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THE CARDOZO ELECTRONIC LAW BULLETIN

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ARTICLES

MONISM, PLURALISM AND LEGAL CHANGE

AN OVERVIEW OF THE CHILEAN EXPERIENCE

Rodrigo Míguez Núñez[*]

INTRODUCTION

This article is an exercise in understanding of pluralistic legal thinking in law. The objective is to offer a reconstruction of legal pluralism in the context of the interaction between formal discourse, alternative narratives and worldviews about law. In so doing, my goal, which highlights aspects of comparative private law, is to show in what way entities or social groups (apart from the State) can be regarded as effective lawmakers in the Chilean context.

Four basic premises are useful to understand the pluralistic legal thinking in Chile.

Firstly, I would pointed out that the subject of this paper is clearly an invitation to think critically about the law.[1] The pluralistic legal thinking does not deal with *ley*, *legge*, *loi*; instead, it deals with *derecho*, *diritto*, *droit*. By looking at legal systems from a perspective not centred on State law, we can

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[1] For a more detailed account on this topic see Wolkmer, Antonio Carlos. *Introducción al pensamiento crítico*. ILSA, 2003.

agree that the "State" and its "formal rule" are both subject to the "law". Thus, it is worth noting that law in this sense is part of a much larger universe, one dominated by an intersubjectivity dimension characterized by its "social dimension".[2]

Secondly, it is necessary to highlight that my scope is not discussing legal systems. Instead, I'm interested in how a society, its citizens and institutions, choose to "live together". In this respect, this study reflects on how different ways of social relationship or "histories" can coexist in one legal system[3].

Thirdly, the tradition of pluralistic legal thinking in Chile is related to the era of "legal particularism" in Latin-American, that is the colonial law. Thus, it would be difficult to explain the evolution of the "histories" that coexist in Chile without taking into account the context in which the history of pluralism has spread all over Latin America.

Finally, 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 we choose to tell. Because of this, legal pluralism depends also on the critical perspective (and personal sensitivity) that each of us possesses of the phenomenon we want to explain. In other words, legal pluralism is not a neutral term but is strongly connected to moral values and ideas of the law.

This paper will be divided into two sections.

Part I will focus on the analysis of the counter-model to the concept of state legislative monopoly, that in Chile can be mainly studied through the evolution of custom as a source of law. This section will argue that the

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[2] Grossi, Paolo. *Prima lezione di diritto*. Roma-Bari, 2012, p. 12.

[3] For more on this account see Halliday, Paul D. "Laws' Histories: Pluralisms, Pluralities, Diversity". *Legal Pluralism and Empires, 1500-1850*, edited by Lauren Benton and Richard J. Ross, NYU Press, 2013, pp. 261-277.

hegemony of legal formalism in Chile has been an endless obstacle to the implementation of other "histories" or "narratives" that go beyond the written law.

Part II will study 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 will present some instances drawn from the Chilean jurisprudence showing how the traditional idea of law has been changing over time. Moreover, it will be illustrated the relevance of labour movements, economic-interest groups and indigenous people in the legislative change. In this regard, the pluralistic legal thinking challenges the set of truths that have dominated the concept of law in Chile since its Independence.

This analysis is not meant to be exhaustive. Rather, it is aimed to stimulate critical reasoning in areas where little theoretical attention to legal pluralism has been paid to this point.

I

FROM PLURALISM TO MONISM

A. 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 on the theoretical and operative implications of this subject[4]. However, while the

[4] In fact, between 1978 and 2008, fifteen constitutional texts were enacted with the recognition of indigenous peoples' rights, new forms of democratic participation and pluralistic character of society. This trend goes hand in hand with the influence of Boaventura de Sousa Santos and

academic study of legal pluralism has been largely ignored, Chilean jurists and legal historians have implicitly analysed the phenomenon of the counter-model concept of a State legislative monopoly by looking at the foundations of the colonial and republican law. In this regard, "custom" has been the term used to refer to any form of non-written or autochthonous law, irrespective of its origins in America or Spain, from indigenous or Creole rule.[5]

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 deal with pluralism. 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 if 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 its version provided by the glossators of the 11th century) recognised the enforcement of custom as a "non-written law".[6] As a source of Castilian law, this Code was applied subsidiarity during the colonial era. Furthermore, from the time of *Leyes Nuevas* (1542-1543) indigenous customs received special treatment within the formal legislation, coexisting with it in

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Gunther Teubner's essays on the debate about legal pluralism in Latin America. See García Villegas, Mauricio. "Constitucionalismo aspiracional: Derecho, democracia y cambio social en América Latina". *Revista Análisis Político*, vol. 25, n. 75, 2012, pp. 89–110; Ocampo, Eduardo. "El Pluralismo Jurídico en América Latina. Principales Posiciones Teórico-Prácticas. Reconocimiento Legislativo". *Revista de la Facultad de Derecho de México*, vol. 68, n. 271, 2018, pp. 363–394.

[5] See Míguez Núñez, Rodrigo. "Indigenous Customary Law in a Civil Law Context: Latin America and the Chilean Case." *Rechtsgeschichte-Legal History*, n. 24, 2016, pp. 302–313.

[6] "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).

a pluralistic legal framework.[7] This structure was maintained by the *Recopilación de Leyes de Indias* (1680) which recognised custom as a source of law by allowing a wide range of indigenous usages.[8] Hence, an essential aspect of colonial legislation was the adaptation of Castilian law and institutions to the customs into force in the New World. Besides, multiple social and institutional orders related to each other interact: the Law of the Indies (either created in the peninsula or in the American space), the Laws of Castile and the indigenous customs[9]. This lack of a centralised law-making process coming from Spain allows us to state that the colonial framework of the sources of law was pluralistic, as it recognises different notions of the law. In other words, the colonial law was fully immersed in the theoretical framework of the "alternative law". There was then an interaction between the official (centralised) and the alternative law in a structure that can be defined as "legal-interlegality" or "pluralism of colonial origin".[10] Evidently, by allowing the interaction between different social orders, the colonial State sought, from an "ideological" perspective, to ensure unity based on differences.

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

[8] See, for instance, L. 4, tit. I, lib. II.

[9] On the reciprocal influence of pre-Hispanic and Castilian law during colonial times, see González de San Segundo, Miguel Ángel. *Un mestizaje jurídico. El derecho indiano de los indígenas.* Universidad Complutense, 1995; Mariluz Urquijo, José M. "El Derecho prehispánico y el Derecho indiano como modelos del Derecho castellano". *III Congreso del Instituto Internacional de Historia del Derecho indiano, Actas y Estudios*. Instituto Nacional de Estudios Jurídicos, 1973, pp. 101–113.

[10] See Santos, Boaventura de Sousa. "El discurso y el poder (Ensayo sobre la sociología de la retórica jurídica)." *Revista Crítica Jurídica*, n. 26, 2007, p. 97. See also Seinecke, Ralf. "What is legal pluralism and what is it good for?". *Legal Pluralism – cui bono?*, edited by Marju Luts-Sootak, Irene Kull, Katrin Sein, Hesi Siimets-Gross, Tartu University Press, 2018, pp. 13–28.

B. The republican era: civil code and "legal classicism"

The affinity towards a pluralist model is interrupted in the 19th century, when the emancipation of America took place. It is a known fact that the republican law is nothing else than legal unity, that is, the concentration of the law-making process in the centralised State. Accordingly, legal pluralism or "normativism" developed during the colonial era, is compared to the idea of rationalism, which involves the notion of "monism".

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

Firstly, custom was almost entirely excluded from the Civil Code as a source of law. Chilean Civil Code defined what should be understood as *ley* (art. 1), but omitted any concept of custom superseding the Castilian legal tradition. Besides, art. 2 (following the formula enacted by the Austrian Civil Code) predicated the validity of custom on the recognition of written law.[11]

Secondly, on the issue of legal interpretation, the Code established that when the meaning of the law is clear, the judge will not ignore its literal tenor (art. 19) and that the words of the law will be understood in their natural and obvious sense (art. 20). Even if the text of the law is obscure or defective, the judge cannot disregard the "general spirit of the law" and the "natural equity" by resorting to other 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

[11] On the origins of these rules, see Figueroa Quinteros, María Angélica. "La codificación civil chilena y la estructuración de un sistema jurídico legalista." *Congreso Internacional 'Andrés Bello y el derecho'*. Editorial Jurídica de Chile, 1982, pp. 77–104.

the slave of the law"[12]; and as a result, to put it as Lira Urquieta brilliantly did, "the law and the supreme government replaced the King".[13]

Thus, in a context dominated by the so-called cult of the written-law, custom and the tradition of colonial pluralism was considered only as simple relic of an earlier period of legal evolution; legal pluralism was then reduced to a simple custom in a primitive society and the role of non-written sources of law was barely subsidiary.[14]

The last interesting consideration to note is that the figure of the Indio did not appear in 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".[15] This omission not only broke with the pluralist tradition of the colonial times but also with the historical background of the Iberian Peninsula where Romans lived along with Celtiberians, Hispano-Romans with Goths, and Arabs with Christians.[16] Significantly then, the Civil Code forgot about the presence of the Indios and their customs as it took for granted their disintegration and transformation into the model of 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 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

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[12] See Tau Anzoátegui, Víctor. "Reforma y codificación en el pensamiento de Andrés Bello (1830-1839)." *Congreso Internacional 'Andrés Bello y el derecho'*, op. cit., pp. 109–110.
[13] Lira Urquieta, Pedro. *El Código Civil Chileno y su época*. Editorial Jurídica de Chile, 1956, p. 25.
[14] For a general review on this point see Baraona González, Jorge. "La cultura jurídica chilena: apuntes históricos, tendencias y desafíos." *Revista de Derecho de la Pontificia Universidad Católica de Valparaíso*, n. 35, 2010, pp. 434–435.
[15] Lira Urquieta, Pedro. *El Código Civil Chileno y su época*, op. cit., p. 28.
[16] Basadre, Jorge. *Historia del derecho peruano*. Edigraf, 1985, p. 282.

national unity and replace the old legal pluralism of colonial era with a rigorous monism[17]. According to art. 14 of the Code, written law "is mandatory for all inhabitants of the Republic, including foreigners", and after the Code's enter into force (January 1, 1857) the pre-existing laws on all matters that are treated in it will be repealed (last article C. Code). Moreover, while a unitary State was consolidating, it is easy to understand that there was no room for pluralism through "State courts" (as it remarkably happened in the case of the New German Reich[18]). In this way, social and regional diversity were also destined to converge in the monism 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 that typically developed in Latin America can be identified.

First, it should be noted that a considerable part of the 20th century was characterised by both the late theoretical transplantation of technique associated with the Code (the exegesis) and the reception of the methods of the Romanists and privatists linked to the German conceptualism. The combination of both factors gave rise to the predominance of that general and abstract current of legal thinking that will dominate the study of the law in Latin America, named, the "legal classicism".[19] Within this

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[17] Míguez Núñez, Rodrigo. "Indigenous Customary Law in a Civil Law Context: Latin America and the Chilean Case", op cit., p. 306.

[18] In fact, according to § 15 of the *Gerichtsverfassungsgesetz* (German Court Constitution Act of 1877): "The courts are state courts. Private jurisdiction is abolished; it is replaced by the jurisdiction of the federal state in which it was exercised […] The exercise of religious jurisdiction in secular matters has no civil effect. This applies in particular to matrimonial matters and matters of betrothal".

[19] López Medina, Diego. *Teoría impura del derecho*. Legis, 2004, p. 130. See also Baraona González, Jorge. "La cultura jurídica chilena: apuntes históricos, tendencias y desafíos", op. cit., p. 433. According to Barros: "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

theoretical framework, it is understood that the space for theoretical analysis based on sociological considerations and then derived from the observation of local reality could not prosper yet. A paradigmatic example of this ideological model can be read in the most 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".[20]

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. Notably, the Latin American reception of his *Pure theory of law* has been fundamental to articulate 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, its positivism, as Baraona

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de la República." Barros, Enrique. "Funciones del derecho y métodos de argumentación jurídica. Reflexiones sobre el positivismo y legalismo chilenos. *La cultura jurídica chilena*, edited by Agustín Squella, Corporación de Promoción Universitaria, 1988, p. 109. For more on positivism and formalism in the Latin American legal education see Courtis, Christian. "Enseñanza jurídica y dogmática en el campo jurídico latinoamericano: apuntes acerca de un debate necesario", *Derecho y sociedad en América Latina: Un debate sobre los estudios jurídico críticos*, edited by Mauricio García V. and César A. Rodríguez, ILSA, 2003, pp. 75–91.

[20] Claro Solar, Luis (1979 [1898]). *Explicaciones de Derecho civil chileno y comparado*. Editorial Jurídica de Chile, 1979 [1898], t. 1, pp. 42–43.

González said, found a good ally in our legal environment, which was then partly influenced by the legalism of the school of exegesis.[21]

As a result, since the birth of the republic until the first decades of the 20th century, the Chilean legal system has tended to form "apolitical" judges and legal operators: 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 apply in an a-critical way the – transplanted – principles on which the national codes founded the unitary State.[22]

II

FROM MONISM TO PLURALISM

A. Legal pluralism in Chilean jurisprudence

Coming up with a history of legal pluralism in Chilean jurisprudence is an arduous initiative. This complexity is explained by the structural reason mentioned above: from the dawn of Chilean Independence to much of the 20th century, what prevailed in the mind of most of legal operators, was an attitude more concerned about the consolidation of the national State (and the performance of its institutions), rather than about any

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[21] Baraona González, Jorge. "La cultura jurídica chilena: apuntes históricos, tendencias y desafíos", op. cit., p. 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, cf. Montt Oyarzún, Santiago. "Codificación y futuro de la educación jurídica en Chile: el caso irremediable pero liberalizante del Derecho administrativo." *Sesquicentenario del Código Civil de Andrés Bello. Pasado, presente y futuro de la codificación*, edited by María Dora Martinic and Mauricio Tapia, AbeledoPerrot/Legal Publishing, 2010, pp. 271-273.

[22] For an indispensable analysis of this phenomenon see Hilbink, Lisa. *Jueces y política en democracia y dictadura: Lecciones desde Chile*. FLASCO, 2014. See also Bravo Lira, Bernardino. "Estudios de derecho y cultura de abogados en Chile, 1758-1998: Tras la huella del ius commune, la codificación y la descodificación en el nuevo mundo". *Revista de Estudios Histórico-Jurídicos*, n. 20, 1998, 85–106, p. 92 ff.; Squella Narducci, Agustín. *Filosofía del derecho*. Editorial Jurídica de Chile, 2001, pp. 552–555.

criticism about the State-centric idea of law. As noted by Edmundo Fuenzalida, Chile's early and exceptional institutional stability gave its legal system an uncommon centralism 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[23]. Civilisation and progress, ethos of a promising nation, demand uniformity and integration of indigenous groups. In order to achieve that, law and jurisprudence had to meet the needs of a unitary State. As a result of it, the criticism of Chilean legal operators to 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 nineteenth and twentieth centuries. In fact, for much of the 20th century, legal pluralism in Chilean academia could 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 everyone's 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.

1. Conceptualism in civil law academia

[23] On Fuenzalida's analysis see Squella Narducci, Agustín. *Filosofía del derecho*, op. cit., p. 555.

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 type of legal literature was followed by the "commentary" (or explanation) of the Code that does not undertake the formation 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 exposed in a "transparent way" the analysis of the civil code omitting their own interpretation of the law.[24] Subsequently, civil law scholars articulated their methods of explanation by means of "treatises".[25] That period marked the birth of a critical review of the code and the "fetishism of the written law."[26] The most representative example of this kind of literature is Luis Claro Solar's *Explicaciones de Derecho civil chileno y comparado* (1898-1945). Notably, Claro Solar moves away from the method of exegesis; its analysis goes beyond the study of the Code and its structure. Instead, he wrote for the first time an explanation on the Civil Code that made extensive use of comparative materials from European countries and colonial sources of law. From then on, the "scientific approach", based on concepts and general principles, has been used to teach law logically 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".

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[24] López Medina, Diego. *Teoría impura del derecho*, op. cit., p. 160.
[25] See generally, Guzmán Brito, Alejandro. "El Código Civil chileno y sus primeros interpretes." *Revista Chilena de Derecho*, vol. 19, n. 1, 1992, pp. 81–88.
[26] Expression coined in 1936 by Eduardo Zuleta Ángel, quoted by López Medina, Diego. *Teoría impura del derecho*, op. cit., p. 290 ff.

It is not the scope of this research to explain the roots and consequences repercussions of these new methodological approaches for the Chilean legal culture (which could be founded in the introduction in Latin America of German conceptualist jurisprudence[27]). Instead, I would note that Claro Solar's treaty represents the first criticism of the legislator's role as the sole voice of the "system" and also the first claim to embrace diverse "narrations" or "worldviews" of the law.

2. Positivism and legal evolutionism

A second effort to counter the "fetishism of the written law" was the introduction of philosophical positivism in the legal discourse. Basically, the assumptions of positivism were used to propose an analysis of society's laws through comparative histories and dialogues with other branches of knowledge.[28] The effort consisted in establishing a fluid contact between legal science and the socio-juridical phenomenon. Although this method did not have in Chile the same level of intensity that reached in other Spanish American countries (Argentina is a notable example[29]), it is necessary to point out that the introduction of positivism was carried out by the prominent intellectual Valentín Letelier (1852-1919).

Letelier, who is considered the most outstanding representative among the heterodox group of positivist thinkers in Chile, introduced the

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[27] See López Medina, Diego. *Teoría impura del derecho*, op. cit., pp. 162–165.

[28] See notably, Álvarez, Alejandro. *La nueva tendencia en el estudio del derecho civil según la pedagogía moderna y según el resultado de las ciencias políticas y sociales*, Imprenta Moderna, 1900. On the implications of these ideas for the Chilean legal academia and society, see Bastías Saavedra, Manuel. "Una nueva generación de estadistas. Derecho, Universidad y la Cuestión Social en Chile, 1860–1925". *Revista Austral de Ciencias Sociales*, n. 29, 2015, pp. 33–47.

[29] See Tau Anzoátegui, Víctor. *Antología del pensamiento jurídico argentino (1901-1945)*, vol. 1, Instituto de Investigaciones de Historia del Derecho, 2007, p. 19 ff. The same phenomenon can be observed in the Peruvian legal culture of that time. See Míguez Núñez, Rodrigo. "Indigenismo, scienza giuridica e proprietà andina". *Rivista critica del diritto privato*, vol. 30, n. 2, 2012, pp. 269–305, 279 ff.

study of sociology through a systematic presentation of historical theory.[30] 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.[31] Letelier's attempts to interpret the origins of the main institutions of legal systems (such as family, property, inheritance) brought legal discourse closer to social sciences. In this regard, the law must be understood as a result of an "ecology of knowledge" composed by 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.

*3. The 1960s: an attempt to reform legal educatio*n

A third attempt to introduce alternative narratives on Chilean law concerns the "method" of legal education. At the end of the 1960s, structural changes in Chile were brought about by international pressure. Questions about "how" the law should have been taught were put in for the first time in Chilean legal academia. Funded by the Ford Foundation, the "Chile Law Program" showcased the "Law and Development" movement to modernise Chilean legal education and legal research.[32] Chile Law Program was based on some ideological foundations taken from the Alliance for Progress. As Merryman states, the "[p]rogram was an Action program in support of efforts by Chilean law faculties to transform

[30] For more on Letelier's positivism see Lipp, Salomon. *Three Chilean Thinkers*. Wilfrid Laurier University Press, 1975, p. 53 ff; Jaksić, Iván. *Academic Rebels in Chile: The Role of Philosophy in Higher Education*. SUNY Press, 1989, p. 41 ff.
[31] Letelier, Valentín. *Génesis del derecho y de las instituciones civiles fundamentales*. Editorial Jurídica de Chile, 1919, p. 6.
[32] Cooper, James M. "Competing Legal Cultures and Legal Reform: The Battle of Chile". *Michigan Journal of International Law*, vol. 29, iss. 3, 2008, p. 538.

('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".[33]

Despite the political opinions that this attempt may have generated, it is worth underlining that this program was a proposal (albeit "tame") for an idea of law as "social practice" (instead of normative order) and an answer to the question of whether the law should play an instrumental role with respect to the social change.[34] Thus, law 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, the Socratic method and the incorporation of other branches of the social sciences in law education and 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. In July of 1970, the first issue of the Bulletin of the Institute was published. A quick reading of all its 29 issues that appeared between July of 1970 and March of 1975 allows verifying that a large number of topics related to the didactic and theory of law were addressed and that virtually all subjects of law education were seriously analysed.[35]

Chilean government under both Salvador Allende and Augusto Pinochet grew increasingly suspicious of U.S. involvement in law schools, and government pressures forced the program to close. Several scholars went on to incorporate what they had learned in their own courses, but the

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[33] Merryman, John Henry. "Law and Development Memoirs I: The Chile Law Program". *The American Journal of Comparative Law*, vol. 48, iss. 3, 2000, p. 481.
[34] Squella Narducci, Agustín. *Filosofía del derecho*, op. cit., p. 556.
[35] Benfeld Escobar, Johann S. "La discusión sobre la enseñanza del Derecho en Chile dentro del nuevo paradigma universitario: Una tarea pendiente". *Revista de derecho (Coquimbo)*, vol. 23, n. 1, 2016, p. 151.

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 subjected most of its legal operators to put on an even more cautious attitude than that prevalent in the 19th century. This kind of attitude can eventually overcome at the end of the military government when the *Corporación de Promoción Universitaria* called again into question the most outstanding features of the Chilean legal culture.[36]

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

4. Marxism in legal academia

The same conclusion can be drawn if we look at the Marxist legal-philosophical analysis introduced by the outstanding work of Eduardo Novoa Monreal (1916-1906). Novoa Monreal's research was 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*,[37] he emphasised the delay of the Latin American law in the face of changing social conditions. This phenomenon was 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

[36] On the work developed by the *Corporación de Promoción Universitaria* see *Evolución de la cultura jurídica chilena* (1988) and *La cultura jurídica chilena* (1994), edited by Agustín Squella.
[37] Novoa Monreal, Eduardo. *El derecho como obstáculo para el cambio social.* Siglo xxi editores, 1975.

framework, the author underlined the relevance of the modern legislation that has emerged from the Latin American social movements (since the Mexican Revolution of 1910). The main criticism of Novoa Monreal was that this legislative dimension was obstructed by the bourgeois law that inhibits any 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 – permeated the debate for a much needed "alternative law".

B. Non-State groups and legal change

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

My concern in these three forces is related to the establishment of three Chilean legislative milestones: 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 paper to analyse in detail the political history of each of those social-economic developments. However, it is interesting to note that its study led to different results in the determination of what constitutes legal pluralism and its functions in the Chilean context.

The concern for "social issue" (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.[38] The discussion about labour legislation that would leave behind the colonial regime and consolidate a liberal and capitalist republic brought forward new philosophical, political, and ideological discussions on legal pluralism.[39]

A second field of lines of thought on non-State law-making regards the establishment by force, during Chilean military dictatorship, of a liberal economy, based on the neoclassical paradigm.[40] This phenomenon is linked to the influence of a group of economists (known as Chicago Boys) and the *gremialista* sector (led by Jaime Guzmán Errázuriz) who took control of the economy in the second half of the 1970s. As we known, the process of implementation of the economic reforms that took place from 1975 to 1989 led to the privatisation of companies and public services. The neoliberal economic model, influenced by the so-called Washington consensus, carried on even after the return to democracy (1990-2003). The neoliberal economy required to guarantee rule of law and it was necessary to ensure a functioning, transparent, and efficient judicial power.[41] Significantly, clear examples of that were criminal procedure reform, human rights protection, increase in access to justice and implementation of dispute resolution

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[38] For an indispensable analysis to this respect cf. Grez Toso, Sergio. *La 'cuestión social' en Chile. Ideas y debates precursores (1804 –1902)*. Dirección de Bibliotecas, Archivo y Museos, Centro de Investigaciones Diego Barros Arana, 1995; Cruzat, Ximena and Tironi, Ana. "El pensamiento frente a la cuestión social en Chile". *El pensamiento en Chile 1830–1910*, vol. I, edited by Mario Berríos, Nuestra América Editorial, pp. 130–151.

[39] See notably, Bastías Saavedra, Manuel. "Una nueva generación de estadistas. Derecho, Universidad y la Cuestión Social en Chile, 1860–1925", op. cit., p. 42 ff.

[40] For details, see Gárate Chateau, Manuel. *La revolución capitalista en Chile (1973-2003)*. Editorial Universidad Alberto Hurtado, 2012.

[41] See generally, Dezalay, Yves and Garth, Bryant G. *The Internationalization of Palace Wars: Lawyers, Economists, and the Contest to Transform Latin American States*. University of Chicago Press, 2002, p. 141 ff.

mechanisms. Hence, these facts demonstrates how legal reforms have been used to further political (and economic) gain in recent Chilean history.[42]

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

There are four factors to be taken into account for a better understanding of this issue.

Firstly, it is worth remembering that in this context legal pluralism should be understood as the coexistence of different systems of social regulation based on cultural or ethnic aspects. Thus, the general condition of this legal pluralism is the cultural plurality.[43] Secondly, legal pluralism in Chile has been 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 it was the first time it was officially declared that Chile is a multi-ethnic society. Besides, the Indigenous Act is the first instrument which has written down indigenous customs.[44] Thirdly, the second major legal instrument referred to above concerned the ratification of the 169 ILO Convention (2008). Of course, the Convention adopted a minimal regulatory standard that states should recognise regarding indigenous groups. As a result, since its entry into force (2009), Chilean legal system

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[42] In this sense see Cooper, James M. "Competing Legal Cultures and Legal Reform: The Battle of Chile", op. cit.

[43] Yrigoyen Fajardo, Raquel. "Un nuevo marco para la vigencia y el desarrollo democrático de la pluralidad cultural y jurídica: Constitución, jurisdicción y derecho consuetudinario. Colombia, Perú y Bolivia." *Desfaçiendo entuertos*. CEAS, 1995, pp. 9–10; Cabedo Mallol, Vicente José. "El pluralismo jurídico en Iberoamérica: los sistemas jurídicos indígenas vs. los sistemas jurídicos estatales." *Derecho & Sociedad*, n. 16, 2001, p. 307.

[44] For more on this see Míguez Núñez, Rodrigo. "Indigenous Customary Law in a Civil Law Context: Latin America and the Chilean Case", op. cit., p. 310. See also critically, Boccara, Guillaume and Seguel-Boccara, Ingrid. "Políticas indígenas en Chile (siglos XIX y XX). De la asimilación al pluralismo (el caso mapuche)." *Revista de Indias*, vol. 59, n. 217, pp. 741-774, 700 ff.

has been challenged on its implementation in different areas, mostly on issues relating to indigenous customs.[45] Fourthly, and last, since the Chilean Constitution of 1980 has not been modified to introduce the ILO Convention, the absence of multiculturalism has generated a "special" situation of legal pluralism when compared to the constitutional standards of the region.[46]

As a result of the above, the recognition of a "conservative"[47] or unfinished pluralism prevents the organisation of indigenous groups and hinders its true participation in the law-making process. Thus, the problem that arises with the introduction of ILO Convention is how to fully recognise the international and comparative standards of legal pluralism. In this respect, the Constitutional reform, 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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[45] See, for instance, the juridical mechanisms for the recognition of ancestral water rights analysed by Yáñez, Nancy and Molina, Raúl (eds.). *Las aguas indígenas en Chile*, LOM, 2011, p. 139 ff.

[46] See Yrigoyen Fajardo, Raquel. "El horizonte del constitucionalismo pluralista: del multiculturalismo a la descolonización". *El derecho en América Latina. Un mapa para el pensamiento jurídico del siglo XXI*, edited by Mauricio García V. and César A. Rodríguez García, siglo xxi, 2011, pp. 139–159.

[47] Wolkmer, Antonio Carlos. "Pluralismo jurídico: nuevo marco emancipatorio en América Latina". *El derecho en América Latina. Un mapa para el pensamiento jurídico del siglo XXI*, op. cit., pp. 247–259.