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## **DRUG POSSESSION, CHILEAN INDIGENOUS PEOPLES, AND CULTURAL DEFENSES**

### **Abstract**

This paper examines two decisions in which the legal dispute was focused on whether it was lawful to possess coca leaves by indigenous peoples to practice rituals according to their traditional customs. Both ILO Convention 169 (ILO C169) and the International Covenant on Civil and Political Rights (ICCPR) were paramount in justifying a cultural defence.

### **KEYWORDS**

indigenous peoples, indigenous rights, religious freedom, traditional religions, criminal law, cultural defences, possession of drugs, cultural diversity, international human rights law

### **SŁOWA KLUCZOWE**

ludy tubylcze, prawa tubylcze, wolność religijna, religie tradycyjne, prawo karne, obrona przez kulturę, posiadanie narkotyków, różnorodność kulturowa, międzynarodowe prawo praw człowieka

## 1. INTRODUCTION: INTERNATIONAL LAW IN THE CURRENT CHILEAN CONSTITUTION

One of the most relevant issues in current legal scholarship is the relationship between international law and national constitutions. In Chile, Article 5.2 of the present Constitution expressed its relation to international human rights agreements in this way: ‘The exercise of sovereignty recognizes as a limitation the respect for the essential rights which emanate from human nature. It is the duty of the organs of the State to respect and promote those rights, guaranteed by this Constitution, as well as by the international treaties ratified by Chile and which are in force.’ This text was a product of the 1989 constitutional reform, which triggered a legal revolution. Chilean courts began to consider human rights conventions as a primary source and developed relevant case law on several topics, from human rights abuses to environmental cases.<sup>1</sup> Domestic judges became the primary enforcers of international human rights law.<sup>2</sup> The current constitutional text does not grant a specific rank to international human rights treaties. Still, its mention is relevant because Article 5.2 of the present Constitution gives international human rights law some priority among legal sources. Some scholars considered that treaties had a constitutional rank and were part of the block of constitutionality; others thought them to have an infra-constitutional nature. However, Chilean courts must interpret domestic law, including the Constitution, in conformity with international human rights agreements.

Possibly, a new constitution may replace the existing one. In 2019, massive protests triggered a broad political agreement to start a process to write a new constitution. A referendum was approved to hold a special election to select the members of a Constitutional Assembly. For the first time, Chileans voted for a body only created to write a new constitution. Of 155 members, 17 seats were reserved for indigenous peoples, which were allocated proportionally, depending on the number of indigenous groups: seven seats for the Mapuche; two for the Aymara; and one each for the Diaguíta, Quechua, Atacameño, Colla, Chango, Rapa Nui, Kawésqar, and Yagán peoples. The population massively supported the political groups that wanted radical changes in the Chilean constitutional model. It is impossible to foresee the outcome of this process. Still, it is highly likely that the influence of the international human rights treaties on the Chilean legal system will be greater. One of the international agreements that will be most relevant is the Indigenous and Tribal Peoples Convention of 1989, No. 169 (ILO C169). It is easy to anticipate that indigenous rights will be an essential issue when the new

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<sup>1</sup> R. Cespedes, *The Influence of International Law on the Chilean Legal System: More than just Pinochet*, QMLJ 2013, No. 3, p. 37.

<sup>2</sup> M. Á. Fernández González, *La aplicación por los tribunales chilenos del derecho internacional de los derechos humanos*, ‘Estudios Constitucionales’ 2010, Año 8, No. 1, p. 425.

constitution is discussed. This treaty was ratified by Chile in 2008 and has been paramount in protecting indigenous peoples' rights. A significant majority of the recently elected Constitutional Assembly have expressed the wish for having a plurinational state acknowledging, inside Chile, several 'peoples' with different ethnicities, languages, and political identities.

Chilean courts have already decided cases related to indigenous rights and natural resources, environment, and cultural defences. Those judicial trends will be paramount in crystallizing fundamental indigenous rights in the future constitution. Part of this trend is the respect of indigenous traditional religions. The two judicial judgments I intend to comment on are part of this tendency.

## 2. CULTURAL DEFENCES AND INDIGENOUS PEOPLES

The cultural defence is a type of criminal defence that involves situations justifying or excusing criminal behaviour. In all the cases, the defendant displays behaviour described and labelled as criminal by law. However, some circumstances justify or excuse such behaviour, ergo, criminal punishment may not be applied. Those conditions are the values or customs of indigenous or minoritarian cultures that may at times conflict with the dominant standards. Majoritarian values are often embodied in the domestic criminal law. The conduct is justified when the behaviour displayed is legitimate, even though it contradicts general legal norms. One example of that is the possession of substances categorized as drugs by law. The international law sources of cultural defences are mainly the International Covenant on Civil and Political Rights of 1966 (ICCPR) and the ILO C169.

The ICCPR is one of the most relevant United Nations agreements and an essential text in international human rights law. It is part of the International Bill of Human Rights, along with the International Covenant on Economic, Social, and Cultural Rights (ICESCR) and the Universal Declaration of Human Rights (UDHR). This pact protects individual rights. The only treaty provision which seems to go beyond this traditional approach is Article 27, which protects minorities. Article 27 provides the framework to guarantee minorities' and indigenous peoples' identities. Article 27 recognizes the rights of ethnic (among them indigenous peoples), religious and linguistic minorities to enjoy their culture, follow their religious beliefs and practices, and speak their language. This provision is intended to protect distinctive cultural traditions as part of the collective identity of minorities and indigenous peoples. In General Comment 23 (1994), the UN Human Rights Committee interpreted this provision of the ICCPR. It declared that:

Although the rights protected under Article 27 are individual rights, they depend in turn on the ability of the minority group to maintain its culture, language or religion.

Accordingly, positive measures by States may also be necessary to protect the identity of a minority and the rights of its members to enjoy and develop their culture and language and to practise their religion, in community with the other members of the group.

The ILO C169 is the primary binding international treaty concerning indigenous people. Indigenous people are a minority of some kind.<sup>3</sup> The general tone of the Convention promotes equality and non-discrimination but not standardization: the ILO C169 values cultural diversity, which has consequences, for instance, for education and teaching of indigenous languages (Articles 26–31).<sup>4</sup> In this manner, the ways of life of indigenous and tribal peoples are legally protected. Some provisions establish measures of positive discrimination. The Convention considers indigenous custom a source of law (Articles 8–9), primarily to mitigate criminal liability (Article 10).<sup>5</sup> The provisions in question have been applied in recent case law by the Chilean courts, where the accused claimed cultural defences.<sup>6</sup> Those claims involved sexual crimes, drug possession, and more.

### 3. CHILEAN DECISIONS

The decisions discussed below are related to the possession of coca leaves (*Erythroxylum coca*). Those leaves come from a bush used for millennia by the Aymara,<sup>7</sup> Quechua,<sup>8</sup> and Atacameños,<sup>9</sup> indigenous peoples' groups living in the highlands of Chile, Bolivia, and Peru. Their possession and consumption are customary in the Andean area, and it is easy to find them in the markets of Peru and

<sup>3</sup> See G. Pentassuglia, *Minorities in International Law: An Introductory Study*, Strasbourg: Council of Europe Publishing 2002.

<sup>4</sup> L. M. Graham, *Reconciling Collective and Individual Rights: Indigenous Education and International Human Rights Law*, 'UCLA Journal of International Law and Foreign Affairs' 2010, Vol. 15(1), p. 83.

<sup>5</sup> A case concerning indigenous custom and protected animal species is *A v Public Prosecuting Authority*, Final appeal judgment, Case no HR-20008-02183-A, ILDC 1328 (NO 2008), Norwegian Supreme Court Gazette (Norsk Rettstidende) 2008, 1789, 19 December 2008, *Oxford Reports on International Law in Domestic Courts*.

<sup>6</sup> J. van Broeck, *Cultural Defence and Culturally Motivated Crimes (Cultural Offences)*, 'European Journal of Crime, Criminal Law and Criminal Justice' 2001, Vol. 9(1), p. 1.

<sup>7</sup> The Aymara people are natives the Andes. They live in Bolivia, Peru and Chile. Their ancestors lived in the area controlled by the Inca empire.

<sup>8</sup> Groups of indigenous people who speak the Quechua languages and live in Ecuador, Bolivia, Chile, Colombia, and Argentina.

<sup>9</sup> The Atacama people are indigenous people from the Atacama Desert and the highlands in the north of Chile, Argentina and southern Bolivia. It is relevant to point out that part of the Atacama people's tradition is smoking hallucinogenic substances.

Bolivia, close to the Chilean border. The most common practice among these peoples is chewing coca leaves for healing purposes, but they are also used in rituals, usually syncretic traditions in the celebration of Mother Earth (*La Pachamama*). Since the Inca empire, coca leaves have been a cultural symbol of those indigenous peoples' identity. During the twentieth century, the coca plantations brought the authorities into conflict with the indigenous communities to prevent the fabrication of cocaine. The two analysed cases reflect that conflict.

### 3.1. *IWHC AND LAHC V PROSECUTOR'S OFFICE OF CALAMA*<sup>10</sup>

The first case was decided according to Article 26 of the ICCPR (ILO C169 was only ratified in 2008), which is the legal basis of the cultural defence acknowledged by the court. Two indigenous Aymara women of Bolivian nationality were arrested for possession of coca leaves (considered illegal since it is the essential raw material to manufacture cocaine). One of the women did not exercise her right to remain silent and told the police that she had bought the coca leaves in Bolivia to give to a woman in Chile for a religious ritual. The prosecutor argued that the substance was a drug, and therefore the women had committed a crime according to the Chilean Drug Trafficking Act (2005). Article 54.1 of the Chilean Indigenous Act (1993) gave general legal value to indigenous custom, but it only benefited the indigenous people of Chilean nationality. The women agreed that they had technically violated the letter of the law but argued that they were exempt from blame because indigenous people had some religious traditions that made them believe their behaviour was not a crime. In their indigenous culture, the use of coca leaves was commonplace, and they had misunderstood the legal prohibition. The first instance criminal court acquitted the women. It held that they had carried out the act criminalized under Chilean law but could not be convicted because they had followed their customs and religious practices. Even though they had coca leaves with the aim of giving them to a third party, there was no criminal intent. The third party declared that she had intended to use the coca leaves in a religious ceremony. Such practices are customary and usual in that region of the country where the Aymara indigenous peoples live. The prosecutor challenged the first instance decision, arguing that the women confessed to having coca leaves, which is a crime under the law.

The writ of annulment was denied, and the first instance ruling was upheld. Article 27 of the ICCPR, a treaty ratified by Chile, acknowledged the minorities' collective right to enjoy their culture, practice their religion, and use their own language. Article 27 of the ICCPR is self-executing and very clear. Therefore, it was mandatory and had to be applied. Article 27 of the ICCPR acknowledges freedoms whose right-holders are national citizens and foreigners. Since Chile

<sup>10</sup> Writ of annulment, Rol No. 250-2007 (30.11.2007), Court of Appeal of Antofagasta (Chile).

had ratified the ICCPR, it was constitutionally incorporated into the domestic legal system, and thus minorities gained the right to equality. Consequently, they cannot be discriminated against on the grounds of their religious beliefs. Accordingly, those minorities can practice their religion and culture and speak their languages irrespective of their nationality. The indigenous community living in the Chilean and Bolivian Altiplano (the Andean Plateau) use coca leaves in their daily life as part of their ancestral religious rituals. The ruling of the first instance criminal court followed and applied an international norm that forms part of the Chilean legal system. Still, coca leaves are a 'drug' according to the Chilean Drug Trafficking Act. Acts of Parliaments are the only primary source of criminal law, as the Constitution (1980) and the Chilean Criminal Code prescribe. The legal value of other incidental sources, such as customs or administrative regulations, are limited. However, there is no criminal liability and its consequential punishment without guilt. It was clear that the women did not have guilty minds, ergo, there was no crime. Courts had to achieve justice, and in this case, the coca leaves were not a 'drug' *per se* but a typical medicinal plant from the Andean Plateau, which was also used as part of an ancient religious ritual by the indigenous people.

This decision is an excellent example of how important international law is for the domestic system. Article 27 of the ICCPR was interpreted in the UN Human Rights Committee General Comment 23.<sup>11</sup> The court followed this comment without quoting it. The Committee stated that Article 27 of the ICCPR created a right and a correlated state obligation (General Comment 23, para 6.1). States are obligated to ensure the survival of minorities' cultural and religious manifestations. Even though the ICCPR acknowledges individual rights, Article 27 of the ICCPR has a collective meaning; the court also recognized this feature. The court also stressed that Chile was obligated to respect the international treaty. Although the court did not quote Article 18 of the ICCPR, its understanding of the term 'religious belief' was in line with the interpretation in the UN Human Rights Committee General Comment 22.<sup>12</sup> The Committee stressed that Article 18 of the ICCPR protects theistic, non-theistic, and atheistic beliefs. Article 18 of the ICCPR is not limited in its application to traditional religions or beliefs with institutional characteristics. Ancient indigenous religions are thus protected by the ICCPR and cannot be discriminated against, as emphasized by the court. Consequently, the Aymara women exercised the right to possess and carry coca leaves to perform a religious ritual. The court considered that Article 27 of the ICCPR was the most appropriate international provision to resolve this controversy. According to the court, the Aymara were a non-dominant and less numer-

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<sup>11</sup> CCPR General Comment No. 23: Article 27 (Rights of Minorities), 8 April 1994, CCPR/C/21/Rev.1/Add.5, adopted at the fiftieth session of the Human Rights Committee.

<sup>12</sup> CCPR General Comment No. 22: Article 18 (Freedom of Thought, Conscience or Religion), 30 July 1993, CCPR/C/21/Rev.1/Add.4, adopted at the forty-eighth session of the Human Rights Committee, paras 1 and 2.

ous group compared to the rest of the population, with different ethnic, religious, and linguistic features. They are also descendants of the peoples who inhabited the territory before the Spanish colonization; they possess a distinct identity and exhibit a strong attachment to their ancestral lands.

At present, the Chilean courts apply the ILO C169 to such cases since it was ratified in 2008, as I will point out in the next examined case. It is clear that the women's intention was not to use coca leaves as a drug or raw material to manufacture cocaine. They intended to use them part of a religious ritual practised for centuries by the indigenous people. The defendants knew that coca leaves were not used by the vast majority of the Chilean population. However, their regular consumption of coca leaves as medicine or as an essential part of an offering to Mother Earth enabled the court to recognize the cultural defence granted by the first instance court. Even though the possession of coca is formally considered a crime in the Chilean legal system, it was condoned when committed by a member of a minority group in which that behaviour was normal and part of their culture and religious tradition. The Chilean courts applying the ICCPR allow different laws to govern other groups within the same country, considering their cultural background. This case is an example of legal pluralism – the existence of multiple legal systems within one geographical area – which respects the spirit of international human rights law.<sup>13</sup>

### 3.2. *VELÁZQUEZ ZAMBRANA V PROSECUTOR OFFICE OF ARICA*<sup>14</sup>

In this case, the court applied the ILO C169 as the basis of cultural defences. On 11 June 2014, during a routine police check in Chile, a Bolivian Aymara truck driver was found in possession of various commodities that were not declared to the customs office. The items included five kilos of coca leaves, the essential raw material to fabricate cocaine. He was arrested on suspicion of committing smuggling-related crimes. The defendant claimed that he had bought and smuggled the coca leaves from Bolivia for an Aymaran woman in Chile, who wanted to sell them during the religious festivities. Velázquez Zambrana acknowledged that he had technically violated the letter of the law but argued that he should be exempted from culpability because the Aymara people had certain cultural traditions, including the use of coca leaves as medicine and on celebratory occasions. The prosecutor argued that the coca leaves were a drug, and therefore Velázquez Zambrana had committed a crime according to the Chilean Drug Trafficking Act (2005).

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<sup>13</sup> B. Z. Tamanaha, *Understanding Legal Pluralism: Past to Present, Local to Global*, Sydney L Rev 2008, Vol. 30(3), p. 375.

<sup>14</sup> RUC No. 1410018700-1, RIT No. 27-2015 (02.03.2015), Arica y Parinacota Criminal Trial Court (Tribunal Penal Oral) (Chile).

Velázquez Zambrana was acquitted of the charges on the smuggling of coca leaves. He was found guilty of smuggling other legal commodities. Velázquez Zambrana had not acted with the criminal ‘intent’ of trafficking coca leaves. He had not understood the illegality of the possession of coca leaves. Articles 2, 5, and 8 of the ILO C169 acknowledge that indigenous people have the right to retain their culture and practice their religion. Article 8(1) of the ILO C169 provides that ‘[i]n applying national laws and regulations to the peoples concerned, due regard shall be had to their customs or customary laws.’ Consequently, Chile is obliged to guarantee respect for the cultural identity of indigenous peoples, which means that when the criminal responsibility of their members has to be determined, it has to be balanced against their social and cultural particularities. Coca is widely used in Bolivia, where it is not illegal, and coca leaves are vital to the Aymara culture. In this instance, coca leaves were used with no intention of trafficking drugs. Coca leaves have to be imported from Bolivia because they cannot be produced in Chile due to its climate. They are so fundamental to the Aymara people that the use of the leaves was protected by the ILO C169. Additionally, the quantity and quality of coca leaves smuggled by Velázquez Zambrana could not be used to make cocaine. Thus, public health was not at risk. In general, it is forbidden to import coca leaves into Chile, but in this case the use of coca leaves was ‘culturally motivated’, which had to be tolerated.

In Chile, the ILO C169 is mainly applied to environmental conflicts,<sup>15</sup> but it has relevant application in criminal law. Collective rights are exercised by a group of people, not individually. In this case, the freedom to possess a plant (used in a Western cultural context to fabricate drugs) to perform religious rituals was considered a collective right. The court made references to how essential coca leaves were to the identity of the Aymara people. The ILO C169 recognized the indigenous peoples’ collective right to preserve their ethnic religion. It was clear that Velázquez Zambrana’s intention was not to use coca leaves as a drug or as raw material to manufacture cocaine. He intended it to be used as part of a ritual practised for centuries by the Aymara people. Even though the defendant knew that coca leaves were not used by the vast majority of the Chilean population, the indigenous peoples’ regular consumption of the leaves as medicine or an essential part of an offering to Mother Earth resulted in the court recognizing the cultural defence. Even though Velázquez Zambrana’s behaviour fitted the description of drug trafficking under the law, the acts were excused when committed by a member of the indigenous group for which that behaviour was normal. The court emphasized how ‘normal’ coca leaves were in the life of the Aymara people and how the use of the leaves was connected to their identity.

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<sup>15</sup> See *Parque Eólico Chiloé, Comunidad Indígena Antú Lafquén de Huentetique v Corema de la Región de los Lagos*, Writ of protection, ILDC 2800 (CL 2012), Rol No. 10.090-2011 (22.03.2012), Supreme Court (Chile).

In their application of the ILO C169, the Chilean courts have applied diverse legal rules to govern different groups of people within the same country, considering their cultural backgrounds. The discussed case is also an example of legal pluralism: the legal system allowed some valid exceptions for indigenous people, coexisting with the general law applicable to non-indigenous peoples. The court did not face the controversy related to freedom of religion but mainly a cultural right issue. As a group, indigenous people have the right to preserve their ways of life in ethnomedicine, particular foods, and traditional rituals. Coca leaves have been used by the Aymara people for centuries, and denying them the collective right to use the plant could put the survival of their culture at risk.

#### 4. CONCLUSION

According to the current Chilean Constitution, indigenous peoples are holders of international rights. Some of those freedoms are acknowledged by the ICCPR and the ILO C169. International human rights treaties prevail over domestic legislation, and the Chilean courts apply them as a higher law in the hierarchy. The ICCPR and the ILO C169 have been helpful tools facilitating fair adjudication of criminal law cases in which indigenous peoples are involved, being the ultimate source of cultural defences. In the two analysed cases, the Chilean courts fully justified the indigenous peoples' behaviour (the possession of drugs) on the grounds of their cultural and religious freedoms. According to the UN Human Rights Committee, indigenous peoples' traditional religions are protected by international law since the definition of the term 'religion' is broad. Those decisions open the door for legal pluralism, and they are an acknowledgment of cultural diversity in Chile. It is highly possible that if the new constitution is adopted, the recognition of indigenous customs will be greater.

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