuche community member with his underage sister), unlike that outlined in “case 1,” the court accepts the allegation of the defense that the perpetrator acted in error of prohibition. Again the question of if the cultural convictions affect or influence the lawfulness or unlawfulness of the behavior is not at play, but only if they may, even in part, explain an error on the part of the perpetrator, at the time of evaluating if what he had done was licit or not, which is completely independent of that which his culture or his people think in that respect.

In any case, the decision to accept, now as sincere, the allegation of the accused that he did not know that what he was doing was prohibited, reveals (in a perhaps more extreme version than in the other cases) a manner of valuing the context formed by beliefs, practices, and “myths” supposedly present in an indigenous community (in this case, Mapuche), that links, in a surreptitious manner, belonging to that “minority” indigenous culture with a certain deficiency in the cognitive, social, and moral development of the perpetrator of a criminal injustice. This is understood and valued as a certain disability, something more than a mere (“culturally conditioned”) error of prohibition: in a certain sense, as a manifestation of the immunity of the accused from prosecution (as is suggested by the ruling in passing, equating this deficit, improperly, to an error of prohibition) or an inability of guilt. The “cultural sensitivity” on which the absolution is based, then, in these types of decisions, comes to recognize not simply a cultural difference of normative convictions, but a deficit of personality and rationality, conditioned by the culture, which is understood in passing as a more primitive culture, feature from which the exonerating capacity is derived (or of a lessening of guilt, in this case) from belonging to the same.

*Mapuche perspective on improper incestuous sexual aggressions?*

It is more difficult to approach the valuation that members of the Mapuche people can make of the context of the precious sexual relations with adolescent minors (or incest involving them) “from the outside” than to do so in the case of the acts of violent recuperation of lands on the part of the Mapuche community members. The first reason is rooted in that, in the latter case, there is an explicit public discourse directed at raising the acts as an understandable response, while not justified, to an injustice. In the former, in contrast, there is no public discourse, if there may well be indicators that, for example, sexual relations with adolescent minors, while not clearly condemned as something illicit (as in the expert anthropological evaluation provided in “case 1”) or improper, above all if it occurs as an incestuous relationship, it would be judged with less severity by the Mapuche (as seems to arise from the anthropological expert appraisal in “case 2”) than by the Chilean state law (the punishment for which is up to twenty years in prison and with no less than five years and one day in any case). These differences in valuation would certainly not be read by the Mapuche as a consequence of their (absolute or relative) incapacity to understand sexuality and its corresponding norms, but of the relatively different valuation of the extension of these norms and the relative gravity of their infraction.

## II. German-inspired criminal legal doctrine and its resources for the problem of multiculturalism

### Legal monism and its expressions in criminal law

*“One State, one Nation, one Law”*

The claim that the Law is applied in all of the territory of the Republic without distinction, with the same rules for all inhabitants, is associated with the fundamental principles of the Chilean legal order, which have a clear expression in criminal law through the primacy, practically without refinements, of legislated state law. The criminal prohibitions of this law are formulated in an abstract and impersonal manner, such that they should apply to all individuals, without exceptions, not even those that could be based in ethnic origin. It is certain that on the subject of mitigating circumstances and even, hypothetically, on matters of exemptions of criminal responsibility, Chilean criminal law admits the possibility of making certain distinctions based on indigenous custom (as shall be seen), but the limited extension given to those special rules, and the suspicion that its single existence awakens in some, accounts for the importance assigned to the principle that the law is and should be one and the same for all.

One of these principles, seen from the interests of the beneficiaries of the law, would be that of equality before the law. Nevertheless, it is clear that the internal logic of this principle is not opposed to but –on the contrary– promotes the unequal treatment of those who are materially in unequal situations, with the potential for recognizing the relevance of the cultural differences in the definition of the legal responsibilities that should serve as a basis for judging behavior.<sup>24</sup> Therefore, it seems necessary, in order to

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<sup>24</sup> As Renteln has highlighted in examining the moral foundation of the consideration of *cultural defenses*: “The reason for admitting a cultural defense lies not so much in a desire to be culturally

understand the insistence with which the Nation-States defend a monist perspective (one law only, the same for all), to direct the gaze to other principles that protect the interest not of individuals but of the State itself: national unity, cultural homogeneity and territorial integrity.

Indeed, until very recently, the great majority of states –and such is clearly the case of Chile– aspired to be Nation-States, model in which “the State was implicitly (and sometimes explicitly) seen as the possession of a dominant national group that used the state to privilege its identity, language, history, culture, literature, myths, religion, etc., and that defined the state as an expression of its national being.” The dominant group was not necessarily the majority, but even “sometimes, a minority capable of establishing its domination –for example, the whites, in South Africa, or the creole élites in some countries of Latin America– [...]”<sup>25</sup>

A series of well-defined policies were at service of this project, among them, the adoption of an official language established by law; the construction of a national system of obligatory education, with a standardized curriculum focused on the teaching of the language/literature/history of the dominant group; the centralization of political power and the elimination of the pre-existing forms of local sovereignty or autonomy, as well as “the construction of a unified legal and judicial system, that functions in the language of the dominant group and uses its legal traditions; and the abolition of every pre-existing legal system used by the minority groups.”<sup>26</sup>

Also at the service of this project, and to make these policies effective, the construction of nation-states often involves the occupation of the lands, forests, and

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sensitive, although that is surely a large part of it, but rather in a desire to ensure equal application of the law to all citizens”; Renteln, Alison Dundes, *The Cultural Defense*, Oxford University Press, Oxford-New York, 2004 [Kindle version], position 3338. On *cultural defenses*, see *infra* \*.

<sup>25</sup> Kymlicka, Will, *Multicultural Odysseys: Navigating the New International Politics of Diversity*, Oxford University Press, Oxford, 2007, p. 61.

<sup>26</sup> Kymlicka, *Multicultural Odysseys*, pp.62-63.

spaces for fishing that used to belong to the minority groups and indigenous peoples, declaring them to be “national” resources, and when these policies are resisted, using “various forms of ‘demographic engineering’ (for example, pressure on the group members to disperse, and/or the promotion of settlements by the members of the dominant group in the territory of the indigenous and minority groups) [...]”<sup>27</sup>

In this framework, the existence and operation of Mapuche law prior to the formation of the Chilean Nation-state were as problematic for this project as the existence of Mapuche territories where the group would exercise jurisdiction with its own authorities, its economy and its customs. Therefore, in contrast with the attitude of the Spanish authorities that during the colony had tolerated the existence of a normativity and some indigenous authorities to administer justice in the causes between Indians when the penalty was not grave, thus recognizing a certain validity of the Mapuche law although it was nevertheless seen as a primitive expression that should remain under Spanish tutelage, the authorities of the budding Republic of Chile, after independence, pushed the “assimilationist” model of relations between the State and state law and the indigenous.<sup>28</sup>

“The prevailing ideology of the period was that the indigenous should assimilate into the dominant creole or mixed world, and therefore, the triple identity State-Nation-Law was created during this period, imported from Europe with the ideas of the Enlightenment. As a political configuration, the State corresponds with only one Nation, defined by one people, one culture, one language, one religion [...] such that it is precisely this model that in the realm of law tries to erase all vestige of its own law and traditional authorities”<sup>29</sup>

And while during the 20<sup>th</sup> century certain rights of the indigenous begin to gain recognition, along with their cultural specificity, expressed in their language, dress and their religion, under the condition that they be integrated into national development as

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<sup>27</sup> Kymlicka, *Multicultural Odysseys*, pp.63, 61.

<sup>28</sup> Final Report of the Commission on the Autonomous Mapuche Project, cit. note n. \*, p. 1032.

<sup>29</sup> Yrigoyen, ...

“ethnicities,” not as “peoples,” the “monist” definition of a single law remained unquestioned, corresponding to the idea of “one State, one Nation, one Law,” corresponding to that which

“all other norm or form of law not produced by the State is seen as a mere custom, as an isolated practice that can sometimes be ‘mixed’ with moral and religious rules. The indigenous laws, not being formalized like those of the state, are seen as backward, retrograde, pre-modern systems that should be subjected to and integrated into the State and to national law, to enable the civilization of those peoples that are equally ‘backward’ [...]”.<sup>30</sup>

### Legal Monism in Criminal Law.

Criminal legal doctrine has indicated the danger that instituting “local criminal laws” inspired by cultural diversity would represent for the (preventive-general) reinforcement of criminal prohibitions of alleged universal validity. In the words of Carnevali, in one of the most documented reflections on the subject in Chilean criminal legal scholarship:

"One of the biggest problems that may be presented with the institution of collective rights, for example, the establishment of legal systems serving the cultural group, is the risk of the generation of ghettos within a society, that may lead to social dismemberment. Precisely, from a general preventative perspective, criminal law may hardly be effective in a society in which diverse normative identities exist. This is to say that through the recognition of cultural diversity as a collective right and the disposition of the members of such groups a seek their own ways of solving conflicts— the fragmentation of criminal law by the presence of individual criminal laws—, would end by permitting certain behaviors that are intolerable for the rest of the social component. It is sufficient to think of the practices of family maltreatment or of sexual aggression.”<sup>31</sup>

It is certain that cases of children’s and women’s rights have greater appeal to universal values than others, due to the transversal danger in every society of maintaining situations of structural violence and oppression whose cultural hold is only the reflection of the unjust distribution of power to generate and maintain norms that

<sup>30</sup> Final Report of the Commission on the Autonomous Mapuche Project, cit. note n. \*, pp. 1033-1039.

<sup>31</sup> Carnevali, Raúl. “El multiculturalismo: un desafío para el Derecho penal moderno”. [“Multiculturalism: A Challenge for Modern Criminal Law.”] Polít. Crim. n° 3, 2007. A6, p. 1-28. [<http://www.politicacriminal.cl>], pp. 22-23.

favor the interests of some to the detriment of others.<sup>32</sup> But, first, by its “emancipating” internal logic, this appeal that seeks to “protect minorities within the minorities”<sup>33</sup> (rejecting situations of structural violence and oppression that, while having formal normative endorsement in the community, have only acquired validity in the framework of an unjust nomogenetic system) is only valid for a fraction of the prohibitions (*i.e.*, for the prohibition of slavery, of sexual exploitation, of open coercion by means of violence or intimidation), and not for many others (the protection of the majority’s moral convictions; property –in the face of non-coercive impairments–; or, certain institutional conditions or state functions considered necessary or useful for exercising individual rights). Second, even concerning prohibitions that appeal to universalist values stemming from the “emancipating” logic, their alleged validity does not at all imply the universal validity of a determined form of protecting them –criminal reinforcement, for example– or a determined legislative response to the prudent question of the intensity of the sanction considered just and necessary for the various forms of infringing upon such prohibitions.<sup>34</sup> In this case the only thing that is “universally valid” might be the duty of loyalty to the democratic procedure of questioning and the abolition of norms (the only thing that can be demanded of the citizen in secular law, or one that admits the relative value of its criminal prohibitions), procedure that may well (with that which as universal may be at play in the definition of criminal norms) recognize local venues for the establishment and abolition of local criminal norms, in the face of which all members of the community must act with loyalty.

It therefore seems that the appeal to the universal value of certain legal interests does not exhaust the explanation of attachment to the “legal(-criminal) monism”

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<sup>32</sup> As Carnevali argues ...

<sup>33</sup> Renteln, *The Cultural Defense*, cit note n. \*, postion 3338.

<sup>34</sup> With more details, Couso, Jaime, *Fundamentos del Derecho penal de culpabilidad. ... [Fundamentals of the Criminal Law of Guilt]*

perceived in the criminal legal doctrine, as in the entire portion of state-legislated criminal law that is not traceable to the universalist argument of emancipation (the largest portion, as it seems). This adhesion to legal(-criminal) monism seems to make reference, as background, to the much more general allegation that “a State” must have “one (criminal) law,” that reflects the convictions of the majority (which is not the same as “universally valid”):

“While the effort directed at recognizing cultural identity may seem reasonable, it seems, in contrast, questionable and even dangerous that the cultural recognition of the minority peoples permits the justification of acts interfering with legal interests that the majority society esteems valuable. That is to say, it is difficult for a society to admit that the practice of certain acts generates duties of tolerance and therefore considers them to be legitimate only because they are grounded in respect for the customs of certain cultures. It is sufficient to think of the conflicts that may be presented to justify acts of family maltreatment or of bodily harm. As was previously established, decisions of this nature —of communitarian tradition— may give room to manifestations of counterproductive social instability, examined from a general preventative perspective.”<sup>35</sup>

Although the example of the acts of family maltreatment again appeal to universalist values (after this evocation the oppression of children and women is clearly assumed), the extension of the “genus” (“acts attending to goods that the majority society esteems to be valuable”<sup>36</sup>) from which this example is taken, as “a species,” and as the basis for worry (“counterproductive social instability, examined from general preventative perspective”), they seem to reveal that, really, what is dangerous is the existence of a plurality of normative systems within the territory of the National state.

*Criminal unlawfulness as an impassable limit to the understanding of indigenous criminal conflict. The case of the culturally conditioned error of prohibition and “acting in conscience.”*

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<sup>35</sup> Carnevali, “El multiculturalismo...”, [Multiculturalism] cit. note n. \*, pp. 22-23.

<sup>36</sup> This limitation in the tolerance of diverse cultural practices also appears in the approach of important philosophers of multiculturalism, like Bikhu Parekh (cited by Renteln, *The Cultural Defense*, cit. note n. \*, position 234).

It is certain that criminal legal doctrine, today more than ever, has become sensitive to cultural differences. Carnevali's approach takes note of this when it advocates for giving space to the excusing criminal unlawful behaviors conditioned by the cultural guidelines and convictions of the perpetrator, not only when –which would be a very rare occurrence– these guidelines and beliefs determine an unfamiliarity with the norm, but even –which would be rather more frequent– when they determine that the perpetrator does not “understand” the meaning of this prohibition, or when:

“the effort of internalizing the norm is seen as particularly difficult on account of his or her cultural conditioning and that permits affirming that it is not possible to reproach him or her for lack of understanding —culturally conditioned error.”<sup>37</sup>

Accommodating this defense in criminal law, Carnevali concludes, supposes that “the judge weighs the cultural conditionings” of the perpetrator. It is a demand of the “principle of equality before the law.”<sup>38</sup>

Nonetheless, in this consideration of cultural difference a basic aspect emerges that seems common to all expressions of the “cultural sensitivity” of criminal legal doctrine, the recognition of an impassable border or barrier: the affirmation, in accordance with the monist-legal system of criminal norms, that a criminal unlawful act has been committed in any case. This would be an impregnable definition from a multicultural perspective, adopted precisely from state-legislated criminal law, not subject to relativizations from the “local” normativity of a determined community of indigenous people.

Thus, for example, referring to the criminal treatment that should be given to the “deed performed for motives of conscience,” where those deeds conditioned by the normative beliefs and conditions of the minority culture or ethnicity to which the perpetrator belongs must be situated, the most celebrated exponent of German-inspired

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<sup>37</sup> Carnevali, “El multiculturalismo...”, cit. note n. \*, p. 27.

<sup>38</sup> Carnevali, “El multiculturalismo...”, cit. note n. \*, pp. 27-28.

criminal law, the writer of treatises Claus Roxin, admits that this deed may be “exempt from responsibility” (which, in terms of the dominant systematic in Chile, would be expressed as “exempt from culpability” or “excused”) due to a lack of preventative necessity of the punishment, to the degree that the perpetrator operates under “coercion of conscience” provoked by the criminal injunction (contrary to his or her convictions) that provokes “strong pressure on the motivation.”<sup>39</sup> But it also expressly rejects that acting on motives of conscience is justified by the legitimate exercise of a right (precisely, the right to freedom of conscience), which would be irreconcilable with “the claim of the law to establish objective norms of general validity.”<sup>40</sup>

In this manner, the right not to be forced to act against one’s own conscience constitutes

“only a right to indulgence, not to the legalization of one’s own point of view.”<sup>41</sup>

*The Anglo-American perspective on “cultural defenses”*

Anglo-American law and case law have developed the so-called “cultural defenses” or allegations that demand that the court take into account the cultural background of the party accused of a crime –or of the interested party in a civil or constitutional litigation, etc.– to modulate the judicial decision in a manner consistent with this background –in a criminal case: exonerating the accused of criminal responsibility, or attenuating it.<sup>42</sup> This development has gradually become a point of reference at the time of debating the question of how to consider, also in the criminal

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<sup>39</sup> Roxin, Claus, *Derecho Penal. Parte General, Tomo I* [Criminal Law, General Part, Volume I], § 22, nm 121-122.

<sup>40</sup> Roxin, *Derecho penal*, cit. note n. \*, § 22 nm 121.

<sup>41</sup> Roxin, *Derecho penal*, cit. note n. \*, § 22 nm 121.

<sup>42</sup> In detail, Renteln, *The Cultural Defense*, cit. note n. \*, *passim*.

law of the continental European systems, cultural and ethnic diversity at the time of adjudicating criminal responsibility.<sup>43</sup>

Read from the perspective of the conceptual and ideological substratum of German-inspired criminal law, this development seems upon first reading to confirm the correction of its principal assumption on this matter: cultural difference attenuates or excuses, never justifies; and, even so, should attenuate or exonerate only in exceptional circumstance, so as not to endanger the general preventative effect of criminal norms and punishments.

Indeed, upon summarizing the reasons in favor of cultural defenses in criminal proceedings, Renteln makes references that seem to coincide with this rather limited approach:

“The rationale behind such a claim is that an individual’s behavior is influenced to such a large extent by his culture that either (1) the individual simply did not believe that his actions contravene any laws, or (2) the individual felt compelled to act the way he did. In both cases the individual’s culpability is lessened”

“The balance is best achieved by the establishment of a cultural defense as a partial excuse”<sup>44</sup>

Nevertheless, when Renteln addresses the problem from the perspective of the right to one’s own culture, the logic that underlies the consideration of cultural defenses is shown to have greater reach, fulfilling a function much closer to the affirmation of a right to behave in accordance with one’s own culture –a right which, if applicable, should be given preeminence–, than that of a behavior certainly improper but more or less excusable:

“[M]y own view is that individuals should have the right to follow their cultural traditions without interference, unless the traditions pose some great risk to members of the ethnic group or to society at large. The risk must be extremely grave, so as to threaten irreparable physical harm.”<sup>45</sup>

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<sup>43</sup> Carnevali, “El multiculturalismo...”, cit. note n. \*, pp. 16-17.

<sup>44</sup> Renteln, *The Cultural Defense*, cit. note n. \*, position 2929, 2937.

<sup>45</sup> Renteln, *The Cultural Defense*, cit. note n. \*, position 2911.

Indeed, for the perpetrator, only in these extreme circumstances should the right to behave in accordance with one's own culture be denied, as, in the end, the right to live in accordance with one's own life plans, defined by one's own culture, are a "fundamental human right," such that it cannot simply be yielded in the face of the allegation that there is only one correct way of life, as much as it is validated by the convictions of the majority society:

"Until the right to culture is understood to be a basic human right, individuals will continue to be told that they must become assimilated, that their background is "irrelevant", and that there one correct way to behave. In a culturally diverse society, it is necessary that individuals be permitted to pursue their own life plans without interference from government"<sup>46</sup>

Otherwise, in her retelling of the form in which the considerations of cultural background influence the treatment of criminal cases, Renteln accounts for the effects that may be interpreted as the affirmation of a justification of the behavior.<sup>47</sup>

The same may be said of the effect of cultural defense in the treatment of the sacrificial use of peyote –cactus with psychoactive and hallucinogenic properties, considered a drug in North American legislation<sup>48</sup>– by North American indigenous peoples, when it has led to acquittals; for example, in the celebrated decision of the Supreme Court of California in 1964 (*People v. Woody*), which recognized the hallucinogenic properties of peyote and the state interest in its regulation but identified a

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<sup>46</sup> Renteln, *The Cultural Defense*, cit. note n. \*, position 3470.

<sup>47</sup> This occurs, for example, when deciding to accept or reject the allegation that the perpetrator committed the deed in "self-defense" (a justification, not a simple exoneration). The standard employed consists of whether, under the objective circumstances in which the perpetrator acted, it was "reasonable" to consider a defense of the magnitude he or she employed to be necessary, issue that should be decided, in any case, taking into account the factors, cultural included, that would reasonably lead the perpetrator to this conclusion, such as the repeated record of violence exercised by the police and the agents of the state (that at some point in history came to constitute genocide) against the minority ethnic community to which the perpetrator belongs and that, in just fashion, made it "reasonable" to judge, under the objective circumstances in which he or she was being assaulted, that the violent defensive reaction undertaken by him or her resulting in the death of a police officer was necessary. Renteln, *The Cultural Defense*, cit. note n. \*, position 497-506.

<sup>48</sup> Also by Art. 5 of the Chilean Regulation of the Law on Drugs, N° 20.000.

collision between the interest of the accused, the Navajo, in exercising their religion by means of the use of the drug, concluding that:

“Since the use of peyote incorporates the essence of religious expression, the first weight is heavy [...] The scale tips in favor of constitutional protection [...]”

to subsequently make a clear declaration in favor of pluralism, not only cultural, but, in this arena, legal:

“The varying currents of the subcultures that flow into the mainstream of our national life give it depth and beauty. We preserve a greater value than an ancient tradition when we protect the right of the Indians who honestly practiced an old religion in using peyote one night at a meeting[...]<sup>49</sup>”

It is clear, then, that this decision does not try to excuse or exonerate the indigenous people for their culturally-conditioned incapacity to understand the criminal prohibition of the trafficking and consumption of hallucinogenic drugs, but to recognize the lawfulness of their cultural values and their different religious practice.<sup>50</sup>

#### *Legal custom and legal(-criminal) monism*

In a relatively recent period, Chilean law has approached the question of multiculturalism with respect to indigenous peoples by means of the recognition of a certain value of the indigenous custom, even in legal-criminal matters. While indirectly, this has occurred when the legislator has taken this into account to modulate criminal treatment of behavior of a determined indigenous people, partially adapting it to the

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<sup>49</sup> *People v. Woody* (1964), cit. by Renteln, *The Cultural Defense*, cit. note n. \*, position 1213.

<sup>50</sup> In fact, as of that recognition in the case law, the sacramental use of peyote by North American indigenous members of the Native American Church (NAC) has been an object of state regulation, permitting even its use by members of the the army that belong to the church, with the restriction of interrupting its consumption 24 hours before returning to active service and not transporting it in military vehicles or bases. Nevertheless, clearly establishing that this does concern a general revision of the socially noxious character of the traffic and consumption of *peyote*, North American case law has rejected extending its justification to individuals that are not Native American, even those that belong to the NAC, for which the non-discrimination clause was considered an obstacle, as the distinction was not “racial” (as was alleged), but “political” (thus, en *U.S. v. Warner* (1984), while the treatment in *Warner v. Graham* (1988) was considered discriminatory. Both decisions are cited by Renteln, *The Cultural Defense*, cit. note n. \*, position 4218), explaining that it does not deal with simply permitting the behavior in the exercise of religious freedom (no one may found a religion that adopts the consumption of drugs as a practice), but an act of cultural pluralism facing a diverse indigenous people and culture.

relatively different value that they would have within this community (as in the case of the Rapa Nui people<sup>51</sup>), or directly, as in the case of Art. 54 of Law N° 19.253 (the “Indigenous Law”), according to which:

“The custom asserted in proceedings between the indigenous belonging to the same ethnicity, shall constitute law, provided it not be incompatible with the Political Constitution of the Republic. In the criminal realm it is considered when it may serve as background for the application of an exoneration or attenuation of responsibility.

When the custom must be given credit in a trial it may be proven by all the means that the law makes available, and, especially, by an expert report the should vacate the Corporation<sup>52</sup> at the request of the Court.”

Upon first glance at this one may observe another expression of legal monism. According to this perspective, this tendency would be inscribed in the framework of the so-called “integrationist model” of resolution of the relations between the State and state law on one hand, and the indigenous peoples on the other, that recognizes the relative value of the indigenous “cultural specificity.” This specificity is also expressed in certain normative values relatively different from those expressed in criminal law, but without questioning the universal value of the norms of state-legislated criminal law, only marginally modulating the application of the exonerations and, above all, of the mitigating circumstances to account for the conditionings and difficulties that certain individuals face at the time of acting in accordance with the demands of law, derived from belonging to a culture that has certain different uses and customs.

Indeed, the recognition of a certain value in the indigenous custom, with these limited effects, supposes the complete abandonment of the definition of the scope of typical criminal injustice, or the licit and the illicit, in the hands of state-legislated criminal law for effects of punishment, permitting the indigenous normativity only to

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<sup>51</sup> Law N° 16.441, of March 1, 1966, that creates the Department of Easter Island, gave a criminal treatment attenuating sexual crimes and crimes against property committed on Easter Island by its natives: “Article 13 In the crimes contemplated in Titles VII and IX of the Second Book of Criminal Code, committed by natives of the Island and in its territory, shall impose a lesser penalty of the minimum degree indicated by the law for the crime for which they are responsible.”

<sup>52</sup> Meaning the National Corporation for Indigenous Development.

influence in the decision of if the individual is, and to what degree, individually reproachable for his or her unlawful behavior, or if he or she should be exonerated, due to the incapacity (if applicable, conditioned by culture –deficient, from the point of view of the state definitions of injustice–) to act in another way (to act dutifully, as the individual without personal or cultural defects would act). On the other hand, on the symbolic plane, the definition of indigenous law as “custom” in a legal order, and in a branch of law, that assigns legislated law a clearly superior value, to the point of being the source *par excellence*, also supposes a devaluation of indigenous law as a more primitive, less detailed and less developed normative product.

Indeed, seen from the Mapuche point of view, Mapuche law ends up relegated to the space of mere uses and customs, “like the spurious product of an inferior culture that dares to challenge the normative homogeneity achieved after decades of codification.”<sup>53</sup>

Therefore, in the Mapuche view, the qualification of Mapuche law as “legal custom”

“[is] a manner of negating the existence of the indigenous authorities and jurisdiction [...]. its recognition is seen as an open challenge to the State and its claim to have exclusive jurisdiction, sustained by the ideology of universalism and equality before the law”<sup>54</sup>

Nevertheless, even when this perspective reflects in good measure the limited advances with which the legislative decision to consider custom in criminal law has been received, what is certain is that its possibilities for configuring the boundaries of what is forbidden and what is permitted under criminal law are greater than they appear. This is such, first, because the Chilean criminal legal order does not associate the exonerating circumstances (or “exemptions” of criminal responsibility, which are referred to expressly in Art. 54 of the Indigenous Law) with the “excuses” but, at least

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<sup>53</sup> Barrientos, cited by the Final Report of the Commission on the Autonomous Mapuche Project, cit. note n. \*, p. 1036.

<sup>54</sup> Barrientos...

conceptually, covers with this expression (presiding in Art. 10 of the Penal Code) not just the excuses but also the justifications, or those causes that, after weighing of the interests in conflict, permit the declaration that the *prima facie* criminal behavior was in the end appropriate and legally correct. Moreover, some of these exemptions (that, like all, should be applied to the indigenous in accordance with their custom) are formulated in such general terms (for example, operating in legitimate exercise of a right, or in the fulfillment of a duty) that they have even come to demonstrate the affirmation of a conformity to law in general terms, without attention to the existence of an exceptional situational context.