Normative worlds clashing:

State planning, Indigenous self-determination, and the possibilities of legal pluralism in Chile

by

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Abstract

Much of the history of Indigenous-state relations in Chile has been shaped by western understandings of law, and by Indigenous engagement with and opposition to such understandings. Spanish colonial law was used to justify settler presence, land dispossession, and violence. Independence was supported by the imposition of Chile's newly created legal system upon pre-existing Indigenous nations, legitimating territorial annexation and nation building from the state's standpoint. Today, the state interacts with Indigenous peoples through the lens of Indigenous rights and recognition following recent developments in international law.

This dissertation investigates how planning has intertwined with western law to facilitate institutionalized Indigenous dispossession over time and how that relationship unfolds today, using the implementation of the duty to consult as an entry point. First, I trace the evolution of state planning since early colonial times, suggesting that contemporary planning practice is inseparable from this colonial genealogy. Then, adopting an institutional ethnographic approach, I examine the creation of a controversial national consultation regulation through the voices of government and Indigenous representatives involved in the process, as well as Indigenous peoples who refused to participate.

The analysis suggests that marginal improvements in state planning are taking place, especially regarding methodological innovations in participatory planning. However, at a more substantial level, consultation policy serves to proceduralize and restrict the scope of Indigenous rights and the exercise of self-determination under the veils of reasonableness and compatibility with Chilean legal frameworks. The failure to reach a mutually agreed regulation and Indigenous refusal to engage in the process suggest that what is really at play in Chile's planning contact zone is not a clash between different ways of planning, but a clash of normative systems. In other words, tensions arising from multiple contrasting interpretations and narratives about what is considered acceptable or unacceptable, allowed or forbidden, legitimate or invalid regarding Indigenous and non-Indigenous coexistence in shared space. I conclude by discussing how understanding planning contact zones in terms of conflicting legal orders in action opens the door to planning practices that are grounded in legal pluralism rather than in domination by imposition of Chilean law.

Lay Summary

The relationship between the Government of Chile and Indigenous peoples is complex. This has historical reasons: Indigenous peoples have been removed from their lands and marginalized through government laws and policies. This study wanted to understand how government laws and policies affecting Indigenous peoples are created and why they usually fail. I interviewed 49 people – Indigenous and non-Indigenous – familiar with Indigenous policy. I wanted to understand why the government develops policy in the way it does and why Indigenous peoples often reject those policies. These interviews hint that there is something deeper happening. Just as the government has laws defining what is right and wrong, Indigenous peoples have long had their own laws. This means that Chile is legally plural: there is more than one legal system. But the government does not see Indigenous laws as valid. Seeing Indigenous policy from this perspective might help understand Chile's complex Indigenous-state relations.

Preface

This dissertation is an original, independent, and unpublished work by author Magdalena Ugarte Urzúa. The fieldwork reported in Chapters 3-6 was approved by the UBC Behavioural Research Ethics Board (Certificate Number H14-00458).

Figures 3.1 and 3.2 presented in Chapter 3 are public domain. They were retrieved from the Digital Library of the National Archives of Chile, which states "this document is public domain and can be used and reproduced freely" ("*este documento pertenece al patrimonio cultural común, por lo que puede ser utilizado y reproducido libremente*").

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List of Abbreviations

C169	Indigenous and Tribal Peoples Convention Nº169 of the International Labour Organization
CONADI	National Corporation for Indigenous Development (*Corporación Nacional de Desarrollo Indígena*)
DS124	Supreme Decree 124 of the Ministry of Planning (*Decreto Supremo Nº124 del Ministerio de Planificación*)
DS40	Supreme Decree 40 of the Ministry of Environment (*Decreto Supremo Nº40 del Ministerio del Medio Ambiente*)
DS66	Supreme Decree 66 of the Ministry of Social Development (*Decreto Supremo Nº66 del Ministerio de Desarrollo Social*)
ILO	International Labour Organization
MDS	Ministry of Social Development (*Ministerio de Desarrollo Social*)
ODEPLAN	National Planning Office (*Oficina de Planificación Nacional*)
SEA	Environmental Assessment Service (*Servicio de Evaluación Ambiental*)
SEGPRES	Ministry of the President's Office (*Ministerio Secretaría General de la Presidencia*)
SEIA	Environmental Impact Assessment System (*Sistema de Evaluación de Impacto Ambiental*)
TC	Constitutional Tribunal (*Tribunal Constitucional*)
UCAI	Indigenous Affairs Coordination Unit (*Unidad de Coordinación para Asuntos Indígenas*)
UN	United Nations
UNDRIP	United Nations Declaration on the Rights of Indigenous Peoples

Acknowledgements

This PhD journey has been long and bittersweet, which among other things means that I have many people to thank for walking alongside me all this time and for making this moment possible. As anyone who has engaged in a long term project of this kind knows, these are always collective achievements, no matter how much universities insist on the myth of single authorship.

The stories I tell in the following pages would not exist without the generous participation of the dozens of individuals who showed an interest in the project and agreed to meet with me to share their experiences, knowledge, and perspectives, sometimes on more than one occasion. Thank you for taking the time to tell me about your work, for challenging some of my assumptions and confirming many others, and for inviting me to spaces I would have otherwise never been invited to. Most of all, thank you for helping me understand with more nuances and more heart the complexities of Indigenous and non-Indigenous relations in my home country, and also my own role in this story. I also thank Arturo Orellana and the Institute for Urban and Territorial Studies at Universidad Católica in Chile, which provided me with much more than office space during my many months of fieldwork.

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For John and Camilo, who in different ways keep reminding me of the importance of history.

Chapter 1: A grounded analysis of the colonial cultures of planning

> *The new forms of colonialism are more insidious because they are produced at the heart of social, economic, and political relationships dominated by the ideologies of antiracism, human rights, equality before the law, non-discrimination, equal dignity… Insidious colonialism is gaseous and evanescent, as invasive as it is evasive – in short, it is astute… It flourishes in non-institutional, though systematic, social apartheids… It easily conceals in other forms of domination… Indeed, insidious colonialism is only perceivable in close-ups, in snapshots of the everyday.*
>
> Boaventura de Sousa Santos, 2018 (translation mine)

1.1 The origins of this inquiry

In June 1939, two fraternal twins were born three months before the due date at a hospital somewhere in Santiago, Chile. Their mother had traveled 600 kms anticipating a complicated early birth. After delivering, and without much hope of the premature babies surviving, she traveled back south to their home in the middle of the native forest of Nahuelbuta, in the Araucanía region. Earlier this year I visited that place for the first time. One of the premature babies, my now 79 year-old dad, was with me and connected that landscape to my own history as we drove on those gravel roads that "looked very different eight decades ago" – he told me. As a child I loved listening to him tell stories about his childhood. No electricity, cold morning showers, long horse rides to go down to the town. These images of places and times unknown to me seemed so distant to my daily routine as a schoolgirl in a big city. It never crossed my mind that these fond memories could be tied to a history of violence and dispossession of other peoples, who had lived there since well before our family started calling that place home in the late 1800s. Colonization was an abstraction for me at that time – a history I did not see as mine.

In the decades that followed I did learn about the colonial history of Chile in broad terms, mostly through the educational system, museum visits, and the encyclopedia we had at home. However, it was only a few years ago that I came across a historical novel called *Maitenrehue* (Sepúlveda, 1976), where a member of my extended family I never met tells in great detail the story of settlement in the area from the perspective of the colonizers. The main character of the book is my great-great-grandfather. While my immediate family lost ties with those lands over the decades for different reasons – which explains why I had never visited my father's homeland until this year's improvised vacation – the complicity of my ancestors with the military occupation of Mapuche lands will be forever a reality, whether captured in history books and novels or not. The pages

that follow are in many ways shaped by the shadow of this family history, the details of which I began to learn about as I was working on this dissertation that is in a way a double project.

This is a study about planning,[1] western law, and Indigenous[2] dispossession in settler colonial contexts. Being more precise, it is about the ways in which state-led planning has intertwined with western law to facilitate institutionalized Indigenous dispossession over time and how that relationship unfolds in Chile today. As often happens to people who engage in research-intensive graduate studies, reaching this point of conceptual clarity has been a slow process for me, inevitably shaped by my standpoint as a non-Indigenous Chilean woman with the family history just described. While I grew up seeing the contrasting realities of Indigenous and non-Indigenous peoples in my country – with different levels of awareness and depth at different stages of my life – the crucial role played by legal systems in the creation, legitimation, and perpetuation of those contrasting realities became clearer to me more recently. And even though learning about *Maitenrehue* was important and has given new meanings to my work and to my position in relation to it, encountering the book is not what led me to begin this inquiry. In fact, I was in the middle of the fieldwork for this research project when the book reached my parents' bookshelf and soon after my night table.

For me the turning point was working with the national government in Chile after finishing my undergraduate program, and then for a provincial government in Canada after my Master's degree. While none of these jobs touched directly on Indigenous matters,[3] these experiences taught me important lessons. One is that I faced the joys and frustrations of trying to produce positive change for the "common good" from that side of the fence. But my biggest takeaways were of a different sort. Working in government settings woke up my interest in institutions[4] and the ways in which they both reflect and shape the types of

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[1] Broadly defined by Sandercock (1998, p. 6) as the "the regulation of the physicality, sociality, and spatiality of the city," although I extend the idea to also encompass these practices beyond urban areas. I focus on the western, mainstream, and government centered version of the discipline. This definition can be placed against the idea of Indigenous planning (Jojola, 2008; Matunga, 2013), understood as planning by and for Indigenous peoples, founded on Indigenous "frameworks, values, and processes" (Matunga, 2013, p. 6), which have existed for millennia and subsist until this day. However, this research also assumes that the colonial project significantly disrupted these traditions in ways that also last until this day.

[2] Generic term that identifies the original inhabitants of the lands that were colonized by European settlers starting in 1492, and the individuals, communities, and nations who self-identify as their descendants. I use Indigenous when making collective references and the names of individual nations whenever possible.

[3] I worked as a Designer with the Ministry of Foreign Affairs of Chile in 2007-2009 and as a Policy, Planning and Research Analyst with the Poverty Reduction Strategy of the Government of Newfoundland and Labrador in 2010-2011.

[4] As I elaborate in Chapter 2, I follow Healey and understand institutions as "the frameworks of norms, rules and practices which structure action in social contexts… [Which] are expressed in formal rules and structures, but also in informal norms and practices, in the rhythms and routines of daily collective life. [Which] structure the interactional processes through which preferences and interests are articulated and decisions made" (2007, pp. 64-65).

societies people (aspire to) live in. I experienced from within the potential, limits, and dual nature of institutions and how they are the result of and simultaneously provide the context for individual action. These experiences also made it clear how state apparatuses and all of their operations boil down to (arbitrary and socially constructed) rules that are generally defined in legal terms. This, in turn, highlighted the enormous power legal professionals and other people involved in formulating these legal regimes have, even though they are oftentimes in the backstage of decision-making. Working in poverty reduction in particular also made visible a big tension: many of the "problems" our initiatives were trying to address had been created by government initiatives in the first place. This tension was most clear when I was asked to analyze and evaluate policies, programs, and services taking place in Labrador, which largely targeted First Nations and Inuit communities. Essentially, we were designing, implementing, and evaluating the impact of the solutions we were proposing to problems we were deeply implicated in. Problems that were grounded in Indigenous dispossession made possible precisely through policies, programs, and services such as the ones I had to assess. Witnessing these paradoxical realities in Canada made me turn my eyes to my own country and revisit the histories I had learned. The commonalities became apparent right away.

The current reality of Indigenous-state relations in settler colonial contexts like Chile is marked by violence. In some cases violence is open, confrontational, oftentimes physical. During the years I spent writing this dissertation I would often wake up to the news of police raids in Mapuche communities, unfair treatment of Indigenous peoples in the Chilean court system, and other forms of open injustice. In other cases, violence is more difficult to see – especially for those of us who do not experience it directly – since it is more covert, subtler, slower. It is the violence of the fact that while 12.8% of the Chilean population is Indigenous (Gobierno de Chile, 2018d), 30.8% of them live in poverty (19.9% for non-Indigenous people), 4.7% are illiterate (compared to 3%), 23.5% experience malnutrition (compared to 17.2%), and almost 80% neither speak nor understand their traditional language (Gobierno de Chile, 2017). In both cases violence rests in the hands of the state, or has been naturalized and legitimized by it, as the following pages will show. While both kinds of violence are disturbing and deserve attention, this dissertation focuses on the latter – on the institutional and bureaucratic governmental practices that, due to their soft nature, get overlooked or underexplored under the abstract veil of policy-making, consultation, or community engagement. In many ways, it was through government policies that facilitated the colonization of the South of Chile, for instance, that the stories told in *Maitenrehue* came into being.

1.2 Situating the inquiry: Premises and foundational concepts

The work you are about to read is grounded in several premises that it is important I make clear upfront, since they shape the scope of the exploration, the research questions that guide it, and the general approach I take. First, this research is grounded in the acknowledgment that the relationships between Indigenous peoples and contemporary settler colonial states are generally complex and tense, as described above. This is hardly surprising if one considers the patterns that have characterized European colonization and territorial expansion since the late 15th century.[5] As the following chapters elaborate, at the core is the loss of a land base that disrupts Indigenous peoples' ways of living, establishing a dynamics of forced dependency and subjugation within the newly established societies (Césaire, 2000). In referring to these tense and contested spaces of encounter I adopt the idea of the contact zone developed by Mary Louise Pratt (1991),[6] which has already been used by Janice Barry and Libby Porter (2012) to describe the sites where Indigenous and state interests meet through planning.

The second premise is that the field of practice now known as planning has been actively complicit with these processes of colonial dispossession, contributing to the oppression and marginalization of Indigenous peoples both during the European colonial project[7] as such and, later, within the newly established nation-states. This complicity – while not linear and with diverse expressions across different contexts – has ranged from usurping and exploiting the lands Indigenous peoples have occupied for millennia, supporting a politics of "otherness" based on cultural and racial superiority, making possible processes of colonial expansion, border delineation, and state building, and imposing Euro-western understandings of planning that have become dominant in the settler states Indigenous peoples currently live in, among others. In order to engage with the

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[5] They include the spread of European diseases; the attempted destruction of Indigenous societies through war; efforts to suppress existing forms of governance and imposition of European political and government models; the deployment of assimilation techniques; the displacement of the Indigenous peoples to reserves; the re-population of the territories with immigrants; the capitalist exploitation of the land; and the occasional development of treaties to guide Indigenous-settler relations (Antileo, Cárcamo-Huechante, Calfío Montalva & Huinca-Piutrin, 2015; Bengoa, 2004; Harris, 2004; Wolfe, 2006).

[6] Pratt defines contact zones as "the social spaces where cultures meet, clash and grapple with each other, often in contexts of highly asymmetrical relations of power, such as colonialism, slavery or their aftermaths" (1991, p. 34). In planning, Janice Barry and Libby Porter have used the concept to describe the "tension between the modern state's attempt to accommodate [Indigenous] rights within existing institutional and legal arrangements and Indigenous aspirations for a more fundamental reconfiguration of their political and spatial relationships" (2012, p. 171).

[7] In talking about "the colonial project" I do not want to imply that colonialism is a monolithic entity involving a single narrative, without variation across times and locations, and without contestation and resistance. There are certainly nuances and different colonial trajectories in different settler contexts, as well as within settler contexts. Colonization is a relational process and as such inherently dynamic. For my purpose here, framing colonialism as a project seeks to highlight the common underlying forces guiding any colonial enterprise and the intentional nature of such an enterprise.

nature of this complicity, I build on the idea of the colonial cultures of planning developed by Porter (2010), which highlights "the extent to which modern planning is constituted within colonialism itself, and… far from being merely an 'export' of [colonial powers], is the product of colonial relations" (2010, p. 3). In other words, not only "the activities, readings, desires, philosophies, technologies and regulatory methods that the historical record shows actively and materially constructed colonies" (Porter, 2010, p. 47) fall within the realm of what today is called planning, but planning is "only one (of many) cultural responses to questions of human–environment relations" (2010, p. 3).

Third, this research assumes that the complicity mentioned above has not been a spontaneous process led by a few individuals, but an active and systematic effort in the hands of colonial and independent governments. In other words, this research is concerned with the institutional infrastructures that connect planning and colonial power. As I will explain in Chapter 2, my interest is both analytical and normative, flowing from the experiences working in government I mentioned. Understanding existing planning institutions, making visible their assumptions and modus operandi, can tell a good deal about the concrete mechanisms, procedures, and rituals that define planning processes. As a level of analysis, institutions provide a sort of middle ground, linking micro to macro social processes and helping to unveil the forces shaping planning practice over time, as well as the dynamic and contested nature of institutional formation, maintenance, and change.

The fourth premise connects closely to the one above. The processes of colonial expansion and Indigenous dispossession I have described have been carried out and legitimized by legal tools – like the ones that allowed my family members to settle on Indigenous lands in the 19th century – many of which fall under the umbrella of planning, as this dissertation will show. While the involvement of planning in these processes has been widely discussed in the planning literature and presented as a historical fact, less attention has been paid to examining empirically how planning practice continues to reproduce colonial dynamics to this day and by which specific mechanisms. In particular, until recently the planning theory literature had remained generally silent about the role of written texts and the actions they activate in these processes (important exceptions include Barry and Porter, 2012; Dorries, 2012; Livesey, 2017). This lack of engagement is paradoxical, given that plans, legal documents, policies, and regulations have been instrumental in the attempted imposition[8] of western planning systems in colonized territories, as Chapters 2 and 3 elaborate. In this regard, this

[8] My use of the adjective "attempted" is in no way meant to minimize colonialism's impacts on Indigenous peoples. The colonial project violently disrupted and continues to disrupt Indigenous ways of life at multiple levels. However, despite colonialism's overtly imposing *modus operandi*, Indigenous peoples and communities have not only resisted and confronted the colonial project, but also actively sustained and strengthened their ways of life in the face of colonial violence.

dissertation argues that regulation making as a process is particularly important. Not only are legal frameworks essential infrastructures through which the colonial cultures of planning materialize, but the actual *mechanics of law production* itself is a key site where the colonial cultures of planning get enacted and are reproduced, as well as where they are resisted and contested today.

The final assumption is that the reality of Indigenous/state relations in Chile today – and thus the planning contact zone more specifically – unfolds in a context marked by the international Indigenous rights discourse.[9] Over the last decades, important developments in international law have re-shaped the normative and legal landscape in which national planning regimes operate in Chile, especially since the country voted in favor of the United Nations (UN) Declaration on the Rights of Indigenous Peoples (UNDRIP) in 2007 and ratified the Indigenous and Tribal Peoples Convention 169 (C169) of the International Labor Organization (ILO) in 2008.[10] This research seeks to explore what these developments mean for planning in light of the colonial trajectory introduced above. In particular, I aim to examine how these international agreements are being taken up (Ahmed, 2007) by Indigenous and non-Indigenous peoples in Chile in the context of their recent endorsement, and how they are transforming (or not) existing planning institutions and legal frameworks. This is where my decision to focus on consultation comes from, as I elaborate below.

It is in the face of these realities that my inquiry is situated. I do not want to essentialize the idea of colonization and suggest that all the tensions that characterize the relationships between Indigenous peoples

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[9] Armed resistance, diplomacy, and social mobilization have been used by Indigenous peoples in their interactions with the colonizers since contact (Harris, 2004). The framing of these struggles in terms of Indigenous rights and their consolidation as a transnational phenomenon linked to western liberal international law, however, started in the 1960s and 1970s. Reasons identified in the literature include the need to seek international alliances and strategies vis-à-vis the limits of national institutions (Lightfoot, 2008); the decolonization regime promoted by the League of Nations in the mid-20th century and the application of the Belgian thesis, which established that "only overseas colonial territories were eligible for decolonization and self-determination" (Lightfoot, 2008, p. 86); and the consolidation of neoliberalism and globalization, with the ensuing intrusion of extractive global corporations into Indigenous territories (Corntassel & Primeau, 1995). While the international Indigenous rights movement has allowed for the unification of otherwise isolated mobilization efforts, provided a shared language at the level of international law (generally under the umbrella of human rights), and offered concrete (mostly legal) tools for the assertion of Indigenous rights, these remedial measures are inherently limited and have been widely criticized (Dodson, 1994). In the end, in most cases demands for political autonomy, the restitution of lands that were never surrendered, the recognition of customary rights, and the restructuring of Indigenous-state relations based on notions of inherent self-determination remain unresolved, as this research shows.

[10] C169 was adopted by the ILO on June 27, 1989 and, to date, 22 countries have ratified it. It promotes the full control of Indigenous peoples "over their own institutions, ways of life and economic development and to maintain and develop their identities, languages and religions". UNDRIP was adopted by the UN General Assembly on September 13, 2007 by a majority of 144 states in favor, with 4 votes against. It reaffirms and expands C169's spirit, affirming the human rights and fundamental freedoms of Indigenous peoples and individuals, and setting out specific rights with regards to identity, language, health, and education, among others (UN, 2007). It also highlights the right of Indigenous peoples to preserve and strengthen their own institutions, cultures, and traditions, prohibiting any form of discrimination against them.

and settler states today are the exclusive result of a colonial history. These are of course multilayered realities and it would be very simplistic to suggest such a linear explanation.[11] Nor do I want to reduce the interactions between Indigenous and non-Indigenous peoples solely to a dichotomy of oppressed/oppressor, with colonization as the single point of reference, ignoring Indigenous agency and resistance. However, I do start from the premise that there are asymmetrical power dynamics at the base of these relationships[12] and that they infuse planning practice. I also assume that these asymmetries need to be read in the light of how European settlement took place and all the implications that history has brought about. In short, this study assumes that the colonial cultures of planning (Porter, 2010) exist and are active in Chile today, and seeks to show what they look like in practice.

1.3 What this study seeks to do: Research goals and guiding questions

Having the premises just described as a point of departure, this research engages in a grounded exploration of the colonial cultures of planning in Chile today. I look at the role of state-led planning in the dispossession of Indigenous peoples in Chile and, more specifically, at the relationship between the construction of legal and regulatory regimes in the context of the international Indigenous rights discourse, and the persistence of systems of internal colonization.[13] As should be clear by now, my interest is not only in the role that planning has played historically, but most of all in the role it still plays today in its interactions with Indigenous peoples. I am particularly interested in *how* the day-to-day operations of contemporary planners working at different scales contribute to these dynamics, in the mechanics of planning in the contact zone, and in how the contact zone is created and unfolds.

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[11] Many factors affect Indigenous-state relations today, including but not limited to the pressures of globalization, immigration flows, the consolidation of neoliberalism, and economic models based on resource extraction, among others.

[12] The fact that discussions about contemporary Indigenous-state relations happen in the languages of the dominant society, within the margins of existing political systems, constrained by the terms of what legal systems allow, and through mechanisms of social organization largely regulated by texts should suffice to illustrate this point. I recognize that my research is placed within these frameworks, but it attempts to be an exercise in self-reflection and a questioning of their seeming neutrality in day-to-day planning practice.

[13] The term refers to the "historical processes by which structures of domination have been set in place… over the indigenous peoples and their territories without their consent and in response to their resistance against and within these structures" (Tully, 2000, p. 37), but also the evolving techniques used by colonial states to govern Indigenous peoples. What defines internal colonization "is not the appropriation of labour… or even the appropriation of self-government… [but] the appropriation of the land, resources and jurisdiction of the indigenous peoples, not only for the sake of resettlement and exploitation… but for the territorial foundation of the dominant society" (Tully, 2000, p. 39). The term is different from Frantz Fanon's (1967) examination of how colonialism is psychologically internalized by the colonized, and how the internalization of an inferiority complex helps to sustain the colonial situation.

The overarching question guiding these efforts is: *How does planning happen in Chile's contact zone today?* In asking this question, I follow the path of planning scholars in the pragmatist tradition (Forester, 1999; Healey, 1997), as well as those concerned with the ways in which power shapes and informs the practice and outcomes of planning (Dorries, 2012; Flyvbjerg, 2004). To explore these issues, my research is guided by the following sub-questions:

- *What role has western law played and continues to play in shaping the relationship between state-led planning and Indigenous peoples in Chile?*
- *How do the textually mediated practices of state planners contribute to reproducing or disrupting the colonial cultures of planning today?*
- *How is the relationship between state planning and Indigenous peoples in Chile being affected by the international Indigenous rights movement and discourse, as expressed in C169 and UNDRIP?*

In asking *how* questions, I want to make visible the ways in which existing and emerging planning legal texts – as they are produced, read, interpreted, used, and changed by planners – reaffirm and impose the supremacy of western understandings of planning and law, or open spaces for Indigenous self-determination,[14] thus unsettling the dynamics of internal colonization. My emphasis is on the performative dimensions of law, as I elaborate in Chapter 2. Given the violence of the contact zone in settler contexts today, other planning scholars that acknowledge the complicity of planning with colonial dispossession have called for approaches to planning that focus on decolonization (Porter, 2010; Sandercock, 2004; Ugarte, 2014) and indigenization (Dorries, 2012; Erfan and Hemphill, 2013) as ways of challenging such complicity. This research contributes to such critical efforts by exploring in depth the mechanics of that complicity today and the central role played by law. For as Fischer argues, "the greater the extent to which a planner… can better understand the dominant power structure, including the discursive nature of its ideological politics, the greater are the chances of developing effective strategies for challenging rather than merely reproducing it" (2009, p. 64).

1.4 Methodological framework: Examining how planning and law happen

The broad question of how state-led planning unfolds in its relation with Indigenous peoples in Chile today and the role law plays in this regard demands examining planning practice closely. With this purpose in mind I approach the questions above qualitatively, using a single case study research design that integrates

[14] Defined by Tully as "the right of a people to govern themselves by their own laws and exercise jurisdiction over their territories" (2000, p. 57).

elements from Institutional Ethnography (IE) alongside a Critical Discourse Analysis (CDA) lens. As I elaborate below, my inquiry follows Bent Flyvbjerg's (2004) call to conduct *phronetic* research in planning.

Case studies are suitable for analyzing complex social phenomena, such as Chile's planning contact zone, as they allow the holistic and contextual features of real-life events (Yin, 2003) to be accounted for through thick and detailed descriptions (Flyvbjerg, 2011; Geertz, 1973).[15] They also allow establishing linkages between concrete events and theoretical abstractions (Stake, 2000), and incorporating diverse analytical tools and "the multiple perspectives of those involved" (Lauckner, Paterson & Krupa, 2012, p. 5) into the analysis, highlighting individual and collective agency. Given the closeness to reality, depth, and attention to details, case studies are particularly suitable for answering *how* questions that focus on process and explanation (Yin, 2003), such as the ones that guide this inquiry. From IE I adopt the focus on mapping "'textually-mediated' social organization" (Devault, 2006) and the emphasis on texts in action (Smith, 2001). A CDA lens adds attention to how texts materialize broader social discourses, allowing and/or excluding certain courses of action, and their role in the "(re)*production and challenge of dominance*" (van Dijk, 1993, p. 249, emphasis in original).

I want to make clear that when I talk about "state-led planning practice" I understand the state as a set of complex institutional webs, which are mediated by text but that ultimately rest on the concrete actions of specific individuals. This understanding tries to move away from conceiving the state as an abstract, monolithic entity, highlighting instead human agency and the relational processes that make institutions possible, as I elaborate in Chapter 2. Similarly, the interactions between Indigenous peoples and the state are multiple and non-linear. In using this approach I have two goals. One is to examine the micro day-to-day operations of people involved in state planning, looking at the possibilities and limits of individual actions. The proposed framework allowed me to learn about people's motivations, rationales, fears, and expectations, and why and how they did what they did. The second goal is to link those activities to macro "deep frames of reference and cultural practices which structure how people make sense of their collective worlds" (Healey, 2007, p. 65). In other words, to place those individual universes against broader, often unexamined social assumptions, beliefs, and values. By putting these two spheres together, I argue that the permanence of the colonial cultures of planning can be seen as a combination of long-lasting institutional path dependencies grounded in individually internalized colonial rationalities and sensibilities.

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[15] Case study research has, of course, several limitations. The most relevant to my work here concerns the fact that it is not possible to easily generalize beyond Chile. Along the same lines, given my closeness to the case under investigation I may not notice potentially theoretically relevant factors that would be more easily identified in the context of comparative research. For a critical analysis of the benefits and main critiques of case study research, see Flyvbjerg (2006, 2011).

1.4.1 The case

In order to answer the guiding questions, this research uses the implementation of the duty to consult with Indigenous peoples as the entry point for the analysis. More specifically, I examine a particular planning and regulation making process known as the Consultation on Indigenous Institutions (hereafter the Consultation), which allows seeing how state-led planning and western law intertwine today in their relation with Indigenous peoples at the national level. The reason for my approach is quite pragmatic. As I briefly explained above, at the time I started my PhD UNDRIP had recently passed the UN General Assembly in 2007 – with Chile's vote in favour – and the country had endorsed C169 soon after in 2008, which meant expectations were high. Consultation had turned into a key space where the relationship between the state and Indigenous peoples was articulated and dominated an important part of the Indigenous policy discourse at the time. Given its centrality to planning practice and the fact that the process was just beginning, I decided to make the most of the opportunity and witness the evolution of the case.

As Chapter 4 elaborates in greater detail, the Consultation was a set of consecutive planning processes led by the Ministry of Social Development (*Ministerio de Desarrollo Social*, MDS) between March 2011 and March 2014. The goal was to create a consultation regulation, which will guide the interactions between Indigenous peoples and the Chilean state whenever a government-led legislative or administrative measure may affect Indigenous peoples directly. The process brought together Indigenous peoples and the national government in the most ambitious participatory planning process related to Indigenous policy carried out in the country to that date. It included an initial phase called the Consultation on Indigenous Institutions (*Consulta de Institucionalidad Indígena*), the reformulation of the process into a more focused Consultation on Indigenous Consultation (*Consulta sobre la Consulta*), a massive gathering with Indigenous representatives known as the Great Gathering (*Gran Encuentro*), the establishment of a Consensus Table (*Mesa de Consenso*) to write the regulation, and the enactment of said regulation (Supreme Decree Nº 66, also known as the Regulatory Framework on Indigenous Consultation, hereafter DS66).

As I elaborate in great depth in Chapters 3, 4, and 5, the process was significant for a number of reasons.[16] For one thing, the Consultation can be seen as one more chapter in the history of Indigenous-state relations in the country, helping to illustrate how planning at the national level interacts with Indigenous peoples on an

[16] Following Stake's (1995, 2005) criteria regarding the interest and relevance of case studies, the Consultation has both intrinsic and instrumental value. In other words, the case has particular features that justify its exploration with explanatory purposes, while at the same time it can inform theory building by serving as an illustration of broader phenomena.

ongoing basis and the institutional frameworks that define these relationships. In other words, it offers an opportunity to explore how everyday planning happens and how the colonial cultures of planning unfold. In addition, the Consultation has been the first (and major) formal state-led initiative after UNDRIP was adopted by the UN General Assembly and Chile endorsed C169, offering insights into the institutional changes that are taking place in the country in this context, in particular with regards to the nuts and bolts of conceptualizing and writing new regulatory frameworks.[17] In that sense, the case also offers an opportunity to examine collaborative meaning making as a space where the colonial cultures of planning get enacted.

Since the Consultation was marked by significant controversy and disagreement between the Government and Indigenous peoples since its early stages, the case offers an exceptional opportunity to look in-depth at how the planning and decision-making process unfolded; how Indigenous leaders and state planners conceptualized and negotiated the notion of self-determination; the tensions and clashes between interpretations that emerged; the different roles played by Indigenous and non-Indigenous actors; and the role of legal texts in these processes. As the following pages show, the examination of the case sheds light both on the mechanics of contemporary state-led planning systems and on the challenges posed to them by this new legal, institutional, and discursive scenario. I also hope to unpack some of the micro dynamics involved in the establishment of regulatory regimes of this type, which are crucial underlying structures that perpetuate existing systems of internal colonization in settler societies such as Chile.

In short, using the implementation of the duty to consult as an entry point allows me to delve into how government planning operates today and to show how the international Indigenous rights discourse is taking root, as well as how the colonial cultures of planning surface in everyday planning practice. Specifically, this study considers what the joint regulation-making process to create DS66 reveals about the nature of Chile's planning contact zone in general, and about how the state and Indigenous peoples are understanding and negotiating Indigenous rights and the duty to consult in particular.

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[17] In the context of the relationship between the Chilean state and Indigenous peoples, DS66 emerges as a central instrument. It directly affects how Indigenous policy will be carried out from now onwards, defining the playing field regarding Indigenous involvement in decision-making. It acts as a regulatory text that assigns roles, allocates responsibilities, defines what is possible, and sets the limits for Indigenous action. It introduces specific terminology and also establishes the duty to consult as an obligation of the state, for the first time. Furthermore, it outlines specific procedures, stages, and timelines that shall guide consultation efforts in matters that might affect Indigenous peoples, as Chapters 4 and 5 elaborate.

1.4.2 Phronetic research as a framework

This study is framed as *phronetic* research. As advanced by Flyvbjerg, *phronetic* planning research is an *approach* (i.e. not a method) that focuses on planning practice and the values underlying it in order to "problematize the taken-for-granted 'truths' about the progressive and rational promise of planning" (2004, p. 302). With a Foucauldian inspiration, Flyvbjerg's approach reflects a concern for what actually happens in planning practice – the realpolitik – as opposed to what should happen,[18] but is also inherently normative. By developing an understanding of the mechanics of planning operations in a particular context, "the result of *phronetic* planning research is a pragmatically governed interpretation of the studied planning practices" (Flyvbjerg, 2004, p. 302) that can illuminate potential courses of action.

Methodologically, Flyvbjerg highlights the need to: look closer at the actions of planners in the contexts in which they work; examine practice before discourse; focus on values and place power at the core of the analysis; establish a dialogue with a polyphony of voices; and ask *how* questions. Ontologically, *phronetic* research understands the social world as "happening" through the way people's actions are coordinated (Smith, 2005) and power as "a more-or-less organized, hierarchical, co-ordinated cluster of relations" (Foucault, 1980, p. 198). In other words, the ongoing construction of social action makes it necessary to examine it in terms of *processes*. Epistemologically, the approach sees the researcher as an interpreter and co-constructor of knowledge, whose role is to develop socially and historically contextual interpretations of a particular reality. This view is not relativistic, however, since that knowledge is validated to the extent that it offers "well-grounded evidence and arguments" that are "accepted or rejected by the community of scholars" (Flyvbjerg, 2004, p. 292). My interest in this kind of examination is due in part to the lack of empirical material about state-led planning with Indigenous peoples in Chile, but also to an interest in highlighting individual agency in these processes, as opposed to understanding planning practice as an abstract, faceless activity and the state as a monolithic entity, as mentioned earlier.

[18] Flyvbjerg and Richardson argue that "the value of Foucault's approach is his emphasis on the dynamics of power. Understanding how power works is the first prerequisite for action, because action is the exercise of power" and this "can best be achieved by focusing on the concrete" (2002, p. 14).

1.4.3 An institutional ethnographic approach to the state: Looking at texts-in-action

Given my interest in law, regulation-making, and texts in planning, adopting an Institutional Ethnography (IE) lens seems a suitable approach to undertake a study of this kind. IE is an "approach to the investigation of the social" (Devault, 2006) that examines how local institutional[19] practices are linked to broader coordinative forces – ruling relations – by looking at how texts[20] coordinate and standardize individual actions in ways that transcend the specificity of local contexts (Smith, 1986, 2005). In doing so, IE seeks to understand and explain how individual, embodied everyday experiences come to be as a result of those coordinative processes. Regarding the relationship of state planning with Indigenous peoples, Barry and Porter (2012, p. 177) suggest that these factors make IE "particularly well suited for exploring how contact zones are shaped and constrained by institutional structures and frames; how the practices undertaken in contact zones are 'textually mediated.'"

In IE texts are not examined in isolation, however, but as the catalysts of institutional action. Their significance lies in how they regulate, authorize, and codify the "actual activities of actual people" (Smith, 2005), shaping what can and cannot be done in a particular institutional context. The idea of texts in action (Smith, 2001) captures the emphasis on individual agency and performativity, and is central to my analysis of state-led planning and regulation making in Chile. The notion of intertextuality, on the other hand, refers to the ways in which texts link to and regulate others texts, establishing complexes of textually mediated activities managed extra locally. This is central to my analysis of how the international Indigenous rights discourse is being taken up (Ahmed, 2007), and how/if Chilean planning frameworks are shifting in this context. The main analytical goal of IE, therefore, is explanation – "mapping and discovering 'how things are put together'" in Smith's words – as opposed to hypothesis testing or theory building. However, there is an assumption that an increased consciousness and awareness of how local practices are managed extra-locally can improve practice, as the earlier quote by Fischer (2009) suggested.

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[19] In this usage, an institution is not a particular type of organization. In DeVault and McCoy's (2006, p. 17) words, "[the term] is meant to inform a project of empirical inquiry, directing the researcher's attention to coordinated and intersecting work processes taking place in multiple sites." For my purpose here, state-led planning and consultation are institutions.

[20] IE conceptualizes texts as "definite forms of words, numbers or images that exist in a materially replicable form" (Smith, 2001, p. 164). While texts do not need to be written, materiality and replicability are essential. It is those features that allow texts to be "read, seen, heard, watched, and so on" (Smith, 2006, p. 65) across multiple institutional sites, thereby coordinating people's activities. For my purpose here, Chilean law in general, planning legislation more specifically, and consultation frameworks in particular are considered texts.

In order to map institutional relations, institutional ethnographers engage in an examination of the actual textually mediated work[21] of people in institutional settings. The overall goal is to uncover how people's everyday activities are connected to each other and to larger ruling relations through text. In exposing those interactions, it is possible to understand the complex mechanics of social processes and illuminate the potential for change. While many institutional ethnographers begin with individual everyday experiences and start mapping institutional relations up, others jump directly into examining the institutional complexes and relations that shape those experiences (DeVault and McCoy, 2006). Here I adopt the second approach.

I follow Barry and Porter (2012) in the way they have integrated elements from IE along with insights from CDA to explore the interactions between Indigenous peoples and western mainstream state-led planning in settler colonial contexts. While IE focuses on the coordinative, standardizing, and regulatory role of texts as they shape individual and institutional practices, CDA[22] offers tools to examine how particular texts allow and/or exclude certain courses of action, and reflects particular socio-political relations, based on how they are constructed in language (Fairclough, 2003, 2005; van Dijk, 1993). As this research will show, the negotiation of DS66 was to a great extent a negotiation of meanings about what futures would become possible at the expense of what others. The approach pays special attention to "dominance relations by elite groups and institutions as they are being enacted, legitimated or otherwise reproduced by text and talk" (van Dijk, 1993, p. 249), in particular depending on how different social groups have access or not to existing discourses. Overall, CDA assumes that social transformations are discursive transformations; hence, it attempts to examine those discourses that reproduce social inequality in order to better understand and challenge them.

CDA enables the incorporation of contextual elements into the examination of texts, "to show the relationship between concrete occasional events and more durable social practices" (Fairclough, 2005, p. 79) and how they materialize in writing. Among the different possible foci of examination identified by Fairclough,[23] two seem especially relevant to this study. A focus on the dissemination and recontextualization of discourses requires looking at texts in different social contexts and at different scales and assessing how

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[21] The term goes beyond conventional understandings of remunerated work and includes "anything or everything people do that is intended, involves time and effort, and is done in a particular time and place under definite local conditions" (Smith, 2006, p. 10). Domestic activities and activism, for instance, are considered work.

[22] What distinguishes CDA from other forms of discourse analysis are, among other things, its focus on dominance and inequality, the explicit adoption of a sociopolitical and normative stance, its focus on structural understanding, and its interest in contributing to social change (Fairclough, 2005; van Dijk, 1993).

[23] They include emergence/constitution, hegemony, dissemination/recontextualization, and operationalization of specific discourses (Fairclough, 2005), such as the international Indigenous rights discourse that concerns me here.

they interact with pre-existing discourses. A focus on discourse operationalization, on the other hand, requires ethnographical methods such as IE, since "it is only by accessing insider perspectives in particular localities… that one can assess how discourses are materialized, enacted and inculcated" (2005, p. 83).

The integration of elements of IE and CDA described above seems a suitable approach to explore the planning, development, and evolution of the Consultation – as well as planning in the contact zone more broadly – helping to capture the textually mediated nature of the process, how the specific actions of individual people were coordinated and shaped the process, and the broader discursive context provided by C169 and UNDRIP. In other words, the approach offers a window into how planning happens. In adopting this approach, I build on the methodological path suggested by Barry and Porter (2012, 2016), but go beyond their analysis by incorporating the idea of texts in action. I pay equal (if not more) attention to the ways in which texts are used and affect actual planning practice as to their role as bearers of discourses. I also pay particular attention to the performative dimensions of law and regulation making, as introduced above; how such discourses articulate in practice and are crafted. Law is examined not just in terms of its outcomes and applications, but also as a space of negotiation and contestation. By developing a detailed account of the interactions between the state and Indigenous peoples in this case, it will be possible to better understand the role played by planning in the dynamics of internal colonization and the reproduction of colonial rationalities in Chile today, either by actively contributing to or by helping to disrupt them.

1.4.4 Gathering and analyzing information

My fieldwork in Chile took place from February to September 2014, with an additional stage in January-February 2015. Given the research goals and methodological framing, the data collection process revolved around three main activities: a) in-depth, semi-structured interviews with people involved in or familiar with the Consultation; b) collection and analysis of documents related to the process; and c) informal participation in activities, witnessing, and additional sources. Together, these experiences offered me the opportunity to better understand the mechanics of state-led planning in Chile in its interactions with Indigenous peoples.

1.4.4.1 Interviews

Interviews are the main source informing my analysis and were designed with two goals in mind. The first was to gain an understanding of the Consultation itself as a way of learning about the mechanics of state-led

planning in the contact zone more broadly. The second was to understand how the international Indigenous rights discourse was taking root in Chile through the implementation of the duty to consult specifically. In both cases, the role played by law and its performative dimensions was a shared underlying concern.

Between April 2014 and February 2015, I conducted 56 semi-structured in-depth interviews with 49 people who were involved in or familiar with the Consultation.[24] They included: Indigenous leaders and representatives (both traditional and elected) who actively participated in, withdrew from, and/or resisted the process; elected Indigenous councilors sitting at the executive board of the National Corporation of Indigenous Development (CONADI); senior government officials, state bureaucrats, and planners; lawyers and consultants working on both sides of the Consensus Table; Indigenous rights activists and advocates; officers from international organizations; and scholars. Twelve women and 37 men participated. To help reduce the perception of risk or vulnerability, all interviewees were offered confidentiality and anonymity in the dissertation text unless they expressed their will to be identified[25] (see Appendix A for a complete list of interviewee profiles and identification codes or names, if applicable). Most interviews lasted between 1 and 1.5 hours, although some lasted up to 3 hours.[26] All interviews were audio recorded and later transcribed. I also took notes by hand during the interviews, highlighting some of the key points made by the interviewees. All interview quotes included in the text of the dissertation have been translated from Spanish by me.

Regarding participant selection, I began identifying potential interviewees since the Consultation started in 2011 based on information available online (government websites, mainstream and alternative media channels, and social media). I purposively recruited the initial group of participants based on their level of involvement in the Consultation and/or their familiarity with Indigenous/state relations in Chile. I contacted most of them by email once I arrived in Chile in February 2014 using information publicly available online. I approached others in person when I met them at seminars, talks, or other events. Through snowball sampling, as interviews took place I was directed to other key people that were not included on my initial list. It is very important to note that I deliberately interviewed not only Indigenous leaders who actively participated in the process, but also those who decided to withdraw as the process progressed or who refused to participate

[24] I conducted follow up interviews with seven of the interviewees during the second stage of the fieldwork (early 2015).

[25] For stylistic consistency I used codes (i.e. Planner 1) throughout the text of the dissertation, but the table shows the names of those individuals who requested their names to be made available.

[26] Two thirds of the interviews took place in Santiago, either because the interviewees lived there or because we took advantage of a trip they had pre-planned. The rest involved me traveling to eight cities from North to South, spanning around 4,500 kms – Arica, Iquique, Copiapó, Tirúa, Temuco, Puerto Saavedra, Villarrica, and Punta Arenas.

outright. As I elaborate in Chapter 6, I understand Indigenous refusal to engage with state-led planning as a constitutive part of Chile's planning contact zone. Non-engagement can be seen both an act of resistance and as an expression of Indigenous self-determination in the face of internal colonization.

Although with differences depending on the interviewee, in concrete terms the conversations focused on gathering stories and descriptions about the participants' involvement in the Consultation; how the process came to be and its rationale; how the Consultation unfolded; and the tensions and challenges associated with its development (see Appendix B for a list of interview questions). The role of written texts in these processes and how they catalyzed people's actions – the idea of texts in action – was always present. Unlike conventional forms of interview – which are aimed at accessing the "informants' inner experience" (DeVault and McCoy, 2006, p. 15) in order to make generalizations – the accounts of interviewees in IE are used to uncover the ruling relations shaping particular institutional practices. In this case, the conversations paid particular attention to the forces shaping the writing of DS66 in order to "discover and explore these everyday activities and their positioning within extended sequences of action" (DeVault and McCoy, 2006, p. 18), as well as the kinds of interactions that took place between government and Indigenous representatives. The process of meaning making and the tensions emerging in that process were a central concern.

The information gathered from the interviews is the deepest and most nuanced, since the long conversations provided a window into the complexity of the Consultation, as well as into the rationalities and sensitivities guiding state-led planning action more broadly. People not only offered detailed descriptive accounts of the nuts and bolts of the process and of their involvement. More importantly, they elaborated on the rationale behind how they made decisions and took their stance. For instance, government officials and planners explained why the consultation came to be at the time it did; how it related to and differed from previous approaches to Indigenous issues; why they chose the timelines, formats, and methodologies they did; and what the limits imposed by the Executive branch were, among others. Indigenous peoples opposing the process elaborated on the reasons for their approach and how/if their thinking changed over time. Elected Indigenous leaders sitting at the national board of CONADI talked about the tensions they faced as the initial official brokers of the process, and why many of them decided to withdraw as the process unfolded.

In terms of processing and making sense of the interview material, I reviewed the interviews in waves and using different approaches during the analysis and writing process. Given my guiding research questions, as I listened to, read, and re-read the material my emphasis was on what the interviews suggested about how the state interacts with Indigenous peoples through planning, how Indigenous peoples understand and engage

(or not) with state-sanctioned ways of planning, and how law fits into the picture. Building on Phillips (2007, p. 45), the analytical process involved getting to know the data through reading and re-reading, identifying recurring themes, looking for interrelationships, paying attention to absences and silences, looking for resistances and counter-discourses, and situating the analysis in the broader discursive context. Conducting all of the interviews in person and transcribing most of them myself, I developed a solid initial understanding of the main recurring themes as well as divergent narratives. Once I had all interview transcripts ready, I supported my analysis with the help of qualitative data analysis software Atlas.ti. This exercise helped me refine my focus and connect emerging themes across interviews using open, axial, and selective coding. Given the large amount of textual data I had, the analysis felt never-ending at times. Thus, I later resorted to a more analog approach that felt more grounded. I printed the roughly 30 interviews that were the richest in quotes I could cite directly (i.e. some of the interviews provided background information as opposed to details about the Consultation itself, or the wording of the conversations was less "quotable" verbatim), and I manually highlighted and chose passages that captured the main ideas expressed by the interviewees.

As a whole, the narrative accounts captured in the interviews suggest particular ways of understanding the relationship between Indigenous peoples and the Chilean state. These different beliefs, values, and expectations – which are grounded in people's experiences – make people act in consequence, but oftentimes in antagonistic directions, as the next chapters show. These contradictions are visible when considering the controversial nature of the Consultation I explore in the rest of the dissertation. The interviews also offered insights about the ways C169 and UNDRIP are being approached by the state, and by Indigenous peoples and advocates, and about the role that the duty to consult plays in Chile's current context. In this regard, the narratives also shed light on how consultation connects to and differs from longstanding approaches to state planning. Finally, the interview material also sheds light on how legal texts codify these types of processes, as well as how these documents – such as DS66 – are actually produced. The richness and complexity of this process in particular (which is captured in depth in Chapter 5) is central to the argument of this dissertation. As a whole, the interviews give institutional ethnographic depth to planning practices that otherwise get overlooked or underexplored under the abstract veil of policy-making, consultation, or community engagement, as Chapters 4 and 5 will show. They break down the institution of state-led planning into relational, textually mediated interactions where the colonial cultures of planning surface in new light.

1.4.4.2 Written documents

I started collecting relevant documents when the Consultation started in 2011 (well before my fieldwork began) and continued throughout the study. The information gathered from these sources is diverse and serves different purposes. Some documents – such as historical and archival material about the relations between the Spanish Crown and Indigenous peoples before independence, accounts about the evolution of Indigenous policy in Chile, and legislative documents related to the endorsement of C169 and to Chile's vote in favour of UNDRIP at the UN General Assembly – offer important background information that informed Chapters 3 and 4, contextualizing the current analysis.

Others – including policy documents, regulations, and plans currently in place – provide a snapshot into the reality of state-led planning today. They allow seeing how the spaces of interaction between Indigenous peoples and the state are conceived, codified, and operationalized through regulatory regimes. Finally and most importantly, there are those documents that illustrate in more detail the process of the Consultation and the writing of DS66 itself. They include DS66 drafts developed by the government, public statements from Indigenous groups and organizations, other internal government documents, reports, and policy drafts, and policy proposals and counterproposals developed over the course of the Consultation. These texts offer the richest details about how the process unfolded and its tensions, complementing the interview material.

Some of these documents were made public online or in print and I accessed them directly, at the recommendation of the research participants, or through personal contacts. Others – mostly government documents – were not publicly accessible at the time (although they were available through transparency legislation) and were given to me by the people I interviewed. Other documentation was given to me directly by Indigenous leaders and representatives, ranging from public statements to internal discussion papers developed over the course of the Consultation.

Similar to my analysis of the interview material, my reading of the documents was informed by a CDA lens in the sense of identifying recurring themes, paying attention to absences and silences, looking for resistances and counter-discourses, and situating the analysis in the broader discursive context (Phillips, 2007, p. 45). However, it is important to make clear that I did not conduct a fully fleshed CDA of the documents just mentioned. Instead, my emphasis was on the intertextualities (Smith, 2005) that became visible, the kinds of courses of action that such documents opened or foreclosed, and whose visions and priorities were reflected in the content, scope, and framing. This was especially the case regarding the drafting of DS66, since the

construction of that document by government and Indigenous representatives expressed with the most clarity the tensions of the contact zone. Here my analysis focused on how the language of western law was performed, and what rationalities and sensitivities prevailed, as Chapters 5 and 6 discuss at length.

In line with the institutional ethnographic approach that guides this research, producing context-less deconstructive analyses of planning texts would have said little about the ways in which those texts perpetuate patterns of social behavior – in this case the colonial cultures of planning – or contribute to changing them. For the purposes of my research, texts are only meaningful insofar as they are the result of, enable, constrain, channel, trigger, or somehow affect human action – in other words, insofar as they are *texts in action*. What remains underexplored in the literature of the complicity of planning with colonialism are historically and socially contextual explorations of texts in action (Smith, 2001) as they are produced, read, interpreted, used, and changed by "sentient actors" (Schmidt, 2008) in specific institutional contexts, as well as how/if they connect to contemporary colonial violences (Antileo et al., 2015) in Chile. This research moves in that direction.

1.4.4.3 Informal participation, witnessing, and additional sources

In addition to the formal data sources just described, my thinking and analysis was also shaped by a number of other activities and experiences that took place over the course of my fieldwork and beyond. I attended several workshops, seminars, talks, and panel discussions on topics relevant to my research, most of which I audio recorded (although I did not transcribe or analyze systematically). I participated in a couple of protests led by Indigenous groups. I also had conversations (i.e. not formal interviews) with individuals who provided background information about the process, offered their insights regarding the relationship between the Chilean state and Indigenous peoples more broadly, or directed me to other key people to talk to. As a result of my conversations with different people – both formal research participants and others – I was also invited to participate in a number of events/field visits. As I elaborate in Chapter 6, while not formally part of the data collection process these experiences have informed my understanding of Chile's planning contact zone in important and transformative ways. Not acknowledging the impact of these additional sources would be not honouring the multilayered nature of Chile's contact zone.

1.4.5 Ethical considerations

This research was informed by several ethical considerations. In formal terms, all research protocols followed the Canadian Tri-Council Policy Statement on Ethical Conduct for Research Involving Humans (TCPS2) and were approved by the University of British Columbia's Research Ethics Board (ethics certificate H14-00458).

According to TCPS2 principles, this project posed minimal risk to the research participants since, in most cases, the scope and content of the interviews fell within the sphere of activities they developed as part of their work. This includes Indigenous interviewees, who were approached given their involvement in the Consultation and/or in their capacity as representatives of Indigenous organizations. Unlike community-based research or other collaborative approaches to knowledge production, this project was conceptualized as an interpretive institutional and policy analysis with ethnographic tenets where the analysis was always in my hands, as described earlier. As such, it did not involve the participation of Indigenous communities as groups shaping the research project, nor was it aimed at producing research outcomes that would directly impact Indigenous communities, and thus did not require community engagement (CHIR, NSERC and SSHRC 2010, Article 9.10). As already mentioned, the interviews focused on the participants' engagement with and assessment of the development of the Consultation, based on their experiences as political representatives, community leaders, or authorities. In a case like this, the consent of Indigenous participants is considered sufficient. As stated in TCPS2, Indigenous peoples "enjoy freedom of expression as does any citizen… [and] are free to consent and to participate in research projects that they consider to be of personal or social benefit" (CHIR, NSERC and SSHRC, 2010, p. 113).

Despite the official categorization of this kind of project as minimum risk, interviews with Indigenous leaders and representatives, and government officials posed the greatest ethical challenges, since they could expose sensitive or confidential information that could negatively affect decision-making processes or personal reputations. In this regard, all participants were ensured anonymity and confidentiality as a way of addressing potential risks. The interviewees whose names have been included in Appendix A are the people who explicitly asked to be identified. Interestingly, almost all government officials asked not to be identified, while almost all Indigenous representatives requested to be identified. In addition to anonymity and confidentiality, all interviewees were informed of their right to withdraw their consent to participate at any time. None of the interviewees withdrew from the project.

In addition, I have taken special care in the management and storage of the information collected given the contemporary and sensitive nature of the process under investigation at the time the interviews took place. This is critical in order to ensure it is not used in ways that could be detrimental to the reputation of the participants or have a negative impact on decision-making processes that are crucial for the advancement of Indigenous rights in Chile. In addition to following UBC protocols regarding data storage and protection, I personally transcribed all of the interviews that touched on sensitive or confidential information, as well as those where the interviewees asked for some sections to be off record. When interviews were sent for transcription to other people, confidentiality agreements were signed and no details about the research project or the profile of the interviewees were given to the two external transcribers.

But beyond the formalities of university-sponsored research, this study has been guided by my ethical commitment to Indigenous justice in Chile and to examining with a critical eye the complicity of state-led planning in Indigenous dispossession that I have described in this introduction. As I elaborate in section 1.5 below, my standpoint as a non-Indigenous woman brings responsibilities as well as limitations to my work. It necessarily shapes the perspectives I bring into the analysis and likely the meanings other people give to my words. Being immersed in the field for so many months made me continuously revisit what my own position was in relation to the issues I was investigating. I went to Chile with what I thought was a fairly clear understanding of my research goals, having as a background my identity as a non-Indigenous Chilean woman, who has lived abroad for almost a decade, who is the heir of the family history I presented at the opening of this chapter, and who has a genuine interest in and concern regarding the structural injustices associated with the establishment and continuing existence of the Chilean state on Indigenous territories. However, I did not know how I was going to be perceived by the people I had to interact with, and what opportunities and challenges that was going to bring. The many conversations with the research participants and my presence in different contexts helped me to see more clearly where I stand (both where I see myself and where other people see I belong), what my moral and political commitments are, and what I can contribute as a Chilean citizen and as a scholar conducting research on these issues. The relationships I have cultivated with individuals and organizations, and the type of work I have begun to develop with some of them, are a testimony to this.

The argument and claims I develop in the following pages are the interpretation I make of these past years of reading, listening, talking, interviewing, discussing, and witnessing planning in Chile's contact zone. This interpretation does not capture everything I read, heard, saw, and reflected about, but it does distill the most

powerful learnings, as well as the most relevant conceptual and substantive insights I gained over these years. I echo Simpson's words when she warns her readers: "I refuse to practice the type of ethnography that claims to tell the whole story and have all the answers. This is not an even playing ground for interpretation, and I do not pretend otherwise. I call this heightened awareness my 'ethnographic refusal'" (Simpson, 2014, p. 34).

1.5 Limitations of the study

As with any interpretive research project, this study has several limitations that are important to acknowledge. Below I highlight four, which in my view have the biggest implications for how the claims I make might be perceived by different readers and for the (in)applicability of the research contributions.

First, I am offering an interpretation of the space where state-led planning and Indigenous peoples meet from my standpoint as a non-Indigenous person. As such, the analysis I develop is inevitably tinged. While the data sources and perspectives that have informed my interpretation are diverse – including extensive interviews with Indigenous representatives and scholarship developed by Indigenous academics and thinkers – the interpretation is nonetheless subject to my analytical lenses and blind spots. My awareness of this inherent limitation explains why my analysis focuses mostly on state-led planning, as opposed to Indigenous perspectives or assessments of Indigenous political (dis)engagement with state planning. This limitation is particularly relevant with regard to the concluding sections that engage with the literature on normative orders, since all insights emerge from my own legal consciousness – to borrow Sarah Hunt's term (2014) – which is founded in particular normative precepts, many of which might likely not be shared by Indigenous peoples whom I interviewed or by other readers. My decision to keep the analysis generally broad and conceptual is a reflection of this awareness. Still, I hope the abstract level of the discussion can nonetheless offer some insights to people inhabiting other normative worlds.

Closely connected to the point above, this analysis portrays Chile's planning contact zone as a dichotomous space marked by Indigenous/non-Indigenous or Indigenous/state relations. Quoting Porter, "my argument rests, then, on the establishment of difference, on a sometimes reified binary… The potential for my argument to turn on a stylized and reified identification of difference is very present" (2010, p. 17). While the risk of essentializing in clear, I would dare to argue that Chile's planning contact zone very much operates under such a paradigm. That is how the Consultation was formulated (i.e. the state engaging the "Indigenous world"), how Indigenous policy is generally framed (i.e. the government creates "Indigenous policy"), and how

social interactions in Chile unfold today in many parts of the country. The insistent reference by Indigenous interviewees to "Chilean people" and "the state" as clear counterparts illustrates that the dichotomy not only finds ground in government circles. In that sense, I trust the analysis – while of course a simplification – remains solid and coherent in proposing a theoretically informed argument.

Along the same lines, given the focus of my research on the complicity of planning with colonial dispossession there is a risk of portraying colonization as the only point of reference and western law as an oppressive force only, as I briefly mentioned earlier in this chapter. The simplification of such a framing is obvious and does not capture the complexity of the contact zone. Similarly, in doing a critique of state planning there is a clear risk of offering a static picture of Indigenous/state relations, which are of course much more dynamic and contested than this research is able to capture. Instead of suggesting that colonialism is *the* lens to adopt, I would like to invite readers to consider what an emphasis on colonial violences can offer to planning theory and practice, and how it can help re-think the role of law in particular.

Finally, despite the presence of significant gender disparities in the pool of interviewees – I noted that only 12 out of 37 participants were women, and most government officials were men – and to the gendered nature of settler colonial violence more broadly, my analysis does not engage with a gender lens in a way that allows me to meaningfully reflect on these realities. At the time of formulating this research I did not embed such an analytical frame, which means my data collection and analysis were not designed with gender considerations in mind. Instead of trying to compensate for my research design retroactively, I hope to expand my engagement with a gender lens as I continue moving this line of work forward in the future.

1.6 Overview of the dissertation

The remainder of the manuscript is organized into five more chapters. In **Chapter 2** I delineate the theoretical framework for this study, and discuss in more detail the foundational concepts and premises introduced here. I first examine how the field of planning and the colonial project have co-evolved and intersect, and some of the implications acknowledging this genealogy has for how planning is theorized, practiced, and taught. I then argue that state-led planning in settler colonial contexts is an inherently institutionalized practice and I explore what institutional theory might offer to the examination of the colonial cultures of planning in Chile. The final section discusses the role of western law in the complicity of planning with colonialism, and identifies key features of the way western law operates that shed light on how

planning produces dispossession for Indigenous peoples until this day. Unlike studies that focus on the outcomes or applications of law at the intersection of Indigenous and state interests, the framework presented here emphasizes individual agency and the performative aspects of regulation making itself in an effort to broaden current examinations of the contact zone.

In **Chapter 3** I trace the evolution of state planning in Chile since early colonial times and argue that current planning practice is inseparable from this colonial genealogy. Drawing on archival and historical material, I discuss some key discourses, strategies, and tools that have facilitated and reinforced Indigenous dispossession through planning over the centuries. My focus is on the institutionalized practices that have been put in place to regulate the relationship between Indigenous and non-Indigenous peoples. The chapter shows how colonization has never been a spontaneous process led by a few individuals, but an active effort carried out and legitimized by legal tools, several of which fall under the umbrella of planning. This chapter paves the ground for the examination of the case study, which I argue can only be understood in light of this history.

In **Chapter 4** I delve into how state planning in Chile unfolds today by examining the implementation of the duty to consult with Indigenous peoples. Drawing on interviews and document analysis, I offer a thick description of the controversial planning process that created a national consultation regulation. The story is told through the voices of government and Indigenous representatives involved in the process, as well as Indigenous peoples who refused to participate. The analysis begins to show how the international Indigenous rights discourse is taking root in Chile, how consultation is being taken up through law, and the role planning institutions and practices are playing in this regard. I suggest that marginal improvements in state planning are taking place, especially regarding methodological innovations in participatory planning. However, at a more substantial level consultation policy serves to proceduralize and restrict the scope of Indigenous rights and the exercise of self-determination under the veils of reasonableness and compatibility with Chilean legal frameworks. The analysis also highlights the role that fear and ignorance among government planners and officials played in the development of the Consultation. Despite the never-seen-before participatory nature of the process and the important innovations that took place, the failure to reach a mutually agreed regulation mechanism suggests that the playing field was always meant to be tilted in order to keep the spirit of what the state wanted.

Building on the institutional ethnographic analysis just introduced, **Chapter 5** delves deeper to examine the specific ways in which western law and planning interweave in consultation legislation to produce such reduction in scope, spirit, and depth. Focusing on law's world-making capacity and performative dimensions, I

show how the implementation of the duty to consult was essentially about creating spheres of jurisdiction that reduced the scope of consultation, producing legal categories amenable to state operations, attempting to have control over meaning making and legal interpretation, and sidelining Indigenous normative understandings. I end the chapter arguing that the failure to reach a mutually agreed regulation and Indigenous refusal to engage in the process suggest that what is really at play in Chile's planning contact zone is not a clash between different ways of planning, but a clash of normative systems. In other words, the result of tensions arising from multiple contrasting interpretations and narratives about what is considered acceptable or unacceptable, allowed or forbidden, legitimate or invalid regarding Indigenous and non-Indigenous coexistence in shared space.

Finally, in **Chapter 6** I discuss how and why understanding the tensions of state planning and Indigenous peoples in the contact zone in terms of conflicting normative systems might offer new ways of theorizing and practicing planning in settler colonial contexts. I first discuss planning theory's longstanding interest in the normative nature of planning and connect it to the literature on normative systems. I then explain why the disagreements that marked the Consultation's failure can be seen as examples of legal orders clashing. Then, I suggest that Indigenous decisions not to engage in the Consultation, as well as the government's inability to engage with Indigenous demands, illustrate a refusal to commit to normative precepts emerging from other collective experiences – in other words, the existence of too much law. I then extend my argument to support the claim made recently by Indigenous scholars in Chile who argue that Indigenous engagement in direct action can be understood as the exercise of Indigenous self-determination grounded in Indigenous legal orders. I close the chapter speculating how engaging in this kind of thinking opens the door to planning practices that are grounded in legal pluralism rather than in domination by imposition of Chilean law.

Chapter 2: Weaving a theoretical framework: Law, institutions, and world-making in planning practice

Simply put, the law creates reality that is real because it has been created by the law.

Dara Culhane, 1998, p. 65

I am reluctant to view the state machinery as a steamroller… Although the ideological and military guidelines for the conquest and penetration of the state into [Indigenous] territory emerged from Santiago, it was the local actors – such as landowners, businesspeople, farmers, soldiers, the police, and bureaucrats – who, moved by their own motives, gave character and substance to colonialism.

Claudio Alvarado Lincopi, 2015, pp. 119-120 (translation mine)

In the first chapter I talked briefly about the origins and some of the premises of this research. Taking planning's complicity with the colonial project[27] as a point of departure I made clear my interest in the institutional dimensions of such complicity. I explained why I think looking more deeply at law in general and regulation-making in particular is essential to understand this relationship, especially in an international context marked by the discourse of Indigenous rights. And I also discussed my decision to do a grounded, institutional ethnographic analysis of the "colonial cultures of planning" (Porter, 2010)[28] in Chile today, which foregrounds agency, tries to move away from monolithic understandings of colonialism and the state, and pays attention to the performative dimensions of law. In the following pages I engage with debates in planning, Indigenous studies, settler colonial studies, and legal geography to elaborate more on those assumptions and foundational concepts.

Western legal systems are widely referred to as constitutive structures of settler colonialism and as key tools of internal colonization. This work seeks to expand prevailing understandings of the role played by regulatory regimes in Indigenous dispossession present in the planning literature, not only by identifying them as key

[27] I find Arneil's (2012, p. 491) thinking useful, which distinguishes between "colonization (the processes by which the imperial state takes over the land and/or sovereignty of another country) and colonialism (the theoretical framework by which colonization is justified)." I see the origins of western planning – and Chilean planning – as being inseparable from colonialism and actively complicit with colonization.

[28] Porter argues that "seeing planning as a cultural practice makes it become specific to particular peoples, life views, times and spaces, even as planning theory tends to mythologize its universal features and norms… [and requires making] available for analysis the ontological philosophies and discursive rationalities that make possible this social practice of spatial ordering in the first place" (2010, pp. 2-3). I share her view that this "seems not only possible but necessary to the political project for Indigenous land justice" (2010, pp. 2-3).

dimensions of planning contact zones in Chile, but by examining regulation-making itself as a crucial site where the interaction between Indigenous peoples and the state gets enacted, and where the colonial cultures of planning become visible, are reproduced, and may be disrupted. The goal of this chapter is to articulate a theoretical framework that considers legal regimes in their capacity as "relatively stable, immovable and irreversible" structures of domination (Tully, 2000, p. 37) – to the extent that they define the scope and nature of state planning action – but that also engages with their pragmatic, relational, and potentially transformative "world-making" capacity (Delaney, 2010).

The next section discusses the multiple ways in which planning and the colonial project have co-evolved and intersect, and some of the implications of this genealogy. I then elaborate on the insights institutional theory might offer for the examination of the colonial cultures of planning in Chile. The final section discusses the role of western law in the complicity of planning with colonialism, and identifies key features of the way western law operates and is performed that shed light on how planning produces dispossession for Indigenous peoples.

2.1 Planning and (internal) colonialism: Complicit relations

> *As an activity, "planning" isn't owned by the West, its theorists, or practitioners. It just happens to be an English language descriptor for a universal human function with an abiding and justifiable concern for the future... Until recently the locus of power and ultimate right to determine this future rested almost exclusively with colonizing non-Indigenous settler governments, either through the power of the musket or the power of law, policy, planning, and technology.*
>
> Hirini Matunga, 2013, p. 4

This research emerges from a concern with the intertwinement of planning, colonialism, and Indigenous dispossession, which I take as a starting point. My concern echoes the growing number of accounts that over the last 15 years have begun looking at the historical relationship between mainstream western state-centered planning in settler states and the European colonial project that began in the late 15th century. These stories are certainly not new and have long been told by Indigenous peoples and by scholars from other disciplines. However, framing these stories in planning terms and exploring the "burden of colonialism" (Sandercock, 2004) on planners brings new perspectives to discussions about Indigenous dispossession, and

has several implications for the ways of practicing, theorizing, and teaching planning as a discipline. Simply put, they invite a reconceptualization of the role, potential, and limits of state planning in settler contexts, as I elaborate below.

At the heart of the complicity lies land dispossession, since settler colonialism essentially involves stripping Indigenous peoples of their territories in order to build a new settler society (Harris, 2004; Wolfe, 2006). As Libby Porter points out, "land was fundamental for the success of colonization in making new territories by securing imperial state rule and creating economic growth in those territories" (2010, p. 51). Several mechanisms and tools of spatial appropriation that today fall under the umbrella of land use planning – such as mapping, surveying, town building, and naming the "newly discovered" territories – were pivotal to establishing colonial regimes (see for example Alvarado Lincopi, 2015; Blomley, 2003; Boisier, 2007; Porter, 2010). These early practices rendered "places known, ordered, rational, and ultimately 'settled'" (Porter, 2010, p. 71), materializing the "spatial rationality of colonial order" (2010, p. 60). A couple of centuries after, the creation of sovereign settler nation-states involved delineating borders that further consolidated territorial appropriation. Although in some places treaties were signed, in most cases there was neither consent nor the establishment of a social contract, making these "colonial processes of territorial acquisition and state formation… a continuous assault on [Indigenous peoples'] political and cultural autonomy" (Lane and Hibbard, 2005, p. 172). As is well known, these early strategies were founded on the doctrines of discovery and *terra nullius*, which justified colonization under the assumption that the lands were unoccupied according to European property standards. Within this ethnocentric understanding "Indigenous peoples… did not have [or had limited] property rights, since they were nomadic populations that did not meet the requisites for land title according to Western law" (Míguez, 2013, p. 30, translation mine), a topic that I elaborate more in section 2.3. From a territorial point of view, the displacement of Indigenous peoples into reservations has perhaps been the clearest manifestation of the attempt to "eliminate the native" (Wolfe, 2006) and make land available for a self-identified sovereign settler society.

On top of helping take the lands Indigenous peoples had occupied for millennia, and supporting border delineation and state building, planning was also grounded in and contributed to a politics of otherness between the colonizers and the colonized (Mignolo, 2000; Quijano, 2000; Rivera Cusicanqui, 2010; Porter, 2010). Initial processes of space production were inseparable from techniques of social, cultural, political, and cognitive control founded on the false premise of European superiority over Indigenous worldviews (Escobar, 1992; Matunga, 2013). Although at times less visible than territorial dispossession and displacement, these

techniques were just as violent. As I discuss in Chapter 3, in Latin America along with Christianization came the imposition of Spanish as the official language, the introduction of mandatory schooling as a mechanism of cultural assimilation, and multiple efforts to eradicate Indigenous identities by fusing them with the peasantry, among others (Bengoa, 2004). Together, these strategies helped consolidate territorial dispossession and the establishment of a first wave of European settlers who never left, among which were parts of my family.

Understanding the colonial genealogy of planning in the west is essential, but the complicity is not just a matter of the past (Porter, 2010). If planning was a tool for active colonization in early contact and during formal colonial times, it then turned into an instrument to support internal colonization once the colonies in America declared their independence or lost their colonial status (González Casanova, 1970). As Mapuche historian Héctor Nahuelpan Moreno argues, "living in [a] nation-state that supposedly dismantled colonial relationships does not mean the same to all people, especially to those groups that were forcefully incorporated, dispossessed of their territories, and whose bodies were submitted to a discipline that legitimized violence and socio-racial hierarchies under ideas of civilization, progress, or development that persist until this day" (2012, p. 120). But while settler societies are built on and still operate within legal, institutional, governance, and decision-making systems that are colonial products (Antileo et al., 2015; Coulthard, 2014; Tully, 2000), planning practitioners work in environments – and are often times trained in schools – where the links of the field with colonialism are rarely made explicit, not to say questioned. There are even places like Chile, where planning does not exist as a professionally accredited practice formally taught in schools, but where planning work happens on an everyday basis in the hands of practitioners from a wide range of disciplines, as this research shows. Although they employ tools and processes that have resulted from this colonial trajectory, there are few formal spaces for learning, training, or practice where the complicity of planning with colonialism can be examined.

In recent years the planning literature has engaged with these concerns and paid more attention to the contemporary spaces where state planning and Indigenous interests intersect in settler contexts – the contact zones Barry and Porter (2012) talk about, as briefly introduced earlier (see section 2.3 for more). Some studies look at the exclusion of Indigenous peoples from planning, showing how planning tools and procedures actively contribute to their marginalization and oppression (see for instance Fontana, 2008; Sanhueza, 2013; Yiftachel, 2009). Several works explore different forms of collaborative planning with Indigenous peoples, innovations in co-management, or the incorporation of Indigenous perspectives and traditional knowledge into planning practice, especially in natural resource management or protected areas

(Barry, 2012; Hibbard, Lane & Rasmussen, 2008; Lane and Hibbard, 2005; Zaferatos, 2004). The assumption is that increased participation of Indigenous peoples in mainstream planning is desirable and the emphasis is then placed on how planning systems are responding and becoming more accommodating to enable such involvement.

As Heather Dorries sharply points out, however, "claims regarding the impact of colonialism on Indigenous peoples, and the role of planning in colonial dispossession are largely asserted, and are not the focus of inquiry. Thus, dispossession is presented as a historical fact and not interrogated as an ongoing process" (2012, p. 26). Analyses tend to move quickly from acknowledging historic injustice towards exploring ways in which planning can redress the damage. While these works offer an important foundation from which to analyze planning practice and explore ways of making it more relevant to settler realities, the big risk is that "divorcing planning from history allows planning to be presented unproblematically as a solution to colonialism" (p. 27).

Obviously, taking the discussions above seriously has several implications. Recognizing planning's complicity with internal colonization brings into question well-established normative assumptions about planning as an essentially transformative practice aimed at improving the world (Friedmann, 1987; Hibbard et al., 2008). This invites a deconstruction of prevailing planning theories in order to account for this complicity (Flyvbjerg & Richardson, 2002; Yiftachel, 1998), as well as to imagine new planning theories that can confront such colonial trajectory and be grounded in Indigenous understandings of planning (Dorries, 2012; Porter and Barry, 2016). Planning practice comes under scrutiny too, since practitioners are urged to re-position themselves and their work in a broader historical context – as Porter and Dorries suggest – taking responsibility for the impacts planning has had on Indigenous peoples. For instance, planning's colonial genealogy defies some of the premises of communicative and collaborative planning practice that have gained traction in the last two decades, since Indigenous peoples' unique status[29] unsettles ideas about consensus building among "stakeholders" with equal power and rights (Huxley & Yiftachel, 2000).

Similarly, practitioners need to adopt a critical, self-reflective ethical stance that might begin questioning values, unsettling long held assumptions, and raising awareness about the limitations and contradictions inherent to their work (Porter, 2009; Porter & Barry, 2016; Regan, 2010; Sandercock, 2004). These discussions also bring to the forefront the different role Indigenous and non-Indigenous people involved in planning

[29] The unique status derives from Indigenous peoples' presence as self-determining and sovereign nations in their territories before European contact (Anaya, 2006).

should play in the face of this historical trajectory (Ugarte, 2014). While Indigenous peoples are in the best position to continue planning for their own communities on their own terms, and for indigenizing mainstream planning practice, non-Indigenous planners are placed in a unique position to begin decolonizing planning systems and their own planning practices (Erfan and Hemphill, 2013). In brief, taking responsibility for western planning's role in Indigenous dispossession demands at least relativizing its alleged supremacy and universality, exposing its underlying assumptions, and questioning its supposed neutrality (Escobar, 1992; Matunga, 2013; Porter 2010; Sandercock, 1998) in order to imagine alternative ways of moving forward. While this line of inquiry is not new to planning theory, the implications of bringing Indigenous sovereignty and self-determination to the foreground are yet to be explored (Dorries, 2012). This is especially relevant in settler colonial states like Chile, where the juridical-legal discourse of Indigenous rights is becoming central to state action and affecting planning systems directly.

The notion of the "colonial cultures of planning" coined by Porter brings together several of these conversations. Defined as "the activities, readings, desires, philosophies, technologies and regulatory methods that the historical record shows actively and materially constructed colonies" (Porter, 2010, p. 47), as I mentioned in the introduction, it is a useful conceptual and analytical entry point to examine how planning actively produces injustice for Indigenous peoples today. In many ways the concept is simple and commonsense, and engages with Dorries' concern: as with any other social practice, "the particular spatial activity of government that we know as planning is a culturally specific and bounded activity. It arises as an activity and set of practices from a locatable and cultural world–view: from a spatial ontology and epistemology" (Porter, 2010, p. 44). It is *not* a neutral, universal, and value-free field of practice as planning theorists and practitioners insisted on for most of the 20th century and as way too many state planners in Chile still believe, but is inescapably rooted in colonial rationalities and sensibilities that still persist. Very importantly, Porter's idea considers both colonial modes of thinking of government and colonial social moralities. She highlights how the role of "sentiment, affect and sensibility" is as important to a historical examination of planning's colonial origins as is the role of "calculative thoughts and actions" (Porter, 2010, p. 44).[30] As Escobar argues, "perhaps no other concept has been so insidious, no other idea gone so

[30] Drawing on Huxley's (2006) and Stoler's (1995) work, Porter understands rationalities as the modes of thinking of government that "have made spaces and environments amenable to calculative thought by mobilizing certain 'truths' of causal relations in and between spaces, environments, bodies and comportments" (Huxley, 2006, 772). While rationalities are important in Porter's conceptualization, her "other instructive source for… vocabulary and framework is Stoler's… historical reading of sensibility and disposition in the production and maintenance of colonial social moralities… [which suggests] that much of the work of colonial government was not driven by rationality at all, but the opposite: sentiment, affect and

unchallenged. This blind acceptance of planning is all the more striking given the pervasive effects it has had historically… [being] linked to fundamental processes of domination and social control… [and] to the rise of Western modernity" (1992, p. 132). Ideas about property, the urban and the rural, appropriate and worthless land uses, the environment, and public participation, to name just a few, which are still dominant in planning discourse and practice in several settler colonial states, cannot be detached from the cultural matrix they emerged from. Even more, they are clear expressions of such cultural matrices.

I share the belief that in order to explore how state planning produces injustice for Indigenous peoples today "we need to make available for analysis the ontological philosophies and discursive rationalities that make possible this social practice… in the first place… to contextualize and historicize planning as a practice and theory: to show planning as only one (of many) cultural responses to questions of human-environment relations" (Porter, 2010, p. 3). And I approach this analytical, pragmatic, political, and ethical task from a particular angle: focusing on how those colonial cultures are institutionalized and articulated through law.

2.2 Planning as a soft infrastructure

> *Some institutions are so… taken-for-granted that they escape direct scrutiny and, as collective constructions, cannot readily be transformed by the actions of any one individual. Institutions are resistant to redesign ultimately because they structure the very choices about reform that the individual is likely to make.*
>
> Peter Hall and Rosemary Taylor, 1996, pp. 939-940

Building on the discussions above, this research is also grounded in a concern with the role of institutions in shaping social life. And I am not referring to formally bounded organizations only, because institutions "are expressed in formal rules and structures, but also in informal norms and practices, in the rhythms and routines of daily collective life… They are a kind of 'soft infrastructure' of the governance of social life," as Patsy

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sensibility" (Porter, 2010, p. 44). Building on Porter's ideas and on the work of other scholars, in the context of this study colonial rationalities and sensitivities can be expressed, among others, in liberal understandings of individual rights (Lightfoot, 2008); European ideals of political organization (Tully, 2001); Lockean notions of property and land use (Porter, 2010); the supremacy of nation-state sovereignty (Dorries, 2012); a positive understanding of international law (Anaya, 2004); capitalist modes of production (Coulthard, 2014; Roy, 2006); and a primarily text-based or logocentric (i.e. writing-based as opposed to orally-based) way of regulating and institutionalizing collective action in social contexts (Cameron, 2013). These colonial rationalities and sensitivities are not necessarily sources of colonial power, but ways in which colonial power is materialized that, in turn, reflect deeply embedded cultural beliefs, as Porter suggests.

Healey beautifully puts it (2007, pp. 64-65). I have decided to embrace an institutional level of analysis in this work because I firmly believe that the colonial sensibilities and rationalities Porter talks about are perpetuated until this day precisely thanks to their crystallization into frameworks of norms, rules, and practices that articulate collective action.

Some planning scholars have found insights from new institutional theory[31] useful to better understand how planning practices "might relate to the wider governance context within which they are inherently located", and also to examine "the circumstances in which a particular initiative in a specific situation has… transformative potential… and when, in contrast, it may merely act to reinforce and maintain established practices" (Healey, 2007, p. 63). This interest in institutions starts from the recognition that social realities cannot be meaningfully accounted for by looking at either individual behavior or structural forces only.

Most accounts that examine the complicity of planning with colonialism I mentioned above show a concern for institutions more or less explicitly. While some studies take a historical perspective, denouncing how the discipline has been constrained by and also supported institutionalized Indigenous dispossession (Boisier, 2007; Fontana, 2008; Hibbard et al., 2008; Porter, 2010; Sandercock, 2004; Stanger-Ross, 2008), others focus on how contemporary institutions of local governance try to assimilate Indigenous planning traditions, cultures, and knowledge into mainstream planning activities (Dorries, 2012; Nadasdy, 2003). Still others suggest that planning has a role to play in shaping new institutions for a fairer relationship between Indigenous and non-Indigenous peoples in settler colonial settings[32] (Jojola, 2008; Zaferatos, 2004). Most empirical analyses focus on emerging collaborative practices between Indigenous and non-Indigenous peoples in areas such as environmental and natural resource planning (Barry, 2012; Lane and Hibbard, 2005; Zaferatos, 2004), but there is some recent work addressing the challenges of governance and/or experiences of Indigenous resurgence in urban settings (Carmona, 2017; Fontana and Caulkins, 2017; Porter and Barry, 2016).

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[31] The new institutionalisms (NIs) emerged in response to the behavioral revolution of the mid-20th century, which explained social change as a result of aggregate individual behavior. In this view, institutions are the milieu in which social change takes place. The NIs –rational choice, historical, sociological, and discursive – try to compensate for this "agency without structure", explain the relationship between institutions and individual behavior, and account for how institutions emerge, maintain over time, and change (Hall and Taylor, 1996; March and Olsen, 1989; Schmidt, 2008).

[32] For some authors, purposive institutional design is possible and affects individual and social change in fairly predictable ways (Alexander, 2005). While I agree intentional institutional change is possible, I am skeptical of mechanistic views that downplay the impact that "deeper frames of reference and cultural practices which structure how people make sense of their collective worlds" (Healey, 2007, p. 65) have on planning practice. This approach not only leaves little room for questioning those underlying systems of meaning, but also overlooks how planners' inaction can be considered action too, insofar as it contributes to system-maintaining practices (Friedmann, 1987).

While there are some exceptions (Dorries, 2012; Porter, 2010; Porter and Barry, 2016), most works about planning's complicity with colonialism found in the planning literature take institutions as given. There is not a deep questioning of the permanence of a colonial structure (Antileo et al., 2015; Coulthard, 2014) or an empirical examination of the mechanisms by which colonial dynamics are perpetuated through planning practices today. The persistence over time of certain modes of behavior, planning processes, or concrete tools is often explained as result of historical path dependencies, while institutional change is often seen as the result of the purposeful intervention of rational actors or of external forces – what new institutionalists call critical junctures. The agency, motivations, and beliefs of planners and other sentient actors are often overlooked or not explored in depth in existing analyses of the colonial cultures of planning. Planning systems and institutions are usually conceptualized as static structures that define the possibilities of planning practice and limit the actions of individuals, or as the backdrop against which planning action happens. This is true in many ways. Yet not exploring the specific ways in which institutions facilitate the reproduction or help disrupt the colonial cultures of planning misses the opportunity to develop more collective self-reflectiveness regarding what spaces of intervention there might be in contemporary planning systems and practices, in order to begin changing direction in the search for Indigenous justice. In a context as highly centralized, statist, legalist, and racist as Chile, where planning systems are characterized by incoherence and institutional fragmentation (Andrade, Arenas & Guijón, 2008; Arenas, 1998; Ugarte, 2016) this exercise cannot wait.

I see mainstream planning in Chile as being *inherently* institutional if we understand it as a field of practice whose origins are linked to processes of colonial expansion and then nation-state building, and whose actions towards Indigenous peoples have always been led and legitimized by different levels of government. As I show in the next chapter, the colonial dispossession of Indigenous peoples has never been a spontaneous process in the hands of a few individuals. Quite the contrary, it has been the result of deliberate and coordinated efforts by the Chilean state (Alvarado Lincopi, 2015; Bengoa, 2004). As such, making sense of this involvement requires examining planning's institutional dimensions closely. This includes micro-level episodes of day-to-day human interaction in planning processes, meso-level processes of strategic action and mobilization, and macro-level culturally embedded assumptions and habits (Healey, 2007). Exploring them in tandem can shed light on the values, rationalities, and sensitivities that shape decision-making, how planning problems are framed, the political nature of planning processes (Flyvbjerg, 1998), and why certain modes of governance and approaches to planning persist over time (Hajer, 1993), even after proving unsuccessful or destructive.

Analytically, the importance of looking at current planning institutions in light of a colonial tradition links to discussions about power and structural violence that are constitutive of Indigenous dispossession. Institutions are not neutral platforms, but actively contribute to reproducing specific patterns of collective behavior. They articulate the webs of interactions among people that shape "which preferences and interests are articulated and decisions made" (Healey, 2007, pp. 64-65), as opposed to institutional decisions or outcomes *per se*. Adopting an institutional lens helps to bridge the divide between individual actors and deeper structures of social relations. In doing so, it is possible to see more clearly the interrelation between specific institutional planning episodes and the broader socio-economic and political contexts that co-constitute them (Healey, 2007). I think this is essential when trying to unpack what ongoing Indigenous dispossession in settler contexts looks like and asking what are some contextual possibilities for transformation.

But my interest in the institutional dimensions of planning's complicity with colonialism is not only analytical – in the sense of adopting an institutional level of analysis and using institutional theory concepts – but also normative. I firmly believe that the kinds of institutions that exist in a society speak of the kinds of societies people live in or aspire to have. What does it mean for a social group to institutionalize racial segregation, for instance? Or gendered oppression? What does this reveal about the values, priorities, and worldviews that give birth to such institutions? And what about the silent perpetuation of these soft infrastructures over time? Insofar as institutions set a visible bar for and contribute to the reproduction of what is acceptable, allowed, expected, forbidden, or punished in a society I think they deserve attention. Taking them for granted is at best a serious oversight, and at worst active complicity with their mandate and actions.

As explained in Chapter 1, I approach this exploration in two ways: by examining micro day-to-day operations of state planners and by linking those activities to macro "deep frames of reference and cultural practices which structure how people make sense of their collective worlds" (Healey, 2007, p. 65). While exploring the agency of planners and their potential for individual change is essential, it seems insufficient in itself since the machinery of internal colonization relies on the existence of more permanent systems people are often blind to. Adopting a micro-dynamics lens allows me to appreciate the scope of possibilities and limits of individual actions. It offers the opportunity to understand people's motivations, rationales, fears, and expectations and why and how they do what they do. Adopting a macro level lens allows me to place that individual universe against broader, often unexamined social assumptions, beliefs, and values. By putting these two spheres together, I see the permanence of the colonial cultures of planning today as a combination of long-lasting institutional path dependencies grounded in individually internalized colonial rationalities and sensibilities.

2.3 Western law and the performance of world-making

> *There is in colonialism a very peculiar function for words: Words do not designate, they rather conceal. And this is particularly evident during the republican period, when it was necessary to adopt egalitarian ideologies while at the same time stripping away citizenship rights from most of the population. In this way, words became a fictional registry, riddled with euphemisms that veil reality instead of naming it.*
>
> Silvia Rivera Cusicanqui, 2010, p. 19 (translation mine)

The third pillar of this research flows from the discussions in the previous pages, since the structural intertwinement of planning, colonialism, and Indigenous dispossession in settler contexts can hardly be understood without talking about law. As Robert Williams sharply points out, "regarded by the West as its most respected and cherished instrument of civilization, [law] was also the West's most vital and effective instrument of empire during its genocidal conquest and colonization of… non-Western peoples" (1990, p. 6). Not for nothing have some Mapuche scholars succinctly portrayed the relationship between Indigenous peoples and the state as "domination by imposition of Chilean law" (Burgos, Cabellos & Luna, 2006, translation mine).

The ways in which law and colonialism intersect to produce such domination are multiple and have been widely documented in narrative accounts and scholarly works. Initially, the creation and enforcement of legal and regulatory systems legitimated the presence of settlers according to western standards and the removal of Indigenous peoples (Rivera Cusicanqui, 2010; Wolfe, 2006; Chapter 3 in this dissertation). Through the doctrines of discovery and *terra nullius* mentioned earlier, already inhabited territories were "simply legally deemed to be uninhabited if the people were not Christian, not agricultural, not commercial, not "sufficiently evolved" or simply in the way" (Culhane, 1994, p. 105). Linking back to the discussions in section 2.1, underlying this approach were very particular understandings of property (privately owned, individual), "productive" land use (capitalist, extractive), and socio-political organization (sedentary, centralized), not to mention particular ways of conceiving law (positive, textual) and rights (individual, liberal), which remain largely in place today.

Here I need to pause to make two important points regarding my understanding of law and the role it plays in my analysis. The first one is that this research is grounded in my commitment to legal pluralism – in other words, in the belief and acknowledgement that multiple normative orders coexist and circulate in society (de

Sousa Santos, 1987; Griffiths, 1986), which are inherently equal in legitimacy even if some of them become dominant or more visible. For my purpose here, this means that I conceive the legal landscape in Chile as comprised by both pre-existing Indigenous systems of law and by western systems of law introduced with colonization and furthered after independence. However, the foci of my inquiry are the imposition and primacy of western legal orders, and their role in ongoing Indigenous dispossession, especially in the normative context provided by the international Indigenous rights discourse over the last decades. My decision is grounded in the observation that, as David Delaney (2010) suggests,

> Under current institutional conditions in much of the world, even those projects that we might comfortably identify as counter-hegemonic are strategically compelled to go through "the state" or state institutions in order to even complete effectively. That fact alone––a fact which implicates the centrality of statist legalism, legal positivism, ideologies of sovereignty, and the presumptive legitimacy of state (that is "authorized") violence––necessarily imposes severe limitations on what kinds of worlds can even be imagined, much less brought into being (p. 149).

This statement might sound hopeless in many ways and places the focus of attention on the state – which is itself a questionable decision. However, I believe it reflects well the pragmatic reality of many places like Chile, where Indigenous peoples have long used western law strategically in order to counter institutionalized dispossession, achieve partial justice, or set minimum standards for Indigenous rights. Indigenous peoples' active engagement with mainstream Chilean law is both an inescapable reality and a deliberate tactic, and one among several avenues to exercise self-determination. As I elaborate more in the following chapters, recent developments in international law – especially ILO Convention 169 and UNDRIP – are consolidating this trend even more.

The second clarification is that of course the attempted imposition of a western worldview – including western legal orders – on Indigenous peoples ultimately rests on the use of physical force. Although settler colonialism is grounded in socio-cultural imposition, the politics of extermination and displacement are essentially aimed at the elimination of Indigenous peoples' presence to free up their territories for occupation (Wolfe, 2006). The mechanics of such politics have partially changed over the centuries – which has led some scholars to suggest that we live in post-colonial societies (Calbucura and Le Bonniec, 2009) – but physical violence continues to be a defining feature of the approach settler states have towards Indigenous peoples. As I was conducting my research I had a couple of crucial conversations with one particular Indigenous leader. He made very clear how any analysis of planning and Indigenous peoples in Chile could not be detached from the brutal reality of ongoing military presence and racist criminalization of Indigenous demands, even if those

two arenas might look seemingly unrelated in the eyes of some people. "That's what it's all about, that's what concerns us most", he declared.[33]

Having said this, as Cole Harris (2004) and other scholars have shown, the actual exercise of physical power requires "effective tools and instruments… [and] law and legal discourse [have been] the perfect instruments of empire… performing legitimating, energizing, and constraining roles in the West's assumption of power" (Williams, 1990, p. 8). Paradoxically, although western law tends to be presented as "the opposite of violence, exception, arbitrariness, and injustice" in settler contexts, "somehow these features [are] all incorporated within it" (Mitchell, 2002, pp. 77-78). So just to clarify, even though this research focuses on bureaucratic as opposed to physical violence, the reality of ongoing physical violence against Indigenous peoples in Chile is the backdrop against which my analysis is placed. In fact, I am particularly concerned with how everyday – and also not-so-everyday – bureaucratic planning work serves to legitimize or hide the use of force by claiming attachment to the rule of law, and to displace, subordinate, suppress, or simply ignore Indigenous legal orders and their multiple manifestations, as this research shows.

2.3.1 Law + history

Going back to Williams' quote in the previous paragraph, the next chapter illustrates how the colonizers' assumption of power was built on the Eurocentric racialization of Indigenous peoples (Quijano, 2000; Rivera Cusicanqui, 2010). Early laws "naturalized the categorization of Indigenous peoples as 'Indians' incapable of formulating their own law" (Hunt, 2014, p. 63), and it was precisely this labelling of Indigenous peoples as others and of their ways of life as inferior to western ways of life that helped justify (and try to hide) their displacement. The inability of the colonizers to understand Indigenous legal orders as such also translated into the attempted erasure of Indigenous laws and their subordination to western legal systems (Borrows, 1996; Carmona, 2009; Melin, Coliqueo, Curihuinca & Royo, 2016). Postcolonial and critical race scholars have long showed how the inseparability of race, space, and law (Razack, 2002) is essential to understand the articulation of the colonial project and the production of what Sarah Hunt has termed the colonialscape – "a way of seeing that naturalizes the relations of domination and dehumanization inherent in colonial relations" (2014, p. 7). This notion builds on the idea of the nomosphere, a neologism coined by Delaney to refer to "the

[33] For detailed accounts of Indigenous peoples and contemporary state violence in Chile, see for example CEPAL-ATM, 2012; Donoso, 2010; Pairican, 2015; Pichinao Huenchuleo, 2015; Toledo Llancaqueo, 2007.

cultural-material environs that are constituted by the reciprocal materialization of 'the legal,' and the legal signification of the 'socio-spatial,' and the practical, performative engagements through which such constitutive moments happen and unfold" (2010, p. 25).[34]

As I elaborate throughout the rest of the dissertation, these conceptualizations are particularly useful to think through the ways in which the colonial cultures of planning surface in Chile today. Highlighting the performative aspects of law – "the pragmatics of world-making" (Delaney, 2010) – allows exploring legal landscapes and regulation-making in relation to the realities they bring into being, as well as the processes by which those realities are brought into being. As discussed in section 2.1, planning has been deeply implicated in processes of territorial dispossession and its associated practices of socio-cultural-political assimilation. However, only recently has the planning literature started to examine more critically the role of written texts and regulatory regimes in this regard. This is paradoxical, to say the least, considering that plans, legal documents, policies, and regulations have been instrumental in the imposition of western planning systems over Indigenous peoples. Until this day, the relationships between Indigenous peoples and settler colonial nation-states are largely mediated by regulatory documents that define – most of the time unilaterally – the terms of those relationships.

Scholars such as Arturo Escobar (1992) and Oren Yiftachel (2009) have long argued that the conflation of planning with legal mechanisms has been critical to help produce the settler colonialscapes described above, especially under the veils of modernization and urbanization. Looking at Chile, Claudio Alvarado Lincopi (2015) shows how early urbanization policies consolidated state presence in Mapuche territory in the late 19th century resorting to the discourse of security, social control, and modernization, thus justifying their violently invasive nature. The UN Economic Commission for Latin America and the Caribbean (CEPAL) and the Alianza Territorial Mapuche (ATM) (CEPAL-ATM, 2012) read existing territorial inequities and social exclusion affecting the Mapuche nation as the result of institutionalized practices enabled by legislation, which actively produce socio-spatial segregation and impoverishment for the Mapuche and benefit the settlers (see Chapter 3). Jimena Pichinao Huenchuleo (2015) examines the role of neoliberal laws introduced during Chile's dictatorship (1973-1990) in furthering Indigenous territorial dispossession and socio-political fragmentation in recent decades, in particular through the division of collectively held lands, their

[34] This term links closely to the idea of nomoscapes, defined by Delaney as "the spatio-legal expression and the socio-material realization of ideologies, values, pervasive power orders and social projects. They are extensive ensembles of legal spaces within and through which lives are lived" (2010, p. i).

privatization, and their commodification. In a similar vein, Mauro Fontana (2008) argues that territorial conflicts in the southern Lumaco region should be understood as a consequence of the socio-spatial transformations associated with the introduction of the forestry industry and with Chile's extractive economic policies more broadly. Looking at the bigger picture, Víctor Toledo Llancaqueo (2005) asserts that Indigenous struggles in Latin America are transitioning from a focus on ethno-political rights to one on territorial rights, echoing the evolution of international law over the last decades and foregrounding the insufficiency of existing institutional and legal frameworks.

These analyses seem to be consistent with Indigenous experiences in other settler colonial contexts. After examining "treaties, Indian land policies, and other documents that determine land use" in Canada, for instance, Heather Dorries (2012, p. 7) argues that contemporary state-led planning practices erode Indigenous sovereignty because they are grounded in a body of legal knowledge the origins of which are colonial. By defining notions such as "jurisdiction, property, and consultation, which are central to planning activities," this legal knowledge takes for granted nation-state sovereignty and negates the sovereignty of pre-existing Indigenous peoples (2012, p. 5). Along similar lines, Biddy Livesey (2017) explores Crown, court, local government, and iwi planning documents in Aotearoa New Zealand to show how colonial discourses persist in contemporary development narratives, but also how legal treaty responsibilities have the potential to transform planning ethics and practice. Theoretically and methodologically, my research aligns most closely with the work Libby Porter and Janice Barry have developed in recent years in Australia and Canada, which begins to examine more deeply the "intersection between agency and the messy everyday reality of practice in the contact zone, with the more structuring effects of textuality imposed by the policy and regulatory regimes through which planning system and recognition domains are operationalized in settler states" (Porter and Barry, 2016, p. 43). While written documents do not define these sites of encounter, they "shape, constrain, authorize and regulate" (Barry and Porter, 2012, p. 183) how Indigenous rights are recognized, incorporating Indigenous claims and interests into dominant frameworks, narratives, and institutional structures. What is more important for my purpose, the authors openly embrace a focus on performativity. They conceive "planning contact zones as constituted and maintained through ongoing 'performances' (of both text and practice) about identity, resources and authority", which opens up spaces for the emergence of new practices that "are neither necessarily transformational nor repressive" (Porter and Barry, 2016, pp. 33-34).

All of the works above foreground how western law and planning have collaborated in the dispossession of Indigenous peoples historically, as well as the role of legal mechanisms today, while also referring to

Indigenous peoples' counter-hegemonic use of law (de Sousa Santos, 2005). However, the accounts generally focus on the outcomes of legal frameworks – their application and the different ways in which dispossession is enabled through legal categorizations and processes – or on how legal frameworks express colonial discourses. In other words, law is treated as either a *medium* (for colonial dispossession) or as a *reflection* (of colonial ideals). My research builds on these understandings and also extends the existing literature. I place law as a historical backdrop for Indigenous dispossession and take today's regulatory systems as already established infrastructures that enable and legitimize colonial violence through planning practice, but I also foreground the actual process of regulation-making as a key relational site where the colonial cultures of planning materialize and are performed today.

This emphasis on the performative dimensions of law – as the following pages elaborate – is influenced by the work of Judith Butler (1993), who argues that "legal sentences, baptisms, inaugurations, declarations of ownership, statements… not only perform an action, but confer a binding power on the action performed" (1993, p. 224). Going back to the linguistic turn in planning theory, "if the power of discourse to produce that which it names is linked with the question of performativity, then the performative is one domain in which power acts as discourse" (Butler, 1993, p. 224). Precisely because law plays all of the important roles examined by the authors above, looking more closely at how regulatory frameworks are produced in the first place can illuminate the mechanics of meaning creation, making more transparent the colonial sensibilities and rationalities at play.

2.3.2 Law + performance

Among the many ways in which western law operates and is performed, this research engages with four features discussed in the socio-legal literature that are particularly insightful for an analysis of the colonial cultures of planning in Chile today, as the next chapters will show – bracketing, categorization, interpretation, and exclusivity.[35] While the principles behind these features are arguably relevant to any normative system,

[35] I build on Nicholas Blomley's (2014) use of the terms bracketing and categorization, although I depart from his understanding of the latter being an expression of the former. As I elaborate throughout the text, I examine categorization as a stand-alone feature. Interpretation is a crosscutting concern widely explored in legal scholarship at large, but here I particularly draw from Robert Cover's (1983, 1986) and Boaventura de Sousa Santos's (1987) discussions. What I call exclusivity is also a crosscutting idea widely discussed in legal scholarship, although not necessarily under that label. My usage of the term here connects closely to debates around legal pluralism, also building on conceptualizations by Cover (1983, 1986) and de Sousa Santos (1987, 2005).

they take a specific form in western law that helps understand the imposition by domination of Chilean law I mentioned at the beginning of the chapter.

Nicholas Blomley defines **bracketing** as "the process of delimiting a sphere within which interactions take place more or less independently of a surrounding context… rearrang[ing] the relations that constitute legal reality" (2014, p. 133). In other words, at its most elemental level law operates by creating arbitrary distinctions, by carving out some elements from reality and separating them from others, and by establishing relations among them. This boundary creation exercise "entails complex and subtle calculations that govern what is, and what is not, to be included within a particular [legal] setting" (2014, p. 136), highlighting both the relational nature of law and the influence held by those people involved in legal practice and regulation-making "for not everyone has the opportunity or the power to successfully frame law in ways that stick" (2014, p. 139). It might be common sense to say that planning action depends on the definition of a delimited space of jurisdiction where such actions are seen as legitimate and necessary, as well as on the definition of who holds the authority to carry out those actions and where. This grounded analysis of regulation-making in Chile adds to these discussions by showing *how* such boundaries are negotiated and created in such a way that they exclude other possible bracketings.

Although **categorization** can be seen as a particular bracketing technology (Blomley, 2014), I am treating it as a feature in itself given its relevance for a research of this kind. It is precisely through the production of legal categories such as "discovery," "Indian," and "empty land" that western law and planning practice intermingled early on to legitimize colonial action aimed at the elimination of the native (Wolfe, 2006). Today, it is through categories like "Indigenous status," "state property," "Indigenous community," "Indigenous association," "urban," and "rural" that Indigenous policy in Chile establishes its scope of operation, and that particular rights and entitlements come to life. Looking at the implementation of the duty to consult specifically, the categorization as "ethnic groups" as opposed to "Indigenous peoples" in the international law sense, the definition of what it means to be "affected directly" by a government measure, and even the categories of "legislative and administrative government measures" themselves define who gets (or does not get) to be consulted, why, how, and with what consequences. Such categories might appear to be descriptive denominators of an external reality, but are actually constitutive of particular realities. In Blomley's words, there is a tendency to "think of the category as an outcome of thought and practice… We are encouraged to think of entities as having some thingness to them, rather than note the ways in which boundaries constitute the object" (2014, p. 141). Social constructivists have long argued about the power of declaratory enactments

in bringing new realities into being through speech acts (Fischer and Gottweis, 2012), and more recent work on performativity has placed more emphasis on the actual sets of actions and effects such declarations produce (Butler, 2010). This research foregrounds how legal categories come to life and how in that process only certain realities become a possibility.

If multiple legal orders exist and if they are the product of different ways of "disentangling" reality (Blomley, 2014), **interpretation** emerges as an essential part of the pragmatics of world-making. In his famous *Nomos and Narrative*, Robert Cover eloquently argues that "the rules and principles of justice, the formal institutions of the law, and the conventions of a social order are, indeed, important to that world; they are, however, but a small part of the normative universe that ought to claim our attention. No set of legal institutions or prescriptions exists apart from the narratives that locate it and give it meaning" (1983, p. 4). This emphasis on narrative echoes the linguistic turn in the social sciences more broadly, and highlights once again the relational and contextual nature of law. The reason why I devote the whole next chapter to tracing the colonial history of planning and Indigenous policy in Chile is precisely that it is impossible to understand contemporary planning institutions, practices, and legal frameworks without considering the particular historical trajectory they emerged from. As de Sousa Santos clearly puts it, "since law and society are mutually constitutive, the previous… laws, once revoked, nevertheless leave their imprint on the [social] relations they used to regulate. Though revoked, they remain present in the memories of things and people. Legal revocation is not social eradication" (1987, p. 282). The bracketing and categorization processes introduced above only become possible through the way in which they relate to an existing normative universe that gives them meaning. And although legal interpretation and meaning-making are particularly visible in court settings, they do not only happen in the hands of a judge once a regulation is in place. This research shows how drafting regulation is also an essential space where bracketing happens, categories are defined, and interpretation takes place.

These discussions take me to the last feature: **exclusivity** – in other words, the tendency in western legal systems by which "in order to operate adequately, a given… [law] must not only negate the existence of other normative orders or informal laws… that might interfere in its realm of application, but also revoke all… [other] laws that have regulated the same or similar social relations in the past" (de Sousa Santos, 1987, p. 282). Although legal pluralism is a fact – i.e. multiple normative orders coexist in practice, within or outside the margins of the state – some normative orders are more likely to feel "legitimated to suppress, marginalize or even destroy the subaltern culture or normative life world" (de Sousa Santos, 2005, p. 450), as the Chilean

case shows. Cover goes even further to suggest that law's search for exclusivity and dominance is actually a *consequence* of legal pluralism. In his own words, "the problem of the multiplicity of meaning – the fact that never only one but always many worlds are created… leads at once to the… imperial mode of world maintenance" that dominates in western legal systems (Cover, 1983, p. 16). Needless to say, such world-maintaining ability rests on the imposition of physical violence if necessary, as I mentioned earlier. This institutional exploration of the implementation of the duty to consult in Chile examines the ways in which a plurality of Indigenous legal orders try to engage with a single, homogenizing normative universe that "aspires to be exclusive, to have the monopoly of the regulation and control of social action within its legal territory" (de Sousa Santos, 1987, pp. 281-282).

How are these debates relevant to my analysis of the colonial cultures of planning in Chile today? What can a focus on the performative dimensions of law offer to an exploration of how colonial rationalities and sensibilities are reproduced or disrupted through institutionalized state-led planning practices? And more specifically, how can an approach of this kind help to re-think the duty to consult with Indigenous peoples in Chile? It is important that I make a clarification. Western law can certainly be understood as a technology of oppression and domination (Fanon, 1967; Scott, 1998), as I have argued here and as Chapters 3, 4, and 5 will demonstrate. However, the emphasis on the performative aspects of law that guides this analysis helps to complicate that narrative and the idea that only the state makes law and that law is oppressive by definition, as I elaborate in Chapters 5 and 6. Despite my belief that legal and regulatory frameworks are central to the understanding of western mainstream planning and its role in internal colonization, I see some fundamental problems using them as analytical entry points. Essentially, legal texts – because in Chile, as in many other western settler colonial contexts, state law is crystallized in written form – are not agents of social change in themselves. So, examining them and stopping there says little about the ways in which they perpetuate patterns of social behaviour or contribute to disrupting them. For the purpose of this research, legal texts are only meaningful insofar as they are the result of, enable, constrain, channel, trigger, or somehow affect human action. In that sense, Delaney's words are illuminating since foregrounding performativity in the examination of law "presupposes a recognition of the social, signifying, embodied, and situated characteristics of human being-in-the-world. At the same time, it assumes that discourses take on a worldly presence through *how* they are performed or put into practice… [Performativity] denotes an irreducible and practical fusion of discursivity and materiality" (2010, pp. 14-15, emphasis in original).

Expanding Porter and Barry's work (2016), this research examines the process of regulating the duty to consult in Chile as a legal contact zone "in which rival normative ideas, knowledges, power forms, symbolic universes and agencies meet in unequal conditions and resist, reject, assimilate, imitate, subvert each other giving rise to hybrid legal and political constellations in which the inequality of exchanges are traceable" (de Sousa Santos, 2005, p. 449). Regulation-making is thus explored through the lens of how the interaction between Indigenous peoples and the state gets enacted, how the colonial cultures of planning become visible, and how the negotiation of meanings offers potential for both continuing or disrupting colonial rationalities and sensibilities.

Chapter 3: A partial history of colonial planning in Chile

Many Indigenous leaders said "I will not sit down to talk about a new consultation regulation until they give my lands back" or things like that. There were very visceral discourses… It is difficult to approach these kinds of people… Sometimes we had meetings that had one objective and we ended up listening to all leaders vent for three hours … And sure, there was a catharsis, we heard these speeches and then "Ok, perfect, goodbye, see you later" and the meeting produced no outcomes at all.

Consultation Planner, Ministry of Social Development, 2014

My argument is that history is made by men and women, just as it can also be unmade and rewritten, always with various silence and elisions, always with shapes imposed and disfigurements tolerated.

Edward Said, 1979, p. xviii

Well before I started writing this dissertation I knew that it had to have a history chapter. Many doctoral dissertations do because there is no doubt that context is essential. One of the main challenges is to decide where to draw the arbitrary temporal line – how far back in time I should go in my effort to describe the relationship between mainstream state-led planning and Indigenous peoples in Chile.[36] I decided to begin in early colonial times, even before the state as such was formed.[37] Is it really necessary to go there? Some people may ask. I feel the quote above – dropped by one of the planners leading the Consultation during a long conversation about the challenges he faced as part of his work – answers that question. After all, using the Consultation as an entry point to examine state-led planning with Indigenous peoples today only makes sense in light of a history of institutionalized dispossession.

Indigenous communities and scholars know this too well, but mainstream literature about the history of planning in Chile is quite shortsighted in this regard. To begin with, it has a clear urban and regional bias, and focuses mostly on the last 150 years, especially the period after state-led planning was formally

[36] Other critical challenges involved in historiographical work include positionality, voice, and interpretation. In other words, who tells the story and through what eyes, and in doing so what silences and omissions take place. As Edward Said puts it, "all knowledge that is about human society… is historical knowledge, and therefore rests upon judgment and interpretation. This is not to say that facts or data are nonexistent, but that facts get their importance from what is made of them in interpretation… for interpretations depend very much on who the interpreter is, who he or she is addressing, what his or her purpose is, at what historical moment the interpretation takes place" (1981, p. 154).

[37] This is not an account of Indigenous peoples histories or planning traditions in Chile, for which I would not be the most entitled or suitable storyteller. This is a brief and partial overview of trends, milestones, and concrete initiatives led by the colonizers that have forcibly shaped the interactions between the Chilean state and Indigenous peoples over time.

institutionalized through the National Planning Office (ODEPLAN). The colonial origins of planning are rarely questioned. Few Chilean planning scholars draw explicit connections between planning as a state-led activity aimed at socio-spatial organization and the dispossession of Indigenous peoples.[38] One could wonder if before the 20th century there were no links between mainstream planning and Indigenous peoples. Or maybe the definition of planning is just too narrow.

Luckily there is a good amount of literature about the evolution of Indigenous/non-Indigenous relations since early contact, including the role of tools of land appropriation in the establishment of the Spanish colonial regime (see section 3.1). Several scholars also discuss the role of the republican state in the oppression and marginalization of Indigenous peoples after independence, especially through policies and other forms of regulation (section 3.2 onwards). These works – most of them coming from disciplines other than planning – make it clear that mainstream understandings of planning in Chile are indeed narrow.

Challenging this trend, in the following pages my understanding of planning is deliberately broad. It includes processes of land appropriation and socio-spatial organization – which are inseparable from capital accumulation – led by early Spanish settlers and by the newly formed state, but also later governmental initiatives that fall under the broad umbrella of Indigenous policy. Without being exhaustive, I discuss some of the key discourses, strategies, and tools that have facilitated and reinforced Indigenous dispossession over the centuries. I focus on the institutionalized practices by which colonization – and internal colonization – structures have been put in place to regulate the relationship between Indigenous and non-Indigenous peoples. The point is to make visible how colonization has never been an organic, spontaneous process in the hands of a few adventurous folks (Bengoa, 2004). It has been carried out and legitimized (in the view of the settlers) by legal tools, several of which belong to the realm of what we now call planning.

The problem with trying to offer a historical overview of the relationship between the Chilean state and Indigenous peoples – even if I acknowledge its partial nature – is that such an exercise inevitably involves sweeping generalizations and subsumes differences. No doubt there are some shared patterns. Land dispossession and displacement, attempted cultural subjugation and political domination, and oppressive labour conditions are some of them. However, generalizing the impacts of such processes is problematic.

[38] For examples see Boisier (2007), Fontana (2008), Molina (2013), Toledo Llancaqueo (2007), Ugarte (2016), and Valdés (2001). For a historical analysis of land use planning as it relates to political organization and centralization see Estefane (2017).

Doing so would not do justice to the diversity of experiences of the nine Indigenous nations that predated and survived the creation of the state.[39]

Then the question arises: can these different histories be brought together somehow? Following Chilean historian José Bengoa (2004), something that connects these histories is the forced interaction of all Indigenous peoples with a single government counterpart in Chile. In fact, I would argue that one of the ways in which colonial violence has been expressed in the country is precisely through one-size-fits-all government policies and laws that insist on putting (socially, politically, culturally, linguistically, and territorially) distinct Indigenous peoples under the same umbrella. Exactly for this reason the object of my analysis is state-led planning. This chapter attempts to shed light on the many faces and divergent trajectories of the colonial project in Chile over time – both regarding the patterns of colonization and the governmental technologies of oppression involved, and the patterns of resistance and contestation in the interactions between Indigenous peoples and the state that unfold until this day[40] – while paying attention to the underlying commonalities. However, it is important to make very clear that my emphasis is on the forces, discourses, and technologies guiding state action.

For the purpose of my inquiry the continuities between colonial and republican[41] ways of planning are more relevant than the differences. As the Community of Mapuche History clearly puts it, "the colonial situation today takes on new economic and material meanings, it has new institutions and technologies to safeguard its operations, it tries new practices vis-à-vis the colonized" (Antileo et al., 2015, 19, translation mine). Taking this as a point of departure, this chapter seeks to lay the groundwork for exploring how the Consultation and the creation of DS66 link to contemporary "colonial violences" (Antileo et al., 2015).

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[39] They are the Mapuche, the Aymara, the Lickanantay, the Quechua, the Colla, the Diaguita, the Rapa Nui, the Kawéshkar, and the Yagán. The Selk'nam and Aónikenk nations in the far south did not survive colonial genocide.

[40] The slow colonization of the central valley under Spanish rule, for instance, differs in important ways from the territorial annexation of the North through wars, the brutal genocide in the Patagonia, the negotiated annexation of Rapa Nui, or the military invasion of Mapuche territory, while at the same time being guided by the same logic of Indigenous dispossession for settlement.

[41] I do not think the term post-colonial is suitable to refer to Chile, given my country's lack of "engagement with, and contestation of, colonialism's discourses, power structures, and social hierarchies" (Gilbert and Tompkins, 1996, p. 2). The term "republican" highlights the temporal distinction without denying Chile's still colonial nature.

3.1 Building a settler colonial regime

Spanish colonization in what is now Chile was, in some ways, not very different from what happened in other parts of Latin America, while at the same time having very particular traits.[42] Not surprisingly, the main goals were political and territorial expansion – including resource extraction to feed the Crown and strengthen trade[43] – and Christianization. Let's not forget that the entire colonial project was backed by Pope Alexander VI, who in 1493 (unilaterally) granted the Spanish Crown the "right" to occupy and evangelize parts of America through three documents known as the *Alexandrine Bulls*[44]. Let's also not forget that the colonizers acted assuming that the lands they "discovered" were available for military invasion and colonization if they were not under Christian control. Indigenous peoples were seen as *naturales*, "barbarous nations to be overthrown and brought to the faith" (Pope Alexander VI, 1493) and who needed guardianship. It is not very hard to see how Eurocentrism justified America's occupation and land appropriation, as well as the colonizers' attempts at Indigenous subjugation (Quijano, 2000).[45]

By the time Pedro de Valdivia left Cusco in 1540 to begin "exploring and conquering" the territories south of *Nueva Castilla* more than one million Indigenous peoples lived on the territory occupied by Chile today (Gobierno de Chile, 2008b). A few years earlier, between 1534 and 1539, King Carlos V had issued legal contracts called *capitulaciones* to divide the lands into four administrative units known as *gobernaciones*. Each one of them was given to a lead colonizer. These contracts – something like huge land use permits – paved the ground for the occupation of what became the *Reyno de Chile* (Kingdom of Chile), which initially covered from parallel 27 to the pole from North to South, and 100 leagues inland from the Pacific Ocean to the East.

But how did colonization happen in practice? Because having the king's authorization to explore and conquer is one thing (however questionable such an authorization might be). But actually attempting to take territorial and political control over thousands of square kilometers of Indigenous lands is another story.

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[42] Given the case study nature of this dissertation, I will not engage in comparative work. However, I remain aware of the importance of assuming neither Chile's uniqueness nor its total comparability to other settler colonial contexts in the continent.

[43] As Aníbal Quijano and Immanuel Wallerstein argue, "the Americas were not incorporated into an already capitalist world-economy. There could not have been a capitalist world-economy without the Americas" (1992, p. 449).

[44] In *Bull Inter Caetera* (May 4, 1493) he declared to "give, grant, and assign" to the Crown "forever, together with all their dominions, cities, camps, places, and villages, and all rights, jurisdictions, and appurtenances, all islands and mainlands found and to be found, discovered and to be discovered" (Pope Alexander VI, 1493).

[45] Spanish colonization was so brutal towards Indigenous peoples that its legitimacy was questioned from early on. Critical voices appealed to natural law to argue that Indigenous peoples were essentially equal to the Spaniards, so their freedom and lands should be returned. Supporters argued that Indigenous peoples were inferior to justify the colonial project.

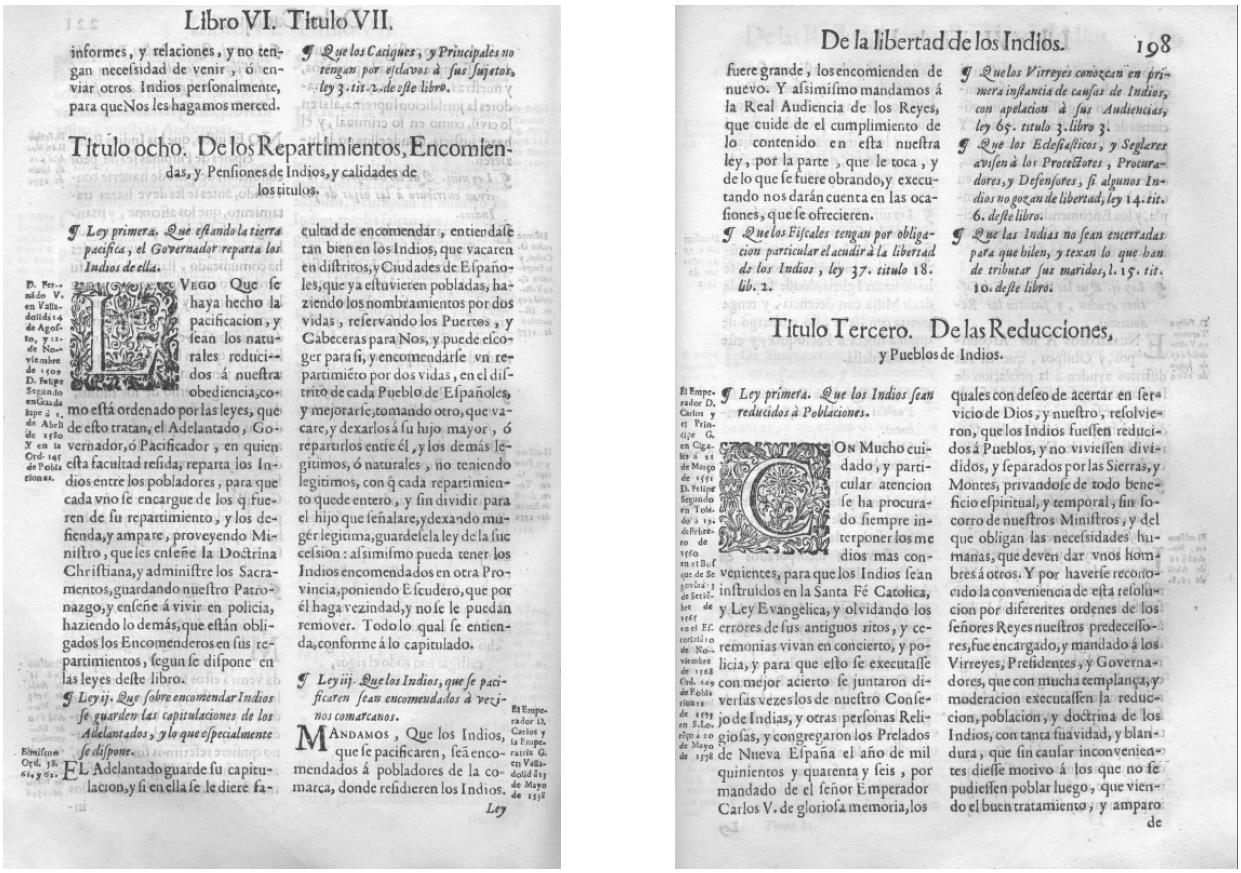
Glancing through the several hundreds of pages of the *Compilation of the Laws of the Indies* (Spanish Crown, 1681) there is no doubt that the process was carefully planned. The collection of regulations known as *Derecho Indiano* (Indian Law) was far-reaching and covered a big range of issues.[46]

Actually, one could easily look at the *Laws of the Indies* as all-encompassing planning documents, which set the guidelines for spatial occupation but also for managing the co-existence (Healey, 1997) of Indigenous peoples and settlers in those shared spaces. The second volume in particular is very much planning-related, discussing the dominion and jurisdiction of the Crown over the territories; rules and considerations for the establishment of towns and settlements; the allocation of land grants; dispute resolution mechanisms; and almost all matters related to the relationship with Indigenous peoples (Spanish Crown, 1681, Vol 2).

Still, the key strategy was to "take possession of the largest possible stretches of territory by founding forts or fortified settlements at the core of areas with high Indigenous population" (Boisier, 2007, p. 89, translation mine). Actually, one of the conditions the King asked the colonizers for when choosing a place to establish a settlement was the presence of "Indians and naturals whom the Holy Gospel can be preached to."[47] In other words, taking the lands where Indigenous peoples were already settled and establishing a relationship with them – although oppressive and dominating – was a deliberate aspect of the colonial project. As still happens today, building settlements involved surveying the lands, designating land uses, naming places, and generally organizing the relationship between people and their environments through planning technologies (Porter, 2010).

Here I want to highlight two interrelated institutions that were critical to consolidating colonial presence in Chile: the creation of *pueblos de indios* (Indian towns) and the *encomienda* system (Figure 3.1). Together, these mechanisms not only enabled Spanish territorial control and Indigenous dispossession, but did so by defining Indigenous peoples in relation to the colonizers, and by attempting to assimilate Indigenous peoples into new social forms. Essentially, these instruments started paving the ground for "erecting a new colonial society on the expropriated land base" (Wolfe, 2006, p. 388). While full assimilation was unsuccessful due to ongoing Indigenous resistance, these efforts were a clear disruption to Indigenous peoples' ways of life.

[46] Topics regulated by Indian Law included colonial administration and institutions, the role of Catholic worship, different professions and occupations, the management of the lands and territories discovered, etc.
[47] Spanish Crown, 1681, vol. 2, book 5, page 88, translation mine.



Libro VI. Titulo VII.

informes, y relaciones, y no tengan necesidad de venir, ó enviar otros Indios personalmente, para que Nos les hagamos merced.

¶ *Que los Caciques, y Principales no tengan por esclavos á sus sujetos, ley 3. tit. 2. de este libro.*

Titulo ocho. De los Repartimientos, Encomiendas, y Pensiones de Indios, y calidades de los titulos.

¶ *Ley primera. Que estando la tierra pacifica, el Governador reparta los Indios de ella.*

D. Fernando V. en Valladolid, 14 de Agosto, y 12. de Noviembre de 1509. D. Felipe Segundo en Guadalupe 21. de Abril de 1580. Y en la Ord. 145. de Poblaciones.

VEGO Que se haya hecho la pacificacion, y sean los naturales reducidos á nuestra obediencia, como está ordenado por las leyes, que de esto tratan, el Adelantado, Governador, ó Pacificador, en quien esta facultad resida, reparta los Indios entre los pobladores, para que cada vno se encargue de los q fueren de su repartimiento, y los defienda, y ampare, proveyendo Ministro, que les enseñe la Doctrina Christiana, y administre los Sacramentos, guardando nuestro Patronazgo, y enseñe á vivir en policia, haziendo lo demás, que están obligados los Encomenderos en sus repartimientos, segun se dispone en las leyes deste libro.

¶ *Ley ij. Que sobre encomendar Indios se guarden las capitulaciones de los Adelantados, y lo que especialmente se dispone.*

Bimifmo Ord. 180. 61, y 62.

EL Adelantado guarde su capitulacion, y si en ella se le diere facultad de encomendar, entiendase tan bien en los Indios, que vacaren en distritos, y Ciudades de Españoles, que ya estuvieren pobladas, haziendo los nombramientos por dos vidas, reservando los Puertos, y Cabeceras para Nos, y puede escoger para si, y encomendarse vn repartimiento por dos vidas, en el distrito de cada Pueblo de Españoles, y mejorarse, tomando otro, que vacare, y dexarlos á su hijo mayor, ó reparturlos entre él, y los demás legitimos, ó naturales, no teniendo legitimos, con q cada repartimiento quede entero, y sin dividir para el hijo que señalare, y dexando muger legitima, guarde esta ley de la sucesion: assimismo pueda tener los Indios encomendados en otra Provincia, poniendo Escudero, que por él haga vezindad, y no se le puedan remover. Todo lo qual se entienda, conforme á lo capitulado.

¶ *Ley iij. Que los Indios, que se pacificaren sean encomendados á vezinos comarcanos.*

El Emperador D. Carlos y la Emperatriz G. en Valladolid á 15. de Mayo de 1538.

MANDAMOS, Que los Indios, que se pacificaren, sea encomendados á pobladores de la comarca, donde residieren los Indios.

Ley

De la libertad de los Indios. 198

fuere grande, los encomienden de nuevo. Y assimismo mandamos á la Real Audiencia de los Reyes, que cuide de el cumplimiento de lo contenido en esta nuestra ley, por la parte, que le toca, y de lo que se fuere obrando, y executando nos darán cuenta en las ocasiones, que se ofrecieren.

¶ *Que los Fiscales tengan por obligacion particular el acudir á la libertad de los Indios, ley 37. titulo 18. lib. 2.*

¶ *Que los Virreyes conozcan en primera instancia de causas de Indios, con apelacion á sus Audiencias, ley 65. titulo 3. libro 3.*

¶ *Que los Eclesiasticos, y Seglares avisen á los Protectores, Procuradores, y Defensores, si algunos Indios no gozan de libertad, ley 14. tit. 6. deste libro.*

¶ *Que las Indias no sean encerradas para que hilen, y texan lo que han de tributar sus maridos, l. 15. tit. 10. deste libro.*

Titulo Tercero. De las Reducciones, y Pueblos de Indios.

El Emperador D. Carlos y el Principe G. en Cigales á 11. de Mayo de 1551. D. Felipe Segundo en Toledo á 19. de Febrero de 1560. en el Bof que de Segovia; y de Setiembre de 1565. en el Escorial á 10. de Noviembre de 1568. Ord. 129. de Poblaciones de 1573. en S. Lorenzo á 20. de Mayo de 1578.

¶ *Ley primera. Que los Indios sean reducidos á Poblaciones.*

CON Mucho cuidado, y particular atencion se ha procurado siempre interponer los medios mas convenientes, para que los Indios sean instruidos en la Santa Fé Catolica, y Ley Evangelica, y olvidando los errores de sus antiguos ritos, y ceremonias vivan en concierto, y policia, y para que esto se executasse con mejor acierto se juntaron diversas vezes los de nuestro Consejo de Indias, y otras personas Religiosas, y congregaron los Prelados de Nueva España el año de mil quinientos y quarenta y seis, por mandado de el señor Emperador Carlos V. de glorioſa memoria, los quales con deseo de acertar en servicio de Dios, y nuestro, resolvieron, que los Indios fuessen reducidos á Pueblos, y no viviessen divididos, y separados por las Sierras, y Montes, privandose de todo beneficio espiritual, y temporal, sin socorro de nuestros Ministros, y del que obligan las necesidades humanas, que deven dar vnos hombres á otros. Y por haverse reconocido la conveniencia de esta resolucion por diferentes ordenes de los señores Reyes nuestros predecessores, fue encargado, y mandado á los Virreyes, Presidentes, y Governadores, que con mucha templança, y moderacion executassen la reduccion, poblacion, y doctrina de los Indios, con tanta suavidad, y blandura, que sin causar inconvenientes diesse motivo á los que no se pudiessen poblar luego, que viendo el buen tratamiento, y amparo de

Figure 3.1 Excerpts from the *Compilation of the Laws of the Indies* defining *encomiendas* (left) and Indian towns (*pueblos de indios*) (right)
Source: Spanish Crown, 1681

So, let's go back to Pedro de Valdivia and his crew. As they moved south from the Viceroyalty of Peru they encountered numerous Indigenous settlements along the way. They generically called them *pueblos de indios*. Unlike in other latitudes – such as pre-Columbian empires in Peru and Mexico – Indigenous peoples in Chile had decentralized political organization. The colonizers could not simply take over and replace a unified pre-existing government structure, and rule from a central urban centre (Boisier, 2007). So, along with establishing Spanish towns and forts to settle and take territorial control[48], during the 16th and 18th centuries the strategy was also founding *pueblos de indios* according to Hispanic standards. The goal was to govern, "civilize", and evangelize the Indigenous population. To achieve this, the settlers allocated lands and water access so that

[48] Pedro de Valdivia founded ten settlements to control 350,000 km^2. The Mapuche insurrection of 1598 destroyed all cities between the Bio-Bio and the Reloncavi inlet, reducing territorial control to 190,000 km^2 (Boisier, 2007). This prompted the settlers to establish La Frontera and to keep colonization efforts off Mapuche territory for the rest of the colonial rule.

Indigenous peoples could sustain a livelihood through agriculture and raising cattle. They also kept control of the residents to make Indigenous tax revenues easier to collect – Indigenous peoples were not allowed to leave the towns. The creation of *pueblos de indios* was perhaps the first form of spatial confinement and segregation of Indigenous peoples in Chile, while also a tool for managing otherness in the colonized territories.

But keeping Indigenous peoples and Spanish colonizers living apart was difficult due to the parallel existence of the *encomienda* system. *Encomiendas* were essentially a mechanism of land allocation coupled with Indigenous labour appropriation and taxation. The Governor rewarded Spanish colonizers for their service with a piece of land and "Indians" they had to "guard and civilize"[49]. Indigenous peoples, on the other hand, were stripped of their freedom and forced to offer personal services to the *encomendero* (owner), and through that work pay taxes to the Crown. Numerous Indigenous peoples were uprooted from *pueblos de indios* and relocated in this way. The *encomienda* was the quintessential space for Indigenous subjugation to the imperial order, since Indigenous *labour* was pivotal to the economic sustainability of the colonies. A deeply racist, exploitative, and Euro-supremacist institution, it established a racialized division of work similar to slavery, and served as a tool for Christianization and cultural assimilation. Perhaps the *encomienda* lasted for so long in Chile[50] precisely because it was such a comprehensive territorial, social, cultural, and political colonial institution.

By 1602, Governor Alonso de Ribera wanted to know the limits of the Kingdom and to identify what lands were under Indigenous and Spanish control. Surveyor Ginés de Lillo was tasked with the mission of measuring the territory. Since *encomiendas* dispersed Indigenous people across estates, the survey also sought to help concentrate the Indigenous population in *pueblos de indios*. Over time, the Spanish Crown became concerned about losing control of its large overseas colonies, so when the Bourbons took power in the 1700s there was a new push to continue building towns and villages to centralize colonial power (Alvarado Lincopi, 2015).

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[49] According to Indian Law, "the original reason and origin of *encomiendas* was the spiritual, and temporal benefit of the Indians and their indoctrination and teaching in the articles and precepts of our holy Catholic faith" and the responsibility of the *encomenderos* was to "defend [Indigenous people under their guardianship] and their possessions, ensuring that they do not receive any harm" (Spanish Crown, 1681, vol. 2, book 6, p. 229, translation mine).

[50] The *encomienda* system was abolished in Chile only in 1789. The Crown ratified this in 1791.

If we look at them with contemporary eyes, *pueblos de indios* and *encomiendas* together facilitated both Indigenous territorial dispossession and social control in very specific ways. They produced a "*de facto* system of classes and castes whereby people characterized as Indigenous had, more often than not, a subordinate role" (Bengoa, 2004, p. 18, translation mine). Since the *encomienda* applied to Indigenous peoples only, it made sense to find ways of hiding or diluting Indigenous identity. *Mestizaje* (interracial mixing) grew strong and helped erode Indigenous identities, stratifying even more the emerging social order. Several scholars argue that these initials patterns of socio-spatial organization marked the evolution of Chile's society, as the abolition of the *encomienda* system gave way to the establishment of *haciendas*[51] that lasted until well into the 20th century.

Figure 3.2 Map of Chile circa 1700
Source: Nicolás Sansón, www.memoriachilena.cl

[51] *Haciendas* were a form of land-based, privately owned economic activity built on livestock and agriculture, with a feudal-like system of *inquilinaje* (peon debt) that resembled the labour dynamics of the *encomienda* (Lockhart, 1969). The main difference was that workers were free (unlike Indigenous peoples in *encomiendas*) and mostly *mestizos*.

Towards the end of the 18th century, the colonization of Chile's central region – from Copiapó to the Bio-Bio River – had deep roots. Settler colonial presence was built on a network of cities and large productive estates in the hands of Spaniards and *criollos*,[52] and was supported by an increasingly solid economy. In legal terms, Indigenous peoples were seen as a distinct, inferior group to be both protected and assimilated. The boundaries of the Kingdom looked quite different from today's (see Figure 3.2). The northern region was still a part of the Viceroyalty of Peru at the time. Although the map shows them as being under Chilean jurisdiction, most of the lands south of the Bio-Bio River – including the Mapuche territory and the Patagonia – in practice remained independent from Spanish rule[53]. Similarly, Rapa Nui (Easter Island) had not been annexed to Chile yet. It was with the beginning of republican life that state-led planning as such consolidated and internal colonization processes were proactively put into place.

3.2 Piecing together a settler nation-state

By the early 19th century, several Spanish colonies in America started to fight for independence. The centralizing Bourbonic reforms were not welcomed by *criollo* elites, who rebelled against the Crown, took control of the colonial government, and began a process of nation-state building grounded on liberal ideals[54] (Bengoa, 2004). Chile's first Government Assembly took place in 1810 and formal independence was declared in 1818, but what happened then? No doubt that there were changes in administration, but the centralized governance practices remained essentially the same. The systems of territorial, economic, social, and political control that had been part of a larger imperial project managed from overseas until then turned into locally-run soft infrastructures – as Healey (2007) would say. Independence in and of itself did not produce any major rupture in the relation between Indigenous peoples and the settler society (Bengoa, 2004). It clearly did not involve the settlers going back to Europe or Indigenous lands being returned to the peoples who were there first.

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[52] Descendants of the colonizers who were born in America and were often *mestizos*.

[53] The Mapuche signed 68 treaties (*parlamentos)* with the Spanish Crown. They defined mutually agreed conditions for co-existence, including recognizing Mapuche autonomy and sovereignty south of the Bio-Bio River. There were also 40 treaties with Argentina, 22 with Chile, 3 with the Dutch, and 3 with Orélie Antoine, King of the Araucanía and Patagonia (Contreras, 2010).

[54] They included a critique to titles of nobility, the defense of legal citizenship, and the priority given to individual rights, which justified the assimilation of Indigenous peoples and the appropriation of their territories (Bengoa, 2004).

What independence *did* bring was an effort to define clear national boundaries and a strong impetus for territorial expansion beyond the central zone. It also brought an open assimilationist agenda to incorporate Indigenous peoples into the life of the newly created country, which I elaborate more in section 3.3 (Bengoa, 2004; Boccara and Seguel-Boccara, 1999; Gobierno de Chile, 2008b). As in Spanish colonial times, Indigenous territorial dispossession and social control were so intertwined that it is hard to say which process led to the other. Hundreds of laws facilitating and regulating colonization and assimilation were passed from 1810-1896. For instance, in 1813 the Government Assembly issued a law regarding Indigenous peoples living in the central region with the goal to end the existence of *pueblos de indios*. The two articles below give a taste of the spirit of the time:

> Article 1 – All authentic Indians who currently live in so-called Pueblos de Indios will henceforth reside in formal villages – which will be built… as designated by a commission – and will enjoy the same citizenship social rights as any other Chileans. These villages will necessarily have a church or chapel with a priest… a town hall, a jail, and a Christian primary school…
>
> Article 8 – The government aims to destroy at any cost existing cast differences in a nation of brothers [sic]; consequently, the commission will encourage and ensure that Spaniards and any other classes also reside in such villages, so that families are able to freely intermarry with each other and to interact in civic life (Zenteno, 1892, pp. 125-126, translation mine).

While there is no doubt that *pueblos de indios* were a racist tool of territorial confinement under Spanish colonial rule, they also meant the exercise of Indigenous peoples' unique status and involved a partial form of collective ownership of the land. Their disappearance meant yet another layer of attempted assimilation and destruction of communal ways of life and Indigenous identity. Chile's Supreme Director Bernardo O'Higgins reinforced this idea on March 4, 1819 when he questioned the "inhumane" treatment by the Spanish Crown of Indigenous peoples and unilaterally declared the equality of Indigenous peoples before the law. His argument was that "the liberal system that Chile [had] embraced [could] not let this precious part of our species to remain in such a state of abasement." So he mandated that Indigenous peoples "should be called Chilean citizens and be free like all other inhabitants of the state" (Zenteno, 1892, p. 129, translation mine). Finally, on June 10, 1823 another law was put in place to identify all remaining *pueblos de indios*, to survey those lands, and to grant title of those lands to Indigenous peoples. All remaining lands were declared state-owned and available for public auction.

So, basically Chilean legislation constructed Chile as a unitary country with a single citizenship applied to everyone early on. The unique status of Indigenous peoples as pre-existing and distinct societies with their own socio-political organization came to an end from a legal perspective. At the same time, however, the

dominant discourse continued to refer to Indigenous peoples as "savage Indians… separate from the civilized society… who seem brute rather than rational… [and] occupy a considerable part of the state" (Zenteno, 1892, p. 105, translation mine). As part of its civilizing vision the government supported religious missions and created Catholic schools to "lead [Indigenous peoples] into finer customs and induce them to build structured societies" (Zenteno, 1892, p. 105, translation mine). This sweeping assimilative approach "pushed [Indigenous peoples] into the frontiers of the state" (Bengoa, 2004, p. 21, translation mine) in the Chilean collective imagination. Let's remember that up to that point there were Indigenous peoples with whom the Chilean state had not even interacted yet – such as the Aymara, Quechua, Lickanantay, Rapa Nui, Yagán, and Kawéshkar – since the central region was mostly populated by the Mapuche.

The appetite for territorial expansion was inseparable from Chile's growing export-driven economy in an international context shaped by the strengthening of capitalism (Alvarado Lincopi, 2015). By 1845, the government officially launched a colonization campaign led by the Ministry of Industry and Public Works[55], which included opening immigrant recruitment offices in Europe. The plan was to bring settlers to "practice any useful industry" on "empty lands" owned by the state (Zenteno, 1892, p. 72, translation mine). To boost immigration the government provided free lands, agricultural equipment, seeds, and settlement and financial support for at least one year.

In less than three decades – between the 1860s and the 1890s – the Chilean state was disturbingly effective in its colonial efforts: it began the occupation of Patagonia and Tierra del Fuego in the far south, invaded Mapuche territory in the south, took control of the northern regions after the Pacific War with Peru and Bolivia, and incorporated Rapa Nui (which had been re-named *Isla de Pascua* by earlier Dutch settlers). All of these overlapping processes were legitimized by *ad hoc* legislation, and supported by military occupation or by private companies the state tasked with the mission of exploiting natural resources and civilizing the local populations. Indigenous peoples were portrayed as an obstacle to economic development so, continuing with the assimilation trend already described, new special policies were put in place along these lines (Bengoa, 2004).

[55] Towards the 1880s, all colonization matters were transferred to the Ministry of Foreign Affairs and Worship (!). This transfer points to an important discursive change, which openly framed European settlers and evangelization practices as the means to consolidate internal colonization.

3.2.1 "The government reserves the right:" Taking over Patagonia and Tierra del Fuego

From the time of initial Spanish contact in the late 1500s until the establishment of Fort Bulnes (1843) and the city of Punta Arenas (1848), the Kawéshkar, Yagán, Selk'nam, and Aónikenk nations remained generally independent from settler presence. But by the mid-19th century the Chilean government was very aware of the strategic nature of the Magallanes Strait regarding trade with Europe and the Pacific. The impetus for colonization in the far south was also a response to the jurisdictional disputes with Argentina regarding control over the Patagonia. On July 8, 1853 President Manuel Montt approved the creation of the Colony of Magallanes, "which [was] convenient to colonize by all possible means" (Zenteno, 1892, p. 318, translation mine).

As I hope is clear by now, the government's discourse was that "the development and prosperity of the colon[ies] depend[ed] mostly on promoting immigration" (Zenteno, 1892, p. 318, translation mine) that would, in turn, result in economically productive activities. So, the authorities did not hesitate to grant and lease massive extensions of "empty" lands to private companies and landowners for the exploitation of coal mines, logging, and raising livestock[56]. The state also took ownership of existing cattle and auctioned half of it for the benefit of the settlers, and "reserved the right" to establish missions or settlements within the leased territories.

Reading through the hundreds of pages of early laws and regulations for the colonization of Magallanes (Zenteno, 1892) it is disturbing to see that the government also "reserv[ed] the right to… guard the savages as it deem[ed] convenient" (p. 356, translation mine) and to "introduc[e] settlers who, in addition to carry out settlement tasks, stop[ped] the predations of Indigenous people" (p. 354, translation mine). Together, all of these policies produced the worst genocide Chile has seen, which is well documented but has only recently seen the public light more openly (Bengoa, 2004). The Selk'nam and Aónikenk nations did not survive the killings in the hands of settlers and the introduction of foreign diseases and ways of life. The Kawéshkar and the Yagán saw their populations decimated as a result of uprooting, territorial confinement, and institutionalized abuses, as I describe in section 3.3.

[56] For instance, Werhahn and Co. received 123,000 hectares to raise livestock in Tierra del Fuego; Pedro García and Roberto Fernández leased Navarino Island (1891); Carlos Williams got control of Lennox Island (1891); and Thomas Bridges received a 40-hectare lease in Picton Island (1896) (IEI-UFRO, 2003).

3.2.2 *Forts, towns, and reservations (or how to invade Mapuche territory)*

As I mentioned earlier, the Mapuche nation was not under Spanish colonial rule when Chile declared its independence. At the beginning the republican government respected their status as a sovereign nation and even signed a new treaty with the Mapuche in 1825 – the *Parlamento de Tapihue* – which confirmed that "the boundary line is the Bio-Bio [River]" (Gobierno de Chile, 1925, as cited in Téllez, Silva, Carrier & Rojas, 2011, translation mine). But by 1861 the government seems to have forgotten about the treaty, perhaps in part because of the myth that circulated in mainstream media suggesting that the lands in the south of Chile were empty. The occupation of the Mapuche territory – wrongly named *Pacificación de la Araucanía* (Pacification of Araucanía) – was a military invasion. It was led by Colonel Cornelio Saavedra and aimed at the "civilization of Indigenous people," the "reduction of Mapuche territory and its incorporation into the Republic" (Saavedra, 1870, p. 6, translation mine). Establishing forts and military posts, and creating new towns and cities were the main strategies to ensure Chilean presence (Boisier, 2007; Estefane, 2017; Ugarte, Fontana & Caulkins, 2017).

On December 4, 1866 Chile passed the *Ley sobre Tierras de la Frontera* (Frontier Lands Law). This law replaced the concept of "Indigenous territory" with "territory for colonization" (Gobierno de Chile, 2008b), legally erasing the people living on those lands. It also mandated the seizure and distribution of the Mapuche territory, declaring that all lands south of the Bio-Bio River were state-owned. By 1873, some of the seized lands began to be auctioned off to private landowners. The military campaign ended in the late 1800s with the founding of Temuco (1881) and the symbolic re-founding of Villarrica – an early Spanish settlement that had been destroyed by the Mapuche three centuries earlier.

When engineer Teodoro Schmidt started surveying the lands he quickly realized that the territory was not empty at all. The solution? Displacing Indigenous people to reservations to prepare the territory for colonization. In 1883 the government created the *Comisión Radicadora de Indígenas* (Commission for Indigenous Relocation and Reserves), whose main task was to provide *Títulos de Merced* (state-sanctioned communally held Indigenous land title) to the Mapuche. For the state the process was simple: the surveyor mapped the lands effectively occupied by a family or groups of families[57], granted land title to a designated head of community, and registered the piece of land as an Indigenous reservation with the Indigenous Affairs

[57] The Mapuche were required to prove the continuous and uninterrupted occupation for at least one year of the lands they claimed, something challenging given the seasonal and itinerant nature of some of their activities. Where the Mapuche were unable to demonstrate occupation according to the criteria above, lands were considered vacant.

Archive. Between 1884 and 1929, the Commission provided 2,918 *Títulos de Merced*. After the *radicación* (territorial confinement) process, the Mapuche nation kept control over only 5% of their ancestral territory (Gobierno de Chile, 2008b). With an openly settler colonial agenda, the government facilitated the re-population of the territory with Chilean and European settlers. This violent process of dispossession and domination by imposition of Chilean law (Burgos et al., 2006) is the root cause of the tense relationship between the Mapuche nation and the state today.

3.2.3 Re-drawing boundaries: The Pacific war and Indigenous peoples in the North

Chile took geopolitical control of the regions of Arica, Tarapacá, and Atacama – which cover important parts of the traditional territory of the Aymara, Quechua, and Lickanantay people – after the Pacific War against Peru and Bolivia (1879-1883). In this way, Chile inherited Indigenous lands that had already been colonized by other settler nation-states. The new boundary was confirmed after the signing of the Peace and Friendship Agreement in 1904, which also meant the application of Chilean citizenship to everyone living within the newly annexed lands. This agreement drew arbitrary geopolitical lines and did not take into consideration the ancestral territory of these nations (Bengoa, 2004; IEI-UFRO, 2003). This situation has created several territorial conflicts that have lasted until today.

The saltpeter industry had been growing in Chile since independence times. Following with the economic expansion impetus I mentioned earlier, the government encouraged the exploitation and export of this and other minerals "in consideration of the recent and important [mineral] discoveries made in the Province of Atacama" (Zenteno, 1892, p. 87, translation mine). When the Pacific War ended there were companies operating in the north already. On August 22, 1888 the Chilean government issued a law facilitating the lease of state lands to private companies. This brought more changes for Indigenous peoples whose traditional territories were affected, as many of them were displaced and relocated, generally joining the labour market as saltpeter workers, cattle drivers, farmers, and miners (Gobierno de Chile, 2008b).

The coastal and valley regions were rich in natural resources and had a strong extractive potential, so the government put effort into developing plans and development programs mostly in urban areas (Gobierno de Chile, 2008b). The government's interest in the highlands, on the other hand, had a more geopolitical than economic value. Planning interventions in the mountain region – where most Indigenous communities were located – focused on establishing military presence through posts and introducing solid governance

structures. But they also offered welfare services, trying to impose a sense of belonging to the Chilean culture among Indigenous peoples, which I describe in more detail in section 3.3.

3.2.4 The captain, the ariki, and the bishop: Annexing Rapa Nui

Among all Chilean colonization efforts, the annexation of Rapa Nui – a Polynesian island 3,700 km west of the continent – is still the most puzzling for me. Territorial proximity was clearly not a factor here – even today it takes a good 6-hour flight over the Pacific Ocean to get there! Also, the island is small and not very suitable for agriculture or other economic activities Chile was pursuing in the late 19th century. It seems obvious to me that the rationale for colonization was more geopolitical than civilizing or aimed at expanding the state's land base, as had happened in other cases.

The island came under Chilean jurisdiction in 1888 through an *Acuerdo de Voluntades* (Agreement of Intentions) between the Rapa Nui people under the leadership of the Ariki Atamu Tekena and Chilean Captain Policarpo Toro. Until then, the island was colonized by Tahitian missionaries and landowners, who had turned the territory into a *hacienda* where the Rapa Nui worked as peons and were evangelized. It was the Tahitian bishop Tepano Jaussen heading the mission who lobbied with Chilean authorities to facilitate the country taking over the island. Between 1886 and 1888, the Tahitian Archbishop transferred all Church lands to Chile, and Chile purchased all remaining private lands from the settlers.

The *Acuerdo* sought to establish a relationship between the Chilean state and the Rapa Nui people around four points: full surrender of Rapa Nui sovereignty to Chile, recognition of Rapa Nui traditional authorities, recognition of Rapa Nui territorial rights over the whole island, and state commitment to ensure the protection, wellbeing, and development of Rapa Nui people (Gobierno de Chile, 2008b). In 1889 the government designated a Colonization Agent for the island and in 1895 leased Rapa Nui to the French citizen Enrique Merlet, who committed horrendous abuses against Rapa Nui people. In 1903, Merlet transferred his properties to the British company Williamson & Balfour (a.k.a. Isla de Pascua Exploitation Company – the name says it all), which transformed the island into a sheep farm and confined Rapa Nui people to a tiny portion of their territory. In 1933 the government declared that all Rapa Nui lands were state-owned by virtue of "being part of the national territory and not having another owner" (Gobierno de Chile, 2000, translation mine). The lease continued until 1952, when it was revoked due to the abuses against Rapa Nui people.

Despite the *Acuerdo*, in practice the Chilean state has disregarded traditional authorities by imposing Chilean institutions and legislation, has not respected Rapa Nui property rights (i.e. leases to foreign companies, declaration of state ownership, state use of more than 75% of the total land base) and has not provided protection, wellbeing, and opportunities for development as promised (IEI-UFRO, 2003).

The formal ratification of the *Acuerdo* by the Chilean state got postponed due to wars in the late 19th century and in the end never happened. This and the fact that the state has not fulfilled its commitments have led some current Rapa Nui authorities to suggest that the agreement is invalid, that sovereignty was never ceded, that authority to self-govern and ownership over land never ceased, and that Chilean law is inapplicable.

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As I hope I have shown clearly enough, all of "the measures applied to Indigenous peoples in this period… were debated in Parliament – having national law status – and were not the result of improvisation by adventurers, spontaneous agents, or uncontrollable situations that, although present in some cases, were always subject to existing legislation and to the action of the state" (Bengoa, 2004, p. 23, translation mine). As soon as the state was established as such, Indigenous dispossession was always enabled, legitimized, and sustained through institutionalized planning practices. Or perhaps I can invert the order and say that the formation of Chile was only possible through the continuation and re-invention of settler colonial violence that planning helped produce. Despite my emphasis on the role of western law in Indigenous dispossession given the focus of my inquiry here, the narrative is not so linear, as Indigenous and non-Indigenous scholars have widely shown (Antileo et al., 2015; Bengoa, 2000; Pairican, 2015a, 2015b). Indigenous resistance and contestation has remained as a continuous force in the face of colonial processes, and opposition to as well as engagement with western law has also marked the nature of Indigenous/state relations over time, as this dissertation will show.

3.3 Assimilation, inclusion, and back again: Indigenous policy in the 20th century

If the mantra during the early republican era was delineating the national territory and ensuring Chilean control, towards the turn of the century the government's emphasis started to shift. Physical displacement and extermination initiatives were still in place, but the task of imposing a discourse of cultural homogeneity,

and consolidating the imagined single national identity and citizenship proclaimed by O'Higgins came to the fore.

Initially, this translated into strategies of forced assimilation of Indigenous peoples (Bengoa, 2004) that sought to absorb all differences. Between the 1880s and the 1930s all Indigenous peoples were brought together under the same umbrella, being subject to a centralized governmental approach to Indigenous issues for the first time (Bengoa, 2004). Strengthening governance was key in order to implement Indigenous policy, so creating municipalities, provincial and regional offices, and military posts was a priority (Boisier, 2007; Estefane, 2017).

Between the 1930s and the 1970s, the government's discourse towards Indigenous peoples softened and started to emphasize integration[58] (Bengoa, 2004; Pinto, 2003). Now the focus was on reaffirming Indigenous people's belonging to the Chilean society. New intermediate agencies[59] directly responsible for Indigenous affairs emerged – the *Dirección de Asuntos Indígenas* (DASIN, Directorate for Indigenous Affairs) from 1953-1972 and later the *Instituto de Desarrollo Indígena* (IDI, Indigenous Development Institute) from 1972-1978. In 1967 the National Planning Office (ODEPLAN) was established. While it initially did not have a direct impact on Indigenous policy, in 1990 this office would become the Ministry of Planning where Indigenous affairs are housed until this day (see section 3.4).

I would argue that these institutional changes follow the transition from heavily spatially focused land appropriation policies to broader social-economic policies aimed at consolidating the resulting socio-spatial organization. For instance, as in other Latin American countries, there was an attempt to merge Indigenous peoples with the peasantry, further invisibilizing Indigenous identities and cultures.[60] Legislation to promote agricultural development and the beginning of the Agrarian Reform played a big role in this regard. Similarly, the introduction of standardized public education in remote and rural areas, along with policies aimed at imposing Spanish as the only official language and to spread a single national history narrative were essential (Bengoa, 2004). The civic-military dictatorship led by Pinochet from 1973 to 1989 meant a return to an openly

[58] According to Bengoa (2004), the policy emphasis in the 30s-40s was assimilation, while the 50s-60s were marked by waves of *Indigenismo* (Indigenism). The late 60s and early 70s were shaped by the *Reforma Agraria* (Agrarian Reform) and other structural reforms introduced by the socialist government of President Salvador Allende.

[59] According to Vergara, Foerster & Gundermann (2005), these agencies emerged under Spanish colonial rule to guide the relationship between the state and Indigenous peoples with the ultimate goal of assimilation. As such they were conceived as transitory institutions, even though this did not happen. Their genealogy is essentially colonial.

[60] The fact that the IDI was merged into the *Instituto de Desarrollo Agropecuario* (Institute for Farming Development), reduced its operations, and turned its focus towards rural farming policy confirms this agenda (Vergara et al., 2006).

assimilationist agenda for 17 years, which through legislation negated and sought to eliminate indigeneity in the country. It also introduced a very aggressive neoliberal agenda that "came to permanently 'free' [Indigenous] lands, leaving them available for a market that constantly needs new places to make profit" (Pichinao Huenchuleo, 2015, pp. 95-96, translation mine).

Although the three arbitrary periods just mentioned were indeed different in many ways as far as state-led planning is concerned (i.e. there was a pendulum-like transition between openly assimilationist and softer integrationist approaches), all policies, programs, and plans targeted to Indigenous peoples still gave priority to issues of national unity, while constitutional recognition of Indigenous peoples as distinct, pre-existing sovereign nations was simply overlooked (Aylwin, 2000; Boccara and Seguel-Boccara, 1999). In that sense they all denied Indigenous self-determination.

For instance, the then recent border disputes with Peru and Bolivia in the north prompted a politics of *chilenización* (chileanization) in the early 20th century. All people living within the newly delineated Chilean territory – including Indigenous peoples – were forced into becoming citizens. In this process, Aymara and Quechua trade and cultural practices were violently disrupted by the border system. Lickanantay and other valley communities were proletarianized thanks to the expansive saltpeter industry. So-called border concentration public schools in remote northern communities played a key role in the integration of Indigenous children, furthering the imposition of the Spanish language and Chilean culture.

For the Mapuche, the *radicación* process and its aftermath was the central vehicle for Indigenous policy. Under this regime, between 1884 and 1929 the Mapuche nation was at the same time stripped of 95% of their traditional territory, forcibly displaced into small reservations that were often distant from their places of origin, and incorporated into the life of the country as Chilean citizens. This process also disrupted existing socio-political forms of organization, since land titles were arbitrarily given to some traditional community heads and not others, forcing unrelated family groups and lineages to come together under a state-defined umbrella. In 1927 Law Nº 4,169 was passed, creating a Special Tribunal tasked with subdividing communal lands whenever a community member required so. Shortly after, in June 1931, Decree-Law Nº4,111 consolidated this trend, establishing five *Juzgados de Indios* (Indian Courts) responsible for overseeing land subdivisions and sales, along with mediating land disputes. Even though these measures looked protectionist, in practice they helped dissolve some *Títulos de Merced*, benefitting private landowners at the expense of Mapuche communities. By the 1970s, in the context of the Agrarian Reform, the government of Salvador Allende set up a Commission for Usurped Lands Restitution, which allowed for the temporary return of some

lands to Mapuche communities, until the dictatorship reversed these changes a few years later. Decree-Law Nº 2,568, enacted in 1979, was the culmination of a decades-long effort to divide Indigenous lands, end with collective ownership, and promote private ownership of the remaining *Títulos de Merced* through land titles (Vergara et al., 2006).

In Rapa Nui, after Williamson & Balfour's lease ended in 1952, the Chilean navy took control of the island until 1966. Then the Pascua Act (Law Nº 16,441) was passed, which created the Department and the Province of Isla de Pascua, and established several government agencies to implement state policy in Rapa Nui[61]. For the first time Rapa Nui people received Chilean citizenship, even though the government had declared ownership of all island lands in 1933, as mentioned above. The application of social and civic rights has resulted in some partial benefits, such as tax exemptions, regularization of land rights (although limited to land actually used), development plans, and measures to restrict the sale of lands to foreigners (IEI-UFRO, 2003).

In Patagonia and Tierra del Fuego, members of the Yagán and Kawéshkar nations were sent to a Salesian mission established in Dawson Island in 1873. This had "the double aim of protecting them from 'Indian hunters' and introducing them into 'civilized life'" (Bengoa, 2004, p. 16, translation mine). By 1895 only 65 people were still alive – while adults worked for the mission's agricultural and logging activities, children were educated according to Catholic doctrine (Gobierno de Chile, 2008b). Over time, they were displaced and confined to specific areas. In the case of the Kawéshkar, in 1936 the Chilean air force established a base in Puerto Edén that motivated some community members to migrate to a nearby town. By 1940, the government created a program that provided access to health care and food to the Kawéshkar, as well as incentives to settle in town, given the precarious conditions for subsistence in the area. This has prompted migration to larger cities. Similarly, by the mid-20th century the few Yagán survivors had experienced significant acculturation as a result of contact with the settler society. The construction of a naval base in what is now Puerto Williams also brought public services and amenities such as schools, medical clinics, and communications. The Yagán were relocated from the town of Mejillones to Ukika, which reinforced the disruption of their ways of life, including language loss (IEI-UFRO, 2003).

The enactment of a new *Código de Aguas* (Water Management Act, Nº 1,222) in 1981 and the *Ley de Fomento Forestal* (Forestry Promotion Act, Decree-Law Nº 701) in 1974, along with several other regulations that

[61] They included the Ministry of Lands and Colonization (now Ministry of Public Assets), the Economic Development Agency (CORFO), the ODEPLAN, and National Forest Corporation (IEI-UFRO, 2003).

facilitated mining and other extractive activities, have also contributed to an erosion of Indigenous rights and livelihoods. Continuing a longstanding tradition of Indigenous resistance to internal colonization, the growth of this structural violence during the dictatorship helped strengthen Indigenous organizations at a new scale. The mobilization and negotiations between the Indigenous movement and politicians in preparation for the first democratic election after Pinochet resulted in the *Acuerdos de Nueva Imperial*[62] (Nueva Imperial Agreements) in 1989. This marked the beginning of important changes in the relationship between the state and Indigenous peoples, which started to revolve around the discourses of Indigenous rights, multiculturalism, and self-determination where the duty to consult is nested.

3.4 Where Chile stands today: Catching up with international standards

I know this has been a long journey in time. However, I believe it is a necessary journey if you also think – as I do – that the quote at the beginning of this chapter is a serious wake-up call and a challenging invitation for planners working at the intersection of Indigenous and state interests in Chile.

I am talking about a country where today, in the 21st century, Indigenous peoples are not even present in the Constitution, but where the many impacts of the history of dispossession I have told in the previous pages continue to be an everyday reality for more than 12% of the population. It is also a country where some of the folks responsible for Indigenous policy within the national government, those whose everyday bureaucratic work continues to have a big impact on the everyday lives of so many Indigenous peoples, say with frustration that "it is difficult to approach these kinds of people" when deep-rooted and rightful demands are brought to the table.

The colonial history of planning I have described is meant to give dates, names, tone, and materiality to practices that are often seen as background information and go unexamined, but that explain where Chile stands today. Now I will introduce the current governance structure of the state regarding Indigenous peoples, and the key discourses that have shaped Indigenous policy for the past two decades. I want to close

[62] When Patricio Aylwin was running for office, the presidential candidate made a number of commitments with representatives from the main Indigenous organizations at the time. The three core agreements were: constitutional recognition; the ratification of the International Labour Organization's Convention 169 (C169); and the creation of an Indigenous Law that would recognize Indigenous territorial rights and create a new Indigenous institutional framework.

the circle and set the stage for the examination of one of the most recent chapters of this story: what happened in 2010-2014 as Chile tried to implement the duty to consult.

3.4.1 The governance of state planning and Indigenous policy in Chile

The current framework guiding Indigenous-state relations in Chile dates from 1993, when the *Ley Indígena* (Indigenous Law) was passed as a result of strong Indigenous mobilization. In a nutshell the law: a) recognizes the existence of nine Indigenous ethnic groups[63]; b) defines Indigenous status; c) defines measures for the recognition, protection, and development of Indigenous lands; d) enables the Ministry of Planning (now Ministry of Social Development) to create *Áreas de Desarrollo Indígena*[64] (Indigenous Development Areas, ADIs) for priority government intervention; e) creates an Indigenous Development Fund; f) establishes guidelines regarding culture and education; and g) creates the *Corporación Nacional de Desarrollo Indígena* (CONADI, National Corporation for Indigenous Development) (Gobierno de Chile, 1993).

Until this day, the mandate of CONADI is to "promote, coordinate, and implement Indigenous policy, including funds and programs aimed at land and water restitution, cultural preservation, and… development" (Gobierno de Chile, 1993, translation mine). It is headed by a national board, which includes 6 appointed government representatives, 3 government-appointed Indigenous advisors, and 8 democratically elected Indigenous councillors.

The *Ley Indígena* has been widely questioned due to the mutilations it suffered during Parliamentary debate (Vergara et al., 2006). First of all, this national law does not involve constitutional recognition of Indigenous peoples. It is a consultative framework, which places the responsibility of all Indigenous matters in the hands of the state, limits Indigenous associativity, and prevents Indigenous organizations from representing Indigenous peoples politically (Aylwin, 2000). It establishes "a welfare agency to mediate between the state and Indigenous peoples… and sets up a *Fondo de Tierras y Aguas Indígenas* (Indigenous Lands and Water Fund, FTAI) to deal with 'land problems' through the market. At the same time, [it promotes] an increased

[63] For a long time all Indigenous policy focused mostly on the Mapuche nation, by virtue of being the largest group by far.
[64] ADIs are not understood as Indigenous *territories*. They are just delimited territorial areas where local Indigenous communities and organizations participate in the definition, management, and implementation of the plans and programs developed by the government. They are also areas for priority government intervention and budget allocation.

presence of the state on Indigenous areas (schools, hospitals, roads, electric power)" (Toledo Llancaqueo, 2007, p. 256, translation mine).

As it stands now, this framework has defined the relationship between the state and Indigenous peoples as a matter of poverty among ethnic minorities. It does not take full responsibility for the fact that Indigenous peoples' pauperization is the result of state action in the first place (CEPAL-ATM, 2012). It excludes any deep engagement with Indigenous rights and criminalizes Indigenous demands, especially when these demands confront the existing economic model and the industries that support it (mostly forestry, mining, energy, and fishing) (Toledo Llancaqueo, 2007). While there has been a transition from an assimilationist approach to one that emphasizes multiculturalism (Antileo, 2012, 2013; Figueroa Huencho, 2014; Pinto, 2003), today's paradigm still denies the existence of an Indigenous sovereignty that pre-dates the state.

3.4.2 Recognition, multiculturalism, and Indigenous rights

Having the *Ley Indígena* as the general framework, in recent years there has been some movement. The idea of "recognizing" Indigenous peoples has gained traction, especially because until recently the only Nueva Imperial Agreement that had been fulfilled since the early 1990s was the enactment of the *Ley Indígena* and the creation of CONADI. The International Labour Organization's Convention 169[65] (C169) was only ratified in 2008 after 17 years of parliamentary debate and constitutional recognition still has not happened. Failing that, other tangential discourses have taken over Indigenous policy. *Desarrollo con identidad*[66] (development with identity), *nuevo trato*[67] (a concept that can be translated both as new treatment and new deal), and multiculturalism are some of them.

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[65] As mentioned in the introduction, C169 was adopted by the ILO on June 27, 1989. It is a binding international law instrument that deals specifically with the rights of Indigenous peoples (ILO, 1989). It emerged as a response to Indigenous peoples' demands for the recognition of their collective rights, including: territorial rights; respect for their ways of life, cultural traditions, and religious practices; the right to define their own institutions and forms of political organization; and the right to set their own priorities with regards to economic development, health care, and education.

[66] For instance, for more than a decade the Ministry of Planning had a program called *Orígenes* (loosely translated as Origins or Roots). Its mission was to "improve the life conditions of Indigenous peoples in rural areas by promoting their economic, social, cultural, and environmental development without losing their essential identity characteristics" (translation mine).

[67] Admitting a history of unjust Indigenous-state relations, in 2001 the government created the *Comisión de Verdad Histórica y Nuevo Trato* (Historical Truth and New Treatment Commission) to conduct research and make recommendations to help restructure the relationship between the state, Indigenous peoples, and the Chilean society at large. Its key recommendations are: a) improving the level of recognition of Indigenous rights, b) furthering "development with identity" initiatives and c) adjust public institutions according to Chile's cultural diversity (Gobierno de Chile, 2008b).

In April 2008, during Michelle Bachelet's first term in office (2006-2010), her government presented an Indigenous policy document called *Re-Conocer: Pacto Social por la Multiculturalidad* (Re-Cognizing: Social Pact for Multiculturalism). It laid out the government's vision, commitments, and action plan regarding Indigenous matters within a frame that recognizes the cultural diversity of the country. Despite having a much broader conceptualization than previous policies related to Indigenous peoples, which could suggest a departure from earlier openly assimilationist approaches to Indigenous policy, the policy still talks about the "Indigenous problem"! (Gobierno de Chile, 2008c, p. 3, translation mine). It also understands the "construction of multiculturalism in terms of *accepting* and *including* Indigenous peoples in Chilean society" (Gobierno de Chile, 2008c, p. 11, emphasis and translation mine; Antileo, 2012).

While all of this was happening, President Bachelet created the *Unidad de Coordinación de Asuntos Indígenas* (UCAI, Indigenous Affairs Coordination Unit) within the Ministry of Social Development. This unit descends directly from the Deputy Minister and is responsible for the high-level formulation and coordination of all Indigenous affairs. It does not replace, but guides and complements the work of CONADI. The UCAI emerged in the context of the ratification of C169 as a way to have close coordination between the then Ministry of Planning, the President, and all government agencies dealing with issues that might affect Indigenous peoples.[68] While covering a wide array of matters, C169 places special emphasis on the role of participatory and consultative mechanisms in order to ensure the involvement of Indigenous peoples in decision-making, reduce their marginalization and the discrimination against them, and contribute to sustainable community development (ILO, 1989; UN, 2007). According to the ILO, "the spirit of consultation and participation constitutes the cornerstone of Convention No. 169 on which all its provisions are based" (ILO, 2001).

When the Consultation took place seeking to regulate the duty to consult – as the next chapter elaborates in greater detail – the UCAI led, planned, and carried out the whole participatory process, including drafting the regulation on Indigenous consultation itself. It was in the context of that process that some Indigenous leaders said "I will not sit down to talk about a new consultation regulation until they give my lands back."

[68] My conversations with former Planning Ministers, Presidential Commissioners for Indigenous Affairs, and other government officials suggest that the UCAI was first and foremost a political move to show presidential commitment to Indigenous issues at a time of increasing armed violence on Mapuche territory after the killings of two young Mapuche leaders – Matías Catrileo (2008) and Jaime Mendoza Collío (2009).

Chapter 4: The duty to consult and the proceduralization of Indigenous rights

> *The verb "to consult" presupposes a willingness to listen to the opinion of the person or collective being consulted, even if their opinions run against the expectations of the person carrying out the consultation. It presupposes respect not only for people and their ideas, but also for their collective approaches to consultation, for their communal forms of deliberation, for their customary mechanisms to address dissent and to reach agreement among different points of view.*
>
> Silvia Rivera Cusicanqui, 2014, p. 17 (translation mine)

> *The big trick of insidious colonialism is to look like a return, when in reality what "returns" never ceased to exist.*
>
> Boaventura de Sousa Santos, 2018 (translation mine)

After tracing the myriad ways in which planning tools and frameworks have intertwined with law over time to facilitate institutionalized Indigenous dispossession in Chile, this chapter brings the narrative to the present. A key premise of this research is that current planning discourses and practices might seem less openly violent than the ones I just discussed, but are essentially an extension of the same colonial rationalities and sensitivities (Porter, 2010). Exploring this premise further requires delving into how state planning happens (Flyvbjerg, 2004; Smith, 2005) today. In that spirit, the next pages examine a practice that has become central to the space where planning and Indigenous interests meet in settler colonial contexts – the duty to consult. Drawing mostly on the numerous interviews with people who led and participated in the process, this part of the analysis begins to show how the international Indigenous rights discourse is taking root, how consultation is being taken up (Ahmed, 2007) through law, and the role planning institutions and practices are playing in this regard.

Unlike other Latin American countries – where discussions about consultation with Indigenous peoples began shortly after C169 was enacted in the late 1980s[69] – in Chile they only started in the late 2000s for reasons that will become apparent throughout this chapter. At the time, the ratification of C169 was in the final stages of parliamentary debate after almost two decades of Indigenous mobilization and political negotiations. Many of the conversations that ensued revolved around how consultation should be implemented and adapted to local realities. This study focuses on the process that led to the creation of

[69] Mexico ratified C169 in 1990; Colombia and Bolivia in 1991; Costa Rica and Paraguay in 1993; Peru in 1994; Honduras in 1995; Guatemala in 1996; Ecuador in 1998; Argentina in 2000; Brazil, Dominica, and Venezuela in 2002; and Nicaragua in 2010.

Supreme Decree 66 (DS66), also known as the General Framework on Indigenous Consultation (*Reglamento General de Consulta Indígena*).

Despite the many limitations of consultation as a principle and as a practice,[70] the process of producing a national regulatory framework of this kind is significant. Consultation has been identified both by the Chilean Government and by many Indigenous organizations and communities as a space that holds potential for renewed relationships between the state and Indigenous peoples grounded in intercultural negotiation (Caniuqueo & Peralta, 2017, p. 15). From a planning perspective, the creation of DS66 is particularly relevant, since it was the most participatory planning process related to Indigenous policy development in Chile up to that point. More pragmatically, in a very precarious legal context that denies Indigenous constitutional recognition, sovereignty, and self-determination, Indigenous peoples have used consultation strategically. They have turned it into a fairly effective resistance tool to halt extractive investment projects, protect their territories, and safeguard culture, among other things. Acknowledging and sharing the critiques of the notion of consultation as expressed in international law, I wanted to examine its implementation because of the relevance it has to the extent that it has become a key institutional mechanism that shapes Indigenous/state relations through planning. In other words, if I wanted to see how state planning with Indigenous peoples happens in Chile today I had to look at consultation.

Through a thick description of the case, below I offer a multifaceted reading of the regulation-making process that produced DS66. I first provide a descriptive chronological overview of the process to ground the analysis. Then I examine how the government and Indigenous peoples justified the decision to regulate the duty to consult. The following section describes some of the key decisions that shaped the process, focusing on what happened after the process was reformulated in September 2011.[71] I highlight the role fear and collective inexperience played in guiding the government's actions. To conclude, I outline some of the main outcomes of the regulation-making process as such. The analysis shows that the creation of DS66 signals an incremental improvement from the perspective of state planning compared to previous consultation standards, in

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[70] The most substantial critiques argue that the notion of consultation in international law emerges from a body of Euro-western liberal legal knowledge that has colonial roots, takes the nation-state as the reference point, and reaffirms the supremacy of settler sovereignty (Carmona, 2009b, 2013a, 2013b; Dorries, 2012). This makes consultation an intrinsically ill suited tool for Indigenous struggles for self-determination. Other critiques do not question the foundations, but point to gaps in implementation (Caniuqueo & Peralta, 2017; Lighfoot, 2008), while also identifying negative impacts such as consultation practices fragmenting community cohesion (Schilling-Vacaflor & Eichler, 2017).

[71] While the initial stage is relevant as a backdrop to understand the evolution of the process, it was after the Consultation was streamlined and redesigned that the regulation-making process for DS66 actually started.

particular regarding the methodological innovations in participatory planning that took place, the agreements reached regarding some procedural aspects of consultation, and a self-reported indigenization of government.

On the other hand, this study suggests that as a whole the production of DS66 was a failure. The process lacked legitimacy due to the high degree of centralization of the regulation-making process, and to questions raised by Indigenous peoples about low participation numbers and non-representativeness of the Indigenous leaders who sat at the negotiation table. But most importantly, the process did not produce agreements regarding the three most substantial matters under discussion – how consultation should be approached in the case of investment projects that have environmental impacts, what administrative and legislative measures should be consulted, and when a government measure might affect Indigenous peoples directly. Despite Indigenous peoples and the government sitting face-to-face to draft DS66 article by article together, planning and law conflated once again, this time to help proceduralize[72] and restrict the scope of Indigenous rights under the veils of "reasonableness" and compatibility with Chilean legal frameworks. The process also shows how the government failed to engage with the deeper concerns brought to the table by Indigenous leaders.

4.1 Introducing the case: The Consultation on Indigenous Institutions

On September 15, 2008 Chile ratified C169 and one year later the Convention entered into force according to ILO protocols. After taking so long, the ratification created high expectations in Indigenous and policy circles alike regarding how Chile would begin bringing its national laws and institutional frameworks up to standard. One of the discussions that came to the forefront concerned the duty to consult with Indigenous peoples regarding government administrative and legislative measures that might affect them directly (ILO, 1989).

[72] The neologism proceduralize came up in conversations with some of the Indigenous interviewees as they tried to articulate what DS66 and the Consultation meant, and as I tried to understand the spirit of what they were describing. Alternative concepts could be regulate, institutionalize, or bureaucratize, but none of them captures the nuances of what actually happened, following Flyvbjerg (2004). Regarding the first two, the Consultation was in fact meant to regulate the duty to consult and to create institutional channels to facilitate its implementation. In doing so, it also sought to embed consultation into bureaucratic processes. These concepts are thus descriptors of what was expected. As used in this study, proceduralization not only describes, but also adds a normative dimension to the analysis. It highlights how the Consultation as a process supposedly meant to enable intercultural consensus building, DS66 as an instrument, and consultation (with lower case c) as a practice in Chile work to break down Indigenous rights into legal practices that reduce their scope, move away from the spirit of those rights, and turn them into something amenable to state operations.

A few months before leaving office, on September 29, 2009 the government of Michelle Bachelet enacted a provisional consultation framework called Supreme Decree 124 (DS124). DS124 was drafted unilaterally by the Minister of the President's Office without consultation with Indigenous peoples.[73] Since it clearly violated C169 standards, the regulation was widely resisted and rejected by Indigenous peoples. It became a symbol of the imposition of state policies and its abolition a rallying cry of the Indigenous movement.

In this context, between 2011-2014 the government of Sebastián Piñera carried out a process initially known as the Consultation on Indigenous Institutions (hereafter the Consultation) to begin addressing the commitments taken on by the state. It was led by the Presidential Commissioner for Indigenous Affairs at the time and managed by the Indigenous Affairs Coordination Unit (UCAI) of the Ministry of Social Development (MDS). As mentioned in the introduction, the process involved a set of consecutive initiatives that brought together Indigenous peoples and the national government in the most ambitious participatory planning process carried out to date.[74] It included an initial phase called the Consultation on Indigenous Institutions (*Consulta de Institucionalidad Indígena*), the reformulation of the process into a more focused Consultation on Indigenous Consultation (*Consulta sobre la Consulta*), a massive gathering with Indigenous representatives known as the Great Gathering (*Gran Encuentro*), the establishment of a Consensus Table (*Mesa de Consenso*) to write the regulation (DS66), and the enactment of said regulation.[75]

The process was launched in March 2011 and was supposed to run from April to September that year. Initially it sought to gather input from Indigenous peoples regarding five matters: 1) constitutional recognition of Indigenous peoples, 2) creating a new government agency to replace CONADI, 3) creating an Indigenous Peoples Council (*Consejo de Pueblos Indígenas*) representing all nine Indigenous nations, 4) writing a new consultation mechanism according to C169 standards to replace DS124, and 5) revising the section of the Environmental Impact Assessment Service (SEIA) Act that regulates consultations with Indigenous communities.

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[73] DS124 was developed by the then Ministry of Planning (now MDS) and sought to regulate Article 34 of Chile's Indigenous Law. DS124 conceptualizes Indigenous participation and consultation in the following terms: "The bodies responsible for the administration of the state shall *listen to the opinion* of Indigenous [peoples] when making decisions about *plans, programs, and projects* that might interfere or have direct relation with matters that affect them" (Gobierno de Chile, 1993, emphasis and translation mine).

[74] For a detailed account of the process from the state's perspective, see the final report (Gobierno de Chile, 2013b).

[75] Unless otherwise indicated, I use the term the Consultation to refer to the whole process.

The initial stage of the process involved around a hundred meetings throughout the country where more than 5,000 Indigenous representatives participated (Gobierno de Chile, 2013b). However, due to its problematic formulation the Consultation on Indigenous Institutions received significant criticism from early on. Indigenous communities and organizations rejected the unilateral imposition of the themes to be discussed, the contents of the proposals for discussion, the methodology – which remained largely informational rather than collaborative – and the complexity and large number of themes to cover. They also reported limited Indigenous representativeness and lack of culturally appropriate outreach. Several statements were released[76] and some groups presented a legislative request in Congress to stop the Consultation. Such mobilization and resistance prompted the government to halt and begin redesigning the process in September 2011. From the perspective of Indigenous peoples, consulting so many themes without first having a mutually agreed consultation mechanism violated Indigenous rights and ran against the spirit of C169. However, as I elaborate in greater detail in the next chapter, the government continued making changes to the environmental legislation – known as Supreme Decree 40 (DS40)[77] – while the general consultation mechanism was being developed, thus producing two parallel systems of Indigenous consultation.

The broad Consultation on Indigenous Institutions thus turned into a more focused Consultation on Indigenous Consultation. Its goal was to create a mutually agreed regulation to guide so-called general consultation processes. From September 2011 to June 2012 the government engaged in conversations with the National Council of CONADI[78] and some Indigenous organizations to find ways of revamping the process. For the first time, the government also provided logistical and financial support for Indigenous organizations, communities, and CONADI Councillors to carry out self-organized, community-based meetings. The process was formally resumed in August 2012, when the MDS released a draft document entitled Proposal for a New Regulation on Indigenous Consultation and Participation (*Propuesta de Nueva Normativa de Consulta y Participación*), which was shared with Indigenous organizations. Community-based meetings continued, now

[76] For a collection of news releases opposing the Consultation, see Mapuexpress (ND).

[77] DS40 is the legal instrument that regulates the System of Environmental Impact Assessment (SEIA) of the Ministry of Environment (Gobierno de Chile, 2013a). It was developed in parallel with DS66 after the Consultation was halted in September 2011. It was formally enacted on August 12, 2013. The process that led to its creation has been widely questioned and rejected by Indigenous peoples.

[78] CONADI's National Council is responsible for the "direction, planning, and general coordination" of the organization. It is comprised of 17 members, including: the National Director of CONADI; the National Deputy Directors; the Deputy Ministers of Social Development, Government's General Secretariat, and Agriculture; three Councillors appointed by the President, including at least one representing the Ministries of Interior, Education, Public Works, Health, or Housing and Urbanism; and 8 democratically elected Indigenous Councillors (Gobierno de Chile, 1993).

with the goal of independently reviewing the government's proposal and submitting counter-proposals. More than 190 self-organized meetings took place and 11 Indigenous proposals were presented.

A breaking point happened from November 30 to December 2, 2012 when the government convened a massive Indigenous Peoples Gathering to discuss the proposal and the "fundamental concepts that must be considered in any Indigenous consultation regulation" (Gobierno de Chile, 2013, p. 3, translation mine). More than 230 representatives from all nine Indigenous nations attended, in addition to the UN Rapporteur on the Rights of Indigenous peoples James Anaya, who joined via conference call and offered comments about the government's proposal. The UN and Chile's National Human Rights Institute attended as witnesses. This event triggered heated discussions among Indigenous representatives, and between Indigenous representatives and government officials, producing a significant rupture. As I elaborate below, disagreements regarding the scope of the regulation and the methodology, mistrust of the government and tensions among Indigenous organizations, and lack of clarity regarding where the Consultation was heading were among the reasons underlying the Gathering's break down. Several Indigenous organizations decided to withdraw from the process, while others stayed on board and decided to engage in conversation with government.

The final stage of the Consultation involved the creation of a Consensus Table from March to July 2013. In a format and scale never seen before in the country, government officials and representatives from some Indigenous organizations sat down face-to-face to revise together the government's regulation proposal in light of all counter-proposals presented by Indigenous groups. There were nine working sessions in total, lasting three days each, and at the end the group produced a document reporting on all decisions made. The process was particularly innovative in that the actual editing of the text was done jointly by Indigenous and government representatives. While several articles of the original proposal were changed or removed, and others were added as a result of the negotiations, there was disagreement regarding three substantive matters. Despite this lack of consensus, the government went ahead enacting DS66, although leaving written record that those three areas were not agreed upon. This situation prompted all Indigenous representatives who had sat at the Consensus Table to write a statement repudiating the regulation and to sue the Chilean state before the ILO's Committee of Experts on the Application of Conventions and Recommendations.[79]

What happened? And why did it happen in the way it happened? Was this lengthy, controversial, and ultimately non-agreed-upon consultation process to create a consultation mechanism a heads up of what

[79] See ILO (2016).

consultation with Indigenous peoples every time a government measure might affect them will be like in Chile? The following sections break down the process to see what rationalities and sensitivities become visible.

4.2 Why regulate?

Or more specifically, how did regulating the duty to consult become such a political and social priority in Chile? This question was in my mind since I started following the process in the early 2010s and realized the importance the subject was gaining, at least based on the media coverage it was receiving, the government resources that were being invested, and the level of mobilization among Indigenous peoples. Understanding the rationale for the Consultation is important, since the whole development and outcomes of the process are much shaped by the way Indigenous peoples and government officials were making sense of what the duty to consult meant and how it should be approached in practice. The conversations I had suggest that the reasons were diverse, especially because Indigenous peoples did not necessarily have the same motivations and expectations as the government. However, the interviews suggest three main rationales. The first I call *legalism* – an understanding that carrying out consultations according to C169 standards was an inescapable legal obligation. The second I call *pragmatism* – the view that (the almost non-) existing consultation standards in Chile at the time were flawed and that keeping the status quo was more detrimental than working towards a new regulatory framework. And finally, the idea that consultation was the first step towards a broader vision of Indigenous/state relations – what I call *incrementalism*.[80]

4.2.1 "It was the government's responsibility:" Legalism and the need to regulate consultation

When the right-wing government of President Sebastián Piñera (2010-2014) took office in March 2010, C169 had just entered into force in Chile a few months earlier. Countries that ratify C169 have to submit yearly reports to the ILO regarding what steps have been taken towards implementation. This means the new administration had just over six months to become familiar with government operations, understand the status of Indigenous policy at the time, and begin working before having to report to the ILO.

[80] My usage of the term *incrementalism* here echoes the classic idea of "muddling through" developed by Lindblom (1959) regarding how bureaucracies work in ways that privilege small, *ad hoc*, and short-term changes that seem feasible at a given time. However, my usage is broader in the sense that it was not only government officials, but also some of the Indigenous representatives, who spoke about this incrementalist stance.

Chile's legalist tradition and adherence to the rule of law have long been discussed in the legal and policy literatures, and helps to understand the country's approach to policy-making, including the development of Indigenous policy (Carmona, 2009a). As UCAI Planner 1 reflected, "the Chilean state, or Chile in general, likes adhering to the rules; *we want everything to be regulated*. So, since C169 is quite broad and at the same time it is the law, as soon as the government took office we had the idea of regulating it, so that it stays well defined in a box" (emphasis mine). The image of having things well defined and in a box is particularly interesting and came up again and again in my interviews with government officers. It points to the need to reduce uncertainty and to the fear of legal ambiguity, which I discuss further in the next point.

In fact, while C169 was being discussed in Congress there were several attempts by elected officials to delay, interrupt, or openly block the ratification of the Convention. Opponents of C169 argued that it ran against the Chilean Constitution, and in 2000 requested the Constitutional Tribunal (TC)[81] to pronounce whether C169 – including articles 6 and 7, which refer to consultation and participation – violated Chile's legal frameworks. The TC resolved that C169 did not contravene the Constitution[82] and further clarified that articles 6 and 7 were self-executing,[83] meaning that they would automatically become domestic law once C169 was ratified. Some of the Indigenous leaders I interviewed speculated that Chile's legalist tradition likely played a big role in the lengthy parliamentary debate, since there was a tacit understanding that once C169 was endorsed, abiding by it was the only option. As Indigenous Leader 1 put it, "one of the things I appreciate about Chile is that it is difficult to enshrine a right. It is difficult to embed it in legislation… [It is difficult] to endorse an international law [agreement]. But [once it is endorsed] it is easier to apply it compared to other countries." Indigenous Leader 2, who ended up withdrawing from the process, went further to say: "It is clear that this [interest in] consultation does not come from the government's good will, but from an obligation

[81] The Constitutional Tribunal's main role is to assess and ensure that all laws adhere to the Chilean Constitution.

[82] See Gobierno de Chile (2008a).

[83] Article 6.1 (a) states that "in applying the provisions of this Convention, governments shall… consult the peoples concerned, through appropriate procedures and in particular through their representative institutions, whenever consideration is being given to legislative or administrative measures which may affect them directly." Article 6.2 further adds that "the consultations carried out in application of this Convention shall be undertaken, in good faith and in a form appropriate to the circumstances, with the objective of achieving agreement or consent to the proposed measures." Article 7.1 refers to participation more broadly and reads: "The peoples concerned shall have the right to decide their own priorities for the process of development as it affects their lives, beliefs, institutions and spiritual well-being and the lands they occupy or otherwise use, and to exercise control, to the extent possible, over their own economic, social and cultural development. In addition, they shall participate in the formulation, implementation and evaluation of plans and programmes for national and regional development which may affect them directly" (ILO, 1989).

imposed by C169. And also from the obligation the state imposed itself when it allowed the TC to review the Convention (to assess its accordance with the Constitution)."

Indigenous leaders also appealed to the state's obligation to fulfill its international law commitments and respect for Indigenous rights. As a Mapuche leader who engaged in the initial stages and withdrew from the process later on puts it, "the main point has always been [to ensure] respect for the set of rights the Chilean state has taken on internationally and nationally… That is what connect us [as Indigenous peoples], because actually each organization, each community, each [Indigenous] people has its own priorities."

The passage below – taken from a conversation with Senior Official 1, who led the early stages of the Consultation – reinforces the idea of legalism from the standpoint of the government's urge to regulate consultation, but offers a more complex reading. According to him,

> The duty to consult was in the public eye, so to speak, absolutely. It was a top priority… At least from a legal point of view there was enough clarity that… the duty to consult… [as expressed] in Article 6 of C169 was fully in force in March 2010. So, *it was the government's responsibility to make strides towards implementation*. And then came the political decision… to begin a process to regulate Indigenous consultation, in particular to [develop] a consultation procedure… I think making that political decision so early on is very valuable… other countries that have ratified C169 sometimes spend many years without even making that political decision, without saying "*we have an instrument that obliges us to do certain things* and we will make progress in this regard…" *We had the conviction* that we had to do it, despite anticipating… the challenges we would face (emphasis mine)

The tension between conviction and obligation that emerges here is worth noting. The legal obligation was clear since the time Congress voted in favour of ratifying C169 in 2008, but where did conviction come from? Why did the government make the political decision to produce a consultation instrument so early on? Was it only because it was a legal obligation? Was it only because of longstanding Indigenous mobilization? And for Indigenous peoples, why were some representatives interested in regulating consultation even though it has proven to easily become a smokescreen in other countries that have ratified C169? That leads me to the next thread that became visible through the interviews.

4.2.2 On strategizing, legal certainty, and fear: The pragmatic origins of DS66

Pragmatism came up as a justification for the need to regulate consultation both for Indigenous peoples and government officials, although in different ways. Indigenous leaders who participated in the creation of DS66

often spoke of how important it was to never stop working with the government towards more just Indigenous/state relations and respect for Indigenous rights, regardless of the administration's political color, but also without ignoring historical distrusts. As Indigenous Leader 1 told me, "sometimes there is money for some meetings and things like that and well, we use it. But when there is none we have to keep working, because you have to give continuity [to the work]. I mean, you can't work for two months and then disappear for six." Many representatives saw producing a mutually agreed consultation mechanism according to C169 standards as the obvious next step after fighting for decades to have C169 ratified, especially considering the weak consultation standards that were in place. In other words, it was better getting involved than letting the government regulate consultation at its will, as had historically happened with Indigenous policy-making. Speaking about the approach of her organization, the same leader put it this way:

> We knew the risks we were taking when we sat at the [Consultation] Table. But between that [option] and doing nothing… and keeping DS124 in force… Because if there is [no new regulation] how do you get rid of DS124? … We had to do it. We said "[if we do not participate in the Consultation] we will continue being stuck." And we decided to do it even taking the risk… We said: "we have a responsibility."

The decision to engage in negotiation with the government was thus grounded in the reality of having to navigate the Chilean legal system, and not necessarily in a belief that a consultation mechanism was the solution to all illnesses. After all, in the two years since C169 had been ratified Indigenous peoples had successfully been using lack of consultation in government and private projects as a powerful legal tool to protect their rights, especially to halt extractive activities on their territories[84] as I mentioned earlier (Abogabir, 2014). Because as Indigenous Leader 8 suggests, "in the end [despite] everything the Convention says, in order to protect rights [in practice] we have to bring it to the courts. That's the alternative Indigenous peoples have to [be able to] exercise their rights. Because the state – which [should be] the guarantor of our rights – is not doing it." There was also clarity about how political cycles can interrupt years-long work. Indigenous Leader 3 admitted: "we wanted to participate [in the Consultation] because we anticipated that the change in government was not going to be beneficial to us. Because most of us [had been in contact with] the previous government. So, not having communication with the [new] government was going to invisibilize us even more."

[84] See footnote 109 next chapter for more details about how failure to consult has been used to halt investment projects.

From the government's perspective, there was also much more than the legal obligation described in point b. When I asked for more details about the government's urge to start the Consultation, Senior Official 1 said,

> I think it's a mix of things. It's at the same time a pragmatic, realist [decision], but also with a level of conviction at the level of ideas. It's pragmatic and realist because… since 2008 we had been witnessing *increasing judicialization* in the country… There were lawsuits launched by Indigenous communities, many times against investment projects, that were beginning to delay the approval of such kinds of projects. *And there was quite a bit of [social] unrest* in this regard. On the other hand, we had another well-known element, which was the situation in the Araucanía region[85], which didn't necessarily have to do with C169 nor consultation [specifically]. But *in the end all untied ends are tied together*, because there is obviously a failure of the State in not having an institutional arrangement that allows involving Indigenous peoples in decision-making… (emphasis mine)

This statement is very telling. While it also speaks to pragmatic considerations, that practical push has a different flavour. First of all, it reflects a concern with the administrative and material reality of judicialization, especially that linked to extractive economic activities.[86] Having a consultation framework validated by Indigenous peoples (unlike DS124) was seen by the government as a way to reduce the risk of investment projects being threatened by Chile's legalist tradition I just described. This concern for extractive economic activities on Indigenous territories – as I elaborate later – was a guiding force throughout the whole Consultation and had a profound impact on how the regulation-making process unfolded, as well as on the outcomes. The passage also acknowledges how the practice of consultation, while apparently not directly connected to Indigenous demands at other levels, is actually closely connected. This powerful official understands that there is a failure of the state – although this failure is framed more in institutional than political terms – and that this failure produces social unrest. Which also links to a historical lack of trust perpetuated until this day. As UCAI Planner 2 said, "the existence of DS124 created huge distrust. [Indigenous peoples] yelled at you or said, 'as long as you don't repeal DS124 we will not enter conversations with the government. You are violating our rights' blah blah… That didn't allow for a smooth dialogue and that's why creating a mechanism to replace DS124 became a pressing matter."

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[85] He was referring to the increasingly violent conflict between the Chilean state and the Mapuche nation, which began with the military occupation of Mapuche territory in the late 19th century, as described in Chapter 3. For Mapuche accounts of this history see Toledo Llancaqueo (2007) and Nahuelpan Moreno, Huinca Piutrin, & Mariman (2012).

[86] Chile's traditional leading industries are mining, fishing, agriculture, and viticulture. Mining is the largest contributor to the GDP and to the country's exports, accounting for nearly 57 percent of exports. Fish products, paper, and chemical pulp are also key exports and often located on Indigenous lands (Gobierno de Chile, 2018a).

The quotes above suggest that the push to regulate the duty to consult was a reactive measure of the government in the face of Indigenous mobilization and the state's dysfunctional relationship with Indigenous peoples. I already mentioned how the ratification of C169 was to a large extent a desperate effort by the Bachelet government to give a political signal after the killing of a young Mapuche community member – Matías Catrileo – in the hands of the police on January 3, 2008. I would argue that the ambitious Consultation was also a way of showing commitment, of doing something, especially after the killing by police forces of a second Mapuche youth – Jaime Mendoza Collío – in August 2009.

It begins to become apparent how legal obligation, political conviction, and practicality were deeply intertwined, because as Senior Official 1 explained, "[if] ministries, regional governments, metropolitan governments, services have a duty to consult… in practice that means having consultation mechanisms in place. [But] mechanisms that require timelines, require procedures, require stages, require having people in charge, require a certain grounding of [otherwise abstract] principles." So, the creation of DS66 was not only a way of fulfilling an international law commitment, but perhaps most importantly, an exercise to achieve legal certainty. As he put it, "you regulate to give more precision, more certainty [to consultation], to work through the details of how, when, whom, what [to consult]… Precisely because it's too general." And it is true that C169 is quite general, as many conventions are. International law instruments acknowledge that there are differences across countries and that agreements need to be adapted to local realities. So, in a way this need for legal certainty and procedural precision relates to policy implementation, to the ability of government agencies and Indigenous peoples to be able to carry out consultation processes in practice. That is precisely what a regulation is supposed to enable.

I do not doubt that legal obligation and pragmatism are solid enough grounds to understand the government's decision to regulate consultation early on. However, I would like to complicate the picture and argue that this impulse towards legal certainty was actually grounded in fear – something planning theorists have long discussed as a powerful, yet often unrecognized, force behind planning action (Forester, 2009; Hoch, 2006; Sandercock, 2003). Government Lawyer 1, who actively drafted DS66 told me that "the [high-level political] directive was 'let's make [consultation] *reasonable*'" (emphasis mine). But what did they mean by reasonable? He continued: "In other words, let's do it, let's do it well, but don't paralyze the whole public administration, don't paralyze private investment, don't paralyze Congress." As I expand in the next chapter, appealing to reasonableness was a way of dealing with what I see as fear of judicialization, fear of paralyzing the operations of the state, fear of slowing down the investment projects on contested Indigenous territories

that fuel the economy, fear of social unrest and conflict arising from the lack of institutional participation of Indigenous peoples in decision-making, fear of interfering with the proper functioning of the legislative machinery. These fears not only triggered the political decision to comply with C169 early on, but also permeated many methodological decisions, shaped the writing of DS66 itself, and are at the base of the disagreements at the end of the process, as I elaborate below.

Regardless of their different underlying motivations, both the government and Indigenous peoples agreed on the problematic nature of DS124 and the need to work towards a regulation mechanism according to C169 standards. However, there was also shared agreement that a consultation mechanism is just one element in a much bigger picture of Indigenous/state relations.

4.2.3 One step at a time: Consultation as incremental progress

Finally, most interviewees understood the writing of DS66 as a step in the right direction, while recognizing that the discussion did not end there. In line with the pragmatic considerations above, Indigenous Leader 1 framed the decision of her organization to participate in the Consultation as follows: "we are quite clear that no success happens overnight… we have realized that achievements grow over years of work, not from one day to the next. Despite protesting, fighting, and so on." This points to the need to see struggles for Indigenous rights with a long-term vision and to understand the duty to consult as part of a larger trajectory. Indigenous peoples had been mobilizing for the ratification of C169 since the return to democracy; so, working through the nitty gritty of implementation was the result and in a way a continuation of this decades-long work.

Some Indigenous leaders also saw the Consultation as a remarkable milestone in light of the history I presented in Chapter 3, and even as a space that opened up opportunities for a new relationship with the state. Indigenous Leader 3, who participated in the Consensus Table until the end told me:

> We had never had this opportunity before. The state had never sent us a proposal of what it planned to do for us to give our opinion, get together with them and discuss… It had never happened. And I did attend the Great Gathering in Santiago, and I did participate in [the process that led to] the ratification of C169. And I'm telling you, I have been a community leader for 14 years and this is the first [time]… We had never had the opportunity to tell a Minister to their face: "I have these concerns, I feel this way."

Producing an improved consultation mechanism to replace DS124 was of course important. After all, consultation is a legal reality today and has huge material implications for Indigenous peoples. As the same leader told me, "[they wanted their] problems to be reflected on the [regulation] document, which is why [they] proposed to draft a document of their own." They wanted to have a say on how consultations should be carried out, so that they would not be just informational processes. So, while participating in the Consultation was "a giant step" for the Colla participants, creating a regulation was not just a goal in itself. Reflecting on the outcomes, Indigenous Leader 1 said: "whether it was us or [other Indigenous representatives participating] it was not going to be totally successful… That's looking for 100% and 100% is never achievable… Total success doesn't exist, there will always be something preventing full success and that has to be accepted. So we need to keep working in search of that little improvement, and then again something else will appear that won't fully satisfy you either."

For the government, "the consultation mechanism was like the starting point for everything else," as Senior Official 1 admitted. When I asked for more details, he added: "there were many decisions that required consultation… *I'm not saying that consultation was a stumbling block*, but from the perspective of other things [the government] wanted to do, if you didn't move forward with consultation, you couldn't move forward with anything else" (emphasis mine). This statement suggests an understanding that implementing the duty to consult was part of a continuum over time, but it also makes clear a very instrumental interest behind the urge to have a regulation in place. In my view, it also suggests that in fact the government *did* see consultation as a sort of stumbling block. Replacing DS124 and producing an instrument validated by Indigenous peoples was a relevant step because it allowed *other* things to happen. These things included all of the other issues that were supposed to be discussed when the Consultation initially started – such as presenting a constitutional recognition bill to Congress and changes to government institutions responsible for Indigenous matters. Very importantly, regulating was also a step towards reducing some of the fears I discussed above, especially regarding investment projects on Indigenous lands. In short, regulating the duty to consult was an incremental move in the search for legal certainty discussed earlier.

When DS66 was enacted at the end of the Consensus Table despite massive Indigenous opposition, triggering the lawsuit before the ILO, the government resorted to an incrementalist discourse to minimize the differences with Indigenous representatives and justify the legal imposition. The Consultation's Final Report states that:

> Consultation with Indigenous peoples is an ongoing dialogical process, which does not stop with this consultation process. Hence, the Government extends an invitation to Indigenous representatives to keep [the dialogue] open over time, so that is it possible to improve and revise the regulation in order to adjust it according to the challenges that the implementation of the duty to consult will bring for [Chile, thus helping us] overcome the differences that still divide us (Gobierno de Chile, 2013, p. 1, translation mine).

The next sections delve into how this dialogical process evolved and how the differences that still divide the government and Indigenous peoples began to grow. They shed light on both the significant process innovations that took place from a participatory planning perspective, and on some of the more substantial mechanics that were shaping the process and outcomes, especially during the actual writing of DS66.

4.3 How the Consultation happened

Once the political decision to regulate consultation was made, the time came for making methodological decisions. Where to start? How should the government go about a process of this kind? Remember that Piñera had recently taken office in 2010 after more than two decades of right wing political parties not being in power. This meant that people in leadership positions – including the Presidential Commissioner for Indigenous Affairs and the Minister of Social Development – were new to their roles and not very familiar with the operations of the state in general, not to mention with Indigenous affairs in particular. Most of the UCAI planners who designed and carried out the Consultation on the ground, as well as helping write DS66 – who were specifically hired for the task by the Commissioner – were not familiar with Indigenous matters either.

4.3.1 An opening reflection on the government planners who led the Consultation

So, let me pause to consider the team that led the process. This research aims to give texture and voice to practices that usually go unexamined under the broad veil of planning and policy-making. But who makes Indigenous policy in Chile? How do their own standpoints shape the processes and outcomes of planning? And in this particular case, what kinds of embodied experiences and worldviews informed the Consultation and the writing of DS66?

As usually happens, when I met with each interviewee the conversations started with introductions. It was striking (yet not totally surprising) that most UCAI planners were non-Indigenous and generally knew

nothing about Indigenous matters prior to landing in government. Most were invited to join the UCAI through personal networks; not because of their previous planning experience or familiarity with Indigenous realities. For instance, one UCAI planner[87] who played a key role in the process explained his involvement saying:

> I was not very close to Indigenous issues before I joined the government. Actually, I had devoted most of my life to engineering. I worked in real estate, in construction, for a mining company in the North of Chile… The year before I joined the government I spent a year volunteering… in the Middle East… because of my… ancestry. In a way, when I came back I was looking for something that could fulfill the curiosity I had before leaving for the Middle East. I had a drive to make a turn in my professional life, to stop working in real estate… I was looking for something different… when [the Commissioner] called me at the recommendation of a friend of mine… And that's how I started to immerse myself in the Indigenous world.

Similarly, another UCAI planner introduced himself like this:

> To be honest, my arrival to the MSD – and to the UCAI in particular – was quite strange… I was working with a consultancy company and the Commissioner… called me to invite me to an interview. He asked if I was interested in joining the Unit to work in the Indigenous world… For a long time I had been interested in public policy… I had been working for 10 years in the private sector and wanted to experience how it was like to work in the public service. So, although I knew nothing about Indigenous realities, I told him "Let's do it. I'll join your team…" I would say my knowledge about Indigenous issues was essentially [LAUGHS] minimum… what you might have learned in school… and maybe some extra-curricular activities related to Indigenous issues… some Catholic mission trips where I first encountered the Indigenous world. But after that I did not have any ties.

Very similar to his two colleagues above, another UCAI planner told me:

> Well, I'm a journalist… And I was always very involved in media and communications. I had a business, a communications company. I did radio shows and then I worked for a long time for a newspaper… where I wrote articles, sport reports, many things. And when I was working there, the Commissioner called me and invited me to work with him as a communications specialist… But I had no clue… I had no idea about Indigenous issues. I mean, I remember that day, when I came to the interview and I started to study a lot. Reading the newspaper [LAUGHS] and I started to become fascinated with Indigenous issues, I began to study, I studied C169 a lot, UNDRIP, the Indigenous Law, I started to read history.

I do not wish to judge the training and qualifications of these planners – which could be the focus of another research project. To be fair, the ignorance and inexperience the planners describe are symptomatic of Chile's

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[87] METHODOLOGICAL NOTE: Only in the case of the three quotes below I am not identifying the planners using codes. Given the personal nature of these accounts, assigning codes could make the planners recognizable to readers familiar with Chilean political circles, as I continue to use other passages in the rest of the dissertation. Since these three planners asked for anonymity, this is a way of ensuring other quotes cannot be attributed to them.

non-Indigenous population more generally. The educational system does a poor job of telling the settler colonial history of the country, so it is not surprising that government planners share this widespread lack of awareness. Moreover, people doing planning work in Chile are not professional planners by training and instead they come from different disciplines, as the UCAI team illustrates. Interdisciplinarity is not a problem per se, of course. However, lacking formal training in planning reduces the chances of developing a shared understanding of the role government planning and policies have played in the dispossession of Indigenous peoples. Also, lacking familiarity with Indigenous realities can be extremely harmful if your work involves working with Indigenous peoples and making decisions on behalf of the state that have enormous impacts on Indigenous peoples. As CONADI Indigenous Councillor 1 framed it,

> The state is still in debt with Indigenous peoples. They still have this knowledge gap that does not allow them – willingly or unwillingly – to move towards developing policies that are more relevant to our peoples. I think there still is a huge lack of information that does not allow them to recognize our problems. And if there is no intervention, the conflicts will grow.

Instead of judging, I would like to call the reader's attention to the ways in which inexperience, ignorance and curiosity about unknown realities, personal sensitivity due to family history and background, and fascination with the "Indigenous world," among others, might have shaped some of the decisions that were critical for the Consultation. The idea of *phronesis* – or practical reason, as theorized by Aristotle[88] – will serve as a lens for the analysis. "Practical reason, as a theory of argumentation, holds that a decision depends on the person making it, and that formal rules of decision-making cannot be abstracted from these people and their actions into formal systems of demonstration modelled [sic] on deductive logic" (Fischer, 2009, p. 117, emphasis in original). There is no doubt that the planners' lack of experience working with Indigenous peoples helps explain their prejudices, short-sightedness, and some of the failures at the beginning of the Consultation, which in turn help understand why Indigenous peoples mobilized so strongly against it and successfully halted it in September 2011, a few months after it started. As UCAI Planner 1 reflected in retrospect, "there is a big challenge ahead there in terms of training, of understanding the human side, of [developing] a culture around Indigenous consultation within the state as a whole." However, I would also like to suggest that the planners' ignorance and novice eyes fuelled a genuine curiosity for learning and triggered methodological

[88] Flyvbjerg (2004) explains that "in Aristotle's words, *phronesis* is an intellectual virtue that is 'reasoned, and capable of action with regard to things that are good or bad for man'… [it] concerns values and goes beyond analytical, scientific knowledge (*episteme*) and technical knowledge or know how (*techne*) and it involves what Vickers (1995) calls 'the art of judgment', that is to say decisions made in the manner of a virtuoso social actor" (284-285, emphasis in original). He further argues that "*phronesis* is commonly involved in practices of planning and, therefore… any attempts to reduce planning research to *episteme* or *techne* or to comprehend planning practices in those terms are misguided" (284-285, emphasis in original).

innovations at a scale never seen before in Indigenous policy-making. Their minimal historical knowledge predisposed them to be more open-minded and humble at times, and to make decisions from a more intuitive place, as some of the quotes presented in the rest of the chapter suggest.[89] In particular, as UCAI Planner 3 explained,

> The experience of traveling and meeting so many [Indigenous leaders]… Of going from conversations that were business-like or political at the beginning, and then start having more humane conversations later on. All of that makes one realize the problems facing Indigenous peoples; how private companies – excuse my French – rip them off and there is no public awareness about it.

The passage above is illuminating. It echoes the literature on the "pedagogical potential of truth-telling" (Regan, 2010, p. 11) and first-hand experiences in "initially unsettle[ing] and then transform[ing] how [non-Indigenous people] view the past as it relates to contemporary Indigenous-settler relations" (Regan, 2010, p. 13). But did this increased awareness about Indigenous injustice inform action in some way? How did inexperience and a more humble attitude translate into the planning and development of the Consultation?

4.3.2 The beginnings

Now let's go back to March 2011, when the Consultation was first launched. The initial approach took as a model the previous national consultations that had been carried out since C169 was signed in 2008,[90] "with some adjustments," according to UCAI Planner 4. The account below captures well many of the flaws of the first stage of the process. As the same planner described,

> There were information sessions, but perhaps the good thing is that many more information sessions were held. It was also possible to bring other [government] services into the process,

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[89] Wagenaar and Cook argue that "a deep knowledge of the assumptions and pragmatics that underlie the activity systems of the main actors in a policy issue is one of the prerequisites for the analyst who aspires to a reformed and effective role in… contemporary politics. Policy analysis in the context of modern governance requires that we bring the person back in. The analyst needs an inside understanding of the formal and tacit knowledge that informs actors' daily activities. A lack of understanding of the practices of policy actors, in the sense of a thick description of what it takes for the actor to be an experienced practitioner, would keep the analyst from understanding the pragmatic roots of contested policy situations. People solve problems by employing their commonsense rationality, their *phronesis*; even when they 'apply' general knowledge, since general knowledge can never exhaustively cover the contingencies of concrete situations" (2003, p. 166, emphasis in original).

[90] Since in 2008 the TC had declared that article 6(a) of C169 was self-executing, as soon as C169 entered into force the Chilean government was mandated to conduct consultations regarding administrative and legislative measures that might affect Indigenous peoples. According to an internal document developed by UCAI planners and shared with me, between 45 and 50 consultations took place between 2009-2013. All of them were done while DS124 was still in force.

> such as the regional offices of the MSD… At the information sessions we provided a document including the contents of each [one of the five] proposal[s] and… a form to fill out. Similar to what had been done before, no major innovations… [but] the number of themes to be consulted was complicated; it was very difficult to jump from one theme to the next because… [the topics were] huge and I believe many people remained silent, because they actually didn't know [about the topics] or had not assimilated the large amount of information we were giving them… So, there is no doubt that the people who attended the meetings were interested in these topics, but they were swamped with information… Even though we had visual supporting materials… But even then, I believe it was difficult, very difficult that people could understand the actual content of the [five] proposals; that they could grasp what the most direct, concrete impacts of the proposals would be on them.

All planners I spoke with shared similar retrospective assessments of the methodology used and were self-critical. More or less explicitly, they justified their decisions by blaming inexperience, ignorance, inability to estimate the scope of the task ahead, or a combination of these. After all, from the government's perspective there were incentives to consult all of these substantial measures at the same time in order to reduce the fear of legal uncertainty as soon as possible on as many fronts as possible, as discussed earlier. As Senior Official 1 told me regarding the decision to put on the table so many themes at the same time, the Consultation was designed in this way "since it was understood that they were all very relevant themes from an institutional point of view, so *it didn't make sense to waste four years waiting* for a consultation about a consultation mechanism to end to only then be able to begin consulting the other themes" (emphasis mine). He recognized the naivety of the approach when he added: "at that time we made the decision to [consult] everything in tandem assuming that it wasn't that complicated… That's how we saw it at first." From the perspective of Indigenous peoples, however, "all of these institutional [changes] could not possibly be done without a consultation process. And [the process] could not use DS124, because it already lacked legitimacy," as Indigenous Leader 4 told me.

The cancellation and redesign of the process gave way to important changes at several levels. If the first stage of the Consultation was very much shaped by a high-level political mandate to settle as many topics as possible in the shortest of timelines, the following stages were much more informed by the on-the-ground learnings the rookie planners leading the process gained during the failed initial phase. The innovations included wide outreach to Indigenous peoples, an "effort" to equalize power imbalances by giving financial and logistical support to Indigenous organizations, the collective editing of DS66 by government and Indigenous representatives at a Consensus Table, and an overall emphasis on "giving dignity" and "elevating" the relationship between the state and Indigenous peoples. More importantly, the analysis suggests that the experience of drafting DS66 might have led to an incipient and modest "Indigenization" of government.

4.3.3 The reformulation

4.3.3.1 "We wanted to work with all:" On widening outreach and opening doors

A first concern was how to reach as many Indigenous peoples as possible. In the minds of the UCAI planning team, this would increase the chances of the resulting consultation mechanism being validated at the grassroots level. Given the controversies around DS124 this was a top priority. Achieving wide participation and representativeness then became a central objective, but also a big logistical challenge. As UCAI Planner 3 told me, "we wanted to work with all Indigenous… leaders. Now, you will understand that it's impossible to meet with, I don't know, the near million and a half Indigenous people in the country. So, one way or another there needed to be some filtering… We said 'Okay, where do we begin? Let's start talking to the CONADI [Indigenous] Councillors.'" From September 2011 to June 2012, the government approached the Councillors and some grassroots Indigenous organizations to consider ways of redesigning the process. According to UCAI Planner 2,

> It was almost an entire year of work, meeting after meeting with many Indigenous organizations. "Let's see, ladies and gentlemen, how do you want us to work on this new Indigenous consultation regulation together? What do you want? How should we do it? Hosting workshops? Who should participate? Should all [Indigenous] organizations participate? Should only some of them participate? [Traditional authority] councils? Community chiefs [legally recognized by the state]? Indigenous associations?" … There were countless meetings that were more underground [so to speak]… All people working in [UCAI] went to meetings all over the place – discussion meetings to see what should be done.

The change in the government's approach is significant not because it involved a radical transformation of the state apparatus or addressed the root of structural power imbalances, but because it suggests a partial shift in attitudes among the people doing Indigenous policy and planning. After failing resoundingly in the first stage, they acknowledged their limited knowledge about Indigenous protocols, political organization, and ways of making decisions. The fear of being accused of doing things wrong again made them collectively more humble and led them to give up some control over the process. As John Friedmann (1987) would say, a process of social learning took place as the MDS went from a fully top-down way of approaching the Consultation to something closer to a shared decision-making model with Indigenous peoples.[91] As a result of

[91] What the planning team did not fully realize at the time was that – despite being democratically nominated through elections – CONADI Councillors are still part of a state agency that is not validated by Indigenous peoples at the grassroots level. They are Indigenous individuals working within the government body responsible for Indigenous policy and are therefore functional to the state. They are not necessarily representative authorities according to the forms of political

this process two important decisions were made: the government was going to draft a consultation regulation proposal to share with Indigenous peoples and Indigenous Councillors would share the government's proposal at the grassroots level, with financial support provided by the government (see next point) but without UCAI intervention.

Indigenous organizations and CONADI Indigenous Councillors carried out dozens of self-organized, community-based meetings across the country to announce that a consultation was coming. The draft was released in August 2012 and meetings continued, now to review the government's proposal. Up to that point, the Consultation had been successful in terms of significantly opening up participation, both in numbers and regarding the development of a course of action mutually agreed with some Indigenous representatives. However, as I mentioned earlier in the chapter, there was a rupture from November 30 to December 2, 2012 when the government convened an ambitious meeting of Indigenous Peoples known as the Great Gathering to discuss the proposal with a wider audience. Reflecting on the experience, UCAI Planner 1 elaborated:

> It was quite chaotic at times, because there were internal fights [among Indigenous leaders]; 250 leaders that had never gathered before came together at that meeting… And that's when several [CONADI] Indigenous Councillors stepped down… I mean, it was very painful and strange, because we had been working for so long with some leaders, planning the gathering, everything was going great… And suddenly, halfway through the process, it was like they turned their backs on you.

Besides the understandable frustration given the situation, the passage also suggests how the planners were invested affectively in the process by this point. The controversy of the Great Gathering was not just an unsuccessful job-related activity, but was experienced almost as an act of betrayal. From the perspective of some Indigenous leaders – including several of the CONADI Councillors – however, the government was not respecting agreements and was trying to move forward with the regulation at any cost. As CONADI Indigenous Councillor 1 said,

> [The CONADI Council] had an internal preparation phase to analyze C169 in order to see how its application would look like [in Chile]. So we did an evaluation, we reviewed everything that was out there… But then the government framed things differently and said that [the analysis we had produced] was the proposal they had for us. And then the government wanted to make [that document] public in an open discussion at the Crown Plaza Hotel. I actually attended [the Great Gathering] with several Indigenous leaders… and I told them clearly what was going on. They realized this was a smokescreen and we left right away.

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organization of their own Indigenous nations. This lack of grassroots support became more visible as the process evolved and Indigenous peoples rejected the decision-making power given to this handful of non-representative leaders.

Despite the massive losses, community-based meetings continued with government support in order to keep reviewing the government's proposal and submitting counter-proposals. Almost 200 meetings took place and 11 Indigenous proposals were received by the UCAI. By March 2013 there was pressure from Indigenous organizations to sit down with government to discuss all of the proposals and work collectively on the final draft of the regulation. The Consensus Table was established and the government's approach to Indigenous participation and representativeness was similar: the government should not decide who should be at the table. As the passage below, shared by UCAI Planner 2, illustrates:

> [As soon as the table was created] began the first criticisms between [Indigenous] organizations: "No, but why is that person sitting at the table?" "No, but these folks are friends with the government" "No, these folks don't want this Consensus Table to work"… And some organizations withdrew from the table… And we said: "We will not intervene. If you want to make decisions about who can participate and who can't, that's a decision of Indigenous peoples themselves, not of the state. Because [according to C169] it's Indigenous peoples who should define representation"…

The government's decision not to get involved in how Indigenous peoples chose their representatives can be read in different ways. Formally speaking, it can be seen as a way of following what C169's Article 6 says about Indigenous peoples defining their own representative institutions (ILO, 1989). However, it was also a way for the government to cover its back regarding future criticisms of or questionings about the process and its outcomes. When faced with any challenges concerning the validity of the negotiation, they could always argue that Indigenous peoples themselves had chosen their representatives without government intervention. Trying to understand why so many people withdrew from the Consultation, despite the efforts the government made openly to make the process as inclusive as possible, UCAI Planner 3 reflected,

> Maybe due to [our] inexperience or I don't know, maybe for another reason… Perhaps we didn't know how to bring people together or to prevent many organizations from dropping out. There might be thousands of reasons… Regarding the formula [we used], I'm convinced that it's not the best formula, okay? But among a range of [alternatives] we considered we chose to do what we did… working together with the Councillors, working with all CONADI [Regional] Directors, putting together a list of all [Indigenous] communities [legally recognized and registered with CONADI], inviting them to participate through different media, through [rural] community radios, newspapers, certified mail…

Again, this passage points to the many ways in which inexperience shaped the process, both in terms of the flaws and the innovations that took place. Despite the pain and the feeling of confusion some of the quotes suggest, overall the planners leading the Consultation had a positive assessment of the approach and took

personal ownership over the process. They felt they "truly opened the door to everyone" and "genuinely made [their] best effort" to include as many leaders as possible.

4.3.3.2 "The government provides the conditions:" Letting go control

Another important methodological innovation concerned the government's agreement to provide logistical, technical, and financial support to Indigenous peoples. As UCAI Planner 4 puts it,

> [On August 8, 2012] when the Minister tells [CONADI Indigenous Councillors] "Look, here it is. This is the draft [regulation] of what the government wants… regarding how to carry out consultations… Now you take the lead…" that day the Councillors replied "Okay, this is an important step. We want to broaden the Consultation and will convene territorial meetings. But we will explain what this is about. You give us funds… provide the conditions… but we will go to the territories and explain the Consultation" (emphasis mine).

Initially, these conditions involved mostly financial and logistical support to do outreach and informational work on the ground with Indigenous communities. Costs associated with transportation, accommodation, food, renting meeting space, and meeting facilitation were essential. It also included legal advice in some cases. Compared with the initial approach – where the government unilaterally defined all leadership and logistics, and approached Indigenous peoples mostly with information-sharing purposes – this was an unusual move, which I would argue can be at least partially understood through the lens of *phronesis* I mentioned earlier. The move was even more unusual considering that most of the funds that flow from the state to Indigenous peoples usually take the form of grants or subsidies (Castro, 2003). The new approach became even clearer during the Consensus Table stage, as UCAI Planner 2 elaborates:

> [Indigenous leaders] proposed a group of seven advisers. We hired the seven lawyers permanently… for three, four months… Every month we paid for their professional fees so they could provide legal advice to Indigenous peoples. [We also covered the cost] when [Indigenous representatives] had to travel to other provinces – because they got together as a group in between the [official Consensus Table] meetings… We also paid for workshops organized by Indigenous organizations in order to share the information. Because, obviously, since the dialogue took [around] five months, it was necessary for [the Indigenous representatives] to inform the grassroots what they were discussing with the government… *so no one would think that decisions were being made at closed doors* (emphasis mine).

Regarding the request for legal advisors, Indigenous Leader 5 explained that they "put the cards on the table" and said "we can work as long as we have a technical support team. Because none of the community leaders is a lawyer or an attorney or anything like that. We all wanted to understand (C169 and the duty to consult) more." But what was behind the UCAI's decision to accept the request made by Indigenous leaders? I would

argue that part of it was fear of looking like they were replicating a top-down approach one more time, trying to influence Indigenous decision-making, or making decisions at closed doors. Adopting a hands-off approach was one way of showing the government was listening to Indigenous peoples demands and recognizing the mistakes made in the first stage, as well as being respectful of Indigenous approaches to deliberation and decision-making. For instance, talking about the initial meetings organized by CONADI Indigenous Councillors to discuss the draft of DS66 UCAI Planner 2 made very clear: "I didn't attend any of those meetings. We just facilitated, we hired consultants that could assist during the meetings, we hired lawyers."

However, the planners admitted that they also acted strategically. UCAI Planner 3 explained how the people who made the request for legal advice and financial support were those Indigenous leaders "that wanted to go ahead with the consultation process, [that were] the government's counterpart to discuss and reach agreement on the new consultation regulation." In a sense, a mutual reciprocity and accountability relationship had emerged. The planners wanted to cultivate that trust and show that they were acting in good faith. While this can be seen as a strategic move – and it certainly was – I would like to highlight the relational and empathetic rationale for the decision. Not only did the planners feel a responsibility to honour the support they were receiving by the group of Indigenous leaders who decided to continue in conversations with the government, but they also had expanded their understanding of the power imbalances at play in their work. As UCAI Planner 1 told me, the planning team developed an "understanding that this is not… a negotiation between just two parts… but that it's between the state and Indigenous peoples. I don't know if you understand me. There is a particular [historical] load and the state has to take responsibility for that. It has to take care of even the smallest details when it comes to sitting down [to negotiate with Indigenous peoples] so that [the process] is a success."

From this perspective, I see the government's engagement with Indigenous peoples' requests for logistical, financial, and technical support as a limited empathetic acknowledgement of those power imbalances, as well as a concrete measure that, in the words of UCAI Planner 3, "would allow them – as much as possible – to sit on an equal foot with the government to discuss a regulation of this kind." This methodological innovation also suggests an understanding on the part of the planners about how limited the state's conception of consultation was overall. As UCAI Planner 4 put it, "when you transfer resources to Indigenous peoples, that's when they start to get involved… Only then can they actually have an impact on [whatever] measure [is being consulted]. Not by attending informational sessions when they just get a document… go home, and nothing else."

4.3.3.3 *"We sat at the table with no methodology:" Regulation drafting and consensus building*

Perhaps the clearest expression of the learnings experienced by the planners throughout the process was that they agreed to the request by Indigenous peoples to establish a Consensus Table and work through the editing of DS66 collectively. The Consensus Table ran from March to July 2013. In a format and scale never seen before in Chile, around 20 government officials and 44 representatives from some Indigenous organizations sat down face-to-face to revise together the government's regulation proposal in light of all counter-proposals presented by Indigenous groups. On the government's side, representatives from nine ministries[92] had been trained by the UCAI during the months before the table was established. As UCAI Planner 2 told me, "the idea was that the table could actually make decisions, that we could discuss about mining, energy, environment, economy, etc. That people close to the ministers participated… Not just a mailbox, with us gathering [Indigenous representatives' opinions], going home, and coming back with an answer." This stage of the process also clearly illustrates the team's inexperience and ignorance, which provided fertile ground for methodological improvisation. As the same planner shared:

> We sat at the table with no methodology. We said: "Ladies and gentlemen, here we will build the methodology together…" Because I thought: "Shit, first of all, I am not someone who knows anything about methodology!"… Actually everything was done quite clumsily. [We said:] "We've received complaints that the mechanism was poorly done in the first stage… so this time we will build it together. And if we take longer, we take longer. But we need to do it together so we're all in the loop of what's going on, so we all agree."

Indigenous Leader 1, who sat at the Consensus Table until the end speculated saying:

> I don't think they had [initially] thought about sitting down with Indigenous peoples as a counterpart. Rather, I think they were planning to make their own proposal for us to then give them some feedback, add a few things, and then have the final proposal. So, since we presented a counterproposal and requested to work together in a joint proposal… that meant having both parties represented [at the Table]. And that changed things. In my view that's what they were thinking about. Not about establishing a working table with a counterpart in order to reach an agreement, or about working consensually to produce a shared document… That's why it [was necessary to] improvise.

While the UCAI team did not know how to proceed when faced with a collaborative exercise of this kind, this passage shows the ability of the planners to recognize and reflect on that lack of preparation, translating it

[92] Besides the MDS, the nine ministries represented at the Consensus Table were: Ministry of the President's Office, National Assets, Economy, Mining, Justice, Environment, Agriculture, Public Works, and Energy. There were also representatives from the National Commission for Easter Island (*Comisión Presidencial para Isla de Pascua*, CODEIPA) and CONADI.

into a humble acknowledgement of the failures of the process, even at the risk of seeming incompetent. The planner's quote also suggests that the approach wanted to give a signal to Indigenous peoples – a signal that the government was listening, that government timelines would not be imposed, that there was a real attempt at working together. Compared with the Consultation's early stages, the merits of this approach are evident, especially in light of the history introduced in the previous chapter. UCAI planners also wanted to show good faith and transparency since, as UCAI Planner 2 reported,

> There was a significant lack of trust… Indigenous peoples [did not want to] sit down with the government at first. So, we collectively decided to invite observers – which were the National Institute for Human Rights and the United Nations – as a way to send the message "Look, here we will all speak openly, no topics will be taboo, everything will be discussed regardless of… whether we reach an agreement on some matters or not. But at least there will be an open discussion. We will video-record everything and all videos will be posted [online] without being edited. Fights, hugs, everything will be [on the record]. *So, no one can say anything strange happened* [at the Consensus Table]" (emphasis mine).

Once again, fear and practical judgement show up in the cracks of the story. The team wanted to avoid at any cost that the process would be delegitimized later on because of perceived lack of transparency or partiality. This deliberate decision to improvise in the negotiation phase allowed for "the methodology at the negotiation table to [emerge] from the experience [they] were gaining as the sessions progressed," in the words of UCAI Planner 1. According to him, "in the end, we built a very strong working methodology, but it was not until the last five sessions… the first part of the process was quite chaotic, in the sense that we were exploring." In the following passage he illustrates in more detail this exploration and how the negotiation methodology evolved, starting from the agreement everyone made during the first session that all decisions should me made by consensus between the government and Indigenous representatives:

> During the first sessions we reviewed the whole regulation [proposal], we had discussions about certain themes, but we used to get stuck, it felt like we were not moving forward. So in the end we decided that each party was going to present… alternative counter-proposals taking into consideration the arguments of the other party, to see what each party could trade-off… So, we would discuss, everyone would speak, sharing arguments, and then later in the day both parties would share… new articles, new texts. And then we would see "Ok, this one seems fine, we don't agree with this one" etc.… When the issue was too complex, we would create small committees including, let's say, four Indigenous and four government representatives. And they would work out a text together, they would negotiate, and then they would bring this proposal before the Table… where the proposal would be approved or rejected… If you ask me now, of course we should have started doing it this way [with smaller committees presenting counter-proposals]. I mean, [it was] totally insane to sit down to listen to the forty-something people that were there, all with different views [as we did initially]!

As I describe in the next section, several articles of the original proposal were changed or removed, and others were added as a result of the negotiation. However, there was disagreement regarding three substantive matters, which in the view of Indigenous peoples were "the pillar of the regulation." Despite this lack of consensus, the government went ahead enacting DS66 in March 2014, which led all Indigenous representatives who had sat at the Consensus Table to sue the Chilean state before the ILO. This obvious failure from the perspective of the outcomes was perceived differently by UCAI planners, however. As UCAI Planner 2 told me, "I think the most valuable [outcome] of this… is the process itself. It's a new way of doing consultation, because we actually had a space where we made decisions together… there was a real effort made to reach an agreement."

4.3.3.4 "I'm not giving you a cup of tea with a sandwich:" Elevating the relationship with Indigenous Peoples

The discussions so far are closely connected to the last innovation I would like to discuss – the flourishing of an open discourse within government circles about "elevating" the relationship between the state and Indigenous peoples. While not a methodological innovation in and of itself, the idea of "giving dignity" to the space where the state's and Indigenous peoples' interests meet – which as I have said Barry and Porter (2012) characterize as a contact zone – through the duty to consult is significant, since it provided the ground and justification for many decisions the planning team made. The Great Gathering and the Consensus Table are the clearest occasions where this emphasis became visible.

Indigenous Leader 3 reported that "the opportunity was given for everyone to participate, for everyone to listen to each other; we were not looked down on… This exercise had never been done before… The fact that [the government] respected grassroots leaders, not only those Indigenous lawyers who live in Santiago, urban leaders." The reflections of UCAI Planner 1 below make visible the place the team was operating from:

> Perhaps for people who look [at Indigenous matters] from the outside it might seem like a trivial, light thing, but I feel that in this process Indigenous leaders were also given some dignity in logistical terms. I mean, Indigenous representatives traveled by plane, they stayed at the best hotels, the meetings had a certain level. [Indigenous leaders] were not hidden in a room somewhere, but [the process] provided certain standards. And we [the UCAI team] fought for that… [For instance,] in 2011 there was an important meeting between the state and representatives from the business sector [where some UCAI planners were invited]… It took place at the Crown Plaza [Hotel]; it was a high-level event attended by the most important businessmen [sic], it was very fancy… At that time we were organizing the Great Gathering… And I told [the Commissioner] "We have to host the event here" and he replied "Yes, we have to host the Great Gathering here. It has to be just like this event." I mean, with the same

> boardroom table, with live streaming… And we had arguments with everyone [in government], [but] we got the funding and we did it there… That's what I mean, we kind of wanted to elevate the level of the discussion starting with things that might seem so simple, but that [show that] you are setting a standard. You're telling [Indigenous peoples:] "I'm not giving you a cup of tea with a sandwich. I'm inviting you to the same venue where we met with the business sector. We meet with Indigenous peoples right on the same venue." You see? We wanted to send certain messages. And that's also why this regulation, this process is a historical milestone for me, because it elevates the level of the discussion and how the states sees, how the state relates to Indigenous peoples.

The decisions described above might seem prosaic and the rationale for them naïve and even problematic (i.e. interactions with the business sector being the benchmark for elevating the relationship with Indigenous peoples). But that is not the point. I want to highlight how, as the novice non-Indigenous planners learned about the many injustices faced by Indigenous peoples in the hands of the state, a sense of empathy grew, which translated into concrete actions. Maybe because of their self-recognized limited knowledge of Indigenous realities and of government operations, the officers had no shame in improvising methodologically and fighting for what they thought was fair within policy circles. In many ways, the process itself became the focus, as UCAI Planner 1 reflected:

> For me, this dialogue process is as important as [the one that created] the Indigenous Law [after the return to democracy in the early 1990s]. Why? Because for the first time… the state, representatives from nine ministries sat at the same table with representatives of the nine Indigenous peoples… talking as equals. And talking about rights… I was always within the state's side and at the [internal] negotiations there was never, never… the plan to steamroll [Indigenous peoples]. It was never like "Let's rip them off." It was never like that. It was always among equals.

I would not go as far as to say that the negotiation was among equals, since the conditions were obviously defined by the government and done according to dominant understandings of law, always within the margins of what Chilean legislation allowed, as the next chapter explores in more depth. The sovereignty of the Chilean state was never questioned, nor was its jurisdiction over Indigenous peoples. As Indigenous Leader 1 put it, "there is a feeling of impotence, because you are sitting down with government officials who have… a whole paraphernalia [in place], something powerful. And we Indigenous peoples have always been in a disadvantaged position." Nonetheless, the evolution of the Consultation reflects an increasing recognition on the part of the government of the inherently asymmetrical relations at play.

Most importantly, the precedent-setting methodological innovations that were put in place suggest a small shift towards addressing those asymmetries as much as possible, as one of the planners quoted earlier said. I

am the first one to say that as much as possible is not enough. But delving into the origins of that shift is a necessary step if the colonial trajectory of planning is to change, which leads me to the next section.

4.3.4 A closing reflection on the indigenization of government planning

Two of the most openhearted conversations I had during this research involved the rookie planners I introduced earlier, who played a key leading role in the Consultation having landed in government without much preparation – professional or otherwise – for their positions. Reflecting on what the Consultation had meant, UCAI Planner 3 told me: "within the government they accuse us of being pro-Indigenous peoples: 'Hey you! You're Indigenists and want to give everything to Indigenous peoples!' – they say. Well, that's why we work in an Indigenous affairs office [LAUGHS]… I think we have become passionate about the subject and are aware of the realities Indigenous peoples live." That passion was largely the result of the on-the-ground work they had to do, of the opportunity to travel, to see "the relationship [with Indigenous leaders and community members become] more familiar, more like a friendship." As UCAI Planner 2 shared, "bonds of trust that didn't exist before began to emerge." When I asked about how these relationships had grown, UCAI Planner 1 said: "perhaps our inexperience, the fact that we did not have a political role, that we had never worked with the state before… Perhaps all of that helped to build some bridges."

Reflecting on the process and the affection that grew among people who participated at the Table, Indigenous Leader 6 told me: "they became more humane; we made them more humane. We made them feel what our afflictions were, how [the regulation] applies in reality. Because sure, they make laws at the central level, but then you have to apply them here. But who applies them? People's judgement. And that's what we wanted them to realize." This short passage not only sheds light on the affective dimensions of planning work. It also confirms the disconnect between high level decision-makers and politicians and lower rank government officers (such as planners) applying regulations on the ground, as well as the importance of practical judgement.

But why would these individual, small-scale transformations in personal attitudes and perceptions be relevant to an analysis of Indigenous planning and policy-making in Chile? Let me go back to the idea of the colonial cultures of planning I have been developing in the previous chapters. According to Porter (2010), contemporary planning practice in contexts with a settler colonial history is grounded in sensitivities and rationalities that are inescapably colonial. In other words, existing practices are not only genealogically colonial

– in the sense of deriving from early practices of territorial appropriation and socio-spatial control that date back to colonial times. The practices are also grounded in "structures of feeling" that emerge from and reproduce particular understandings of human-environment relations. As I already mentioned, Porter draws on Huxley (2006) and Stoler (1995) to argue that these structures of feeling encompass "sentiment, affect and sensibility" as well as "calculative thoughts and actions" (Porter, 2010, p. 44).

If the colonial cultures of planning in Chile are to be disrupted, that change necessarily has to do with a transformation in those sensitivities, as well as those rationalities. Might the increased passion and awareness described by the planners suggest a small crack in those colonial sensitivities and rationalities that have characterized Indigenous policy-making and planning in Chile? And if so, what could be the implications at a more structural level? UCAI Planner 1 offered a reflection in this regard when he told me:

> It might sound silly, but I think we awakened a lot of sympathy for Indigenous issues within the government. It was a real issue. Everyone was concerned. I mean, whenever people saw the Commissioner or me they called us *peñi* [brother in the Mapuche language]. And everyone knew about it, everyone was paying attention to the regulation. I feel that the government developed affection for Indigenous issues. Regardless of what might happen in the South [of Chile]… around public safety issues… But most ministers became very immersed in Indigenous matters. From National Assets, to Agriculture, Education, Health… This process was so crosscutting and at the Ministerial Council [for Indigenous Affairs] all of the Ministers were there, and they started to understand, [the process] started to awaken certain sensitivity for Indigenous issues… I think there is a seed that needs to be taken care of, that was planted. It is very basic, incipient, but I think there is something there… So I think this is all very positive. I think there might be some hope for certain institutional changes to work on this issue. I think awareness for Indigenous matters found a place.

The planner referred to this as an indigenization of government. While modest, this incipient indigenization was possible because of the leadership of some government officials – such as one of the Commissioners and one of the Ministers of Social Development – who actively advocated for Indigenous rights within political circles as the Consultation evolved. UCAI Planner 3 described this advocacy work as "a big effort" of the entire planning team "trying to convince… different political actors to get their support to move this regulation forward." But while all interviewees shared the perception that overall there was a change among the government officers involved in the process, all of them also felt constrained in the work they could do.

The big effort they had to make trying to convince people speaks to at least two things. One is the generalized lack of awareness within government circles about the role state planning has played historically in the dispossession of Indigenous peoples, to which I have already referred extensively. The other is the existence of a very hierarchical political culture in Chile, which translates into a centralized way of making

decisions too. Despite the methodological innovations I just described, the Consultation was not the exception. This centralized approach had many implications, especially regarding the process of actually writing DS66 during the Consensus Table phase. Because, as UCAI Planner 3 admitted, they "had to produce the regulation at any cost."

At the end of the Consultation, (mostly non-Indigenous) state planners working with Indigenous peoples in Chile seem to find themselves at an odd space. On the one hand, many have a genuine interest in challenging the status quo. They recognize that things need to be done differently, and that the current relationship between the state and Indigenous peoples is not sustainable. They are conscious that the exercise of Indigenous rights – which continues to strengthen, now supported by the international agreements the country endorsed – is changing the landscape of state-led planning. They acknowledge that there is an inescapable historical baggage that fuels distrust and taints any possible relationship between Indigenous peoples and state planners. They see the limitations of existing governmental structures, rules, and procedures. And they have proved that they can actually begin changing their beliefs, learn about unfamiliar realities, and become more empathetic to the injustices faced by Indigenous peoples. On the other hand, system-wide change seems distant, which leads to the bigger and more complex question of how individual and collective transformative learning – such as the one reported by UCAI planners – might begin to translate into systemic change.

4.4 What the Consultation process brought about: A bird's eye overview

If the government's goal was truly to produce a mutually agreed consultation regulation with Indigenous peoples – as they publicly stated – the process clearly failed. Not only did several Indigenous organizations resist the Consultation from the outset or withdrew during the first stages – thus undermining the legitimacy of the process and its outcomes. But even those Indigenous leaders who actively negotiated with the government in the latest stages ended up repudiating the regulation due to the lack of consensus and the government's decision to go ahead passing DS66 anyway. This was the cost of producing the regulation at any cost.

The analysis of the Consultation echoes the tension between process and outcomes that has long permeated discussions among planning theorists (Fainstein, 2010; Healey, 1999; Huxley & Yiftachel, 2000). The failure at the level of the outcomes just described does not necessarily mean denying the several – though partial –

improvements made at the methodological and procedural levels. The lack of agreement does not necessarily diminish the value of the incipient indigenization of government planners either. According to Indigenous Leader 1, the Consultation helped to "break away a bit with [the government's] paternalism and with the submissiveness" of Indigenous peoples. However, the way in which the contents of DS66 were negotiated and the fact that the three most controversial articles were not agreed upon brings to the surface once again the persistence of colonial rationalities and a governmental modus operandi grounded in Indigenous peoples' domination by imposition of Chilean law (Burgos et al., 2006). A closer look at DS66 puts into relief these dynamics.

4.4.1 Matters agreed upon

When the government released the initial *Proposal for a New Regulation on Indigenous Consultation and Participation* in August 2012, the draft document included 27 articles[93]. As a result of the negotiation over more than 30 Consensus Table sessions (March-July 2013) some articles were removed, others were added or merged, and still others were substantially revised and rewritten in light of the counterproposals presented by Indigenous peoples. When the Table ended, 17 out of 20 articles had been agreed upon[94] (Gobierno de Chile, 2013b). This quantitative way of assessing the outcomes of the Consultation was the dominant narrative I heard from government officials when I asked about their overall views of the process. In the words of Government Lawyer 1, "we were all happy with seventeen out of twenty articles, only three were being questioned… Three out of twenty. I mean, we're talking that we reached a consensus with every person who participated, [and they] received legal advice." The official Consultation final report captures the process and its outcomes in a similar light:

> The Consultation process has been a big learning for the government, since it will not only allow to leave [DS124] – which has been so severely criticized by Indigenous organizations – behind. [The process] also made substantial progress regarding this legal instrument [consultation], such as: reaffirming that prior consultation is a right of Indigenous peoples and a

[93] The general areas the regulation covers are: definition of general concepts (*disposiciones generales*), consultation principles (*principios de la consulta*), and consultation procedures (*procedimiento de la consulta*).

[94] They were: 1) revocation of DS124, 2) object of the regulation, 3) definition of consultation, 4) state agencies governed by the regulation, 5) definition of Indigenous peoples, 6) subjects of consultation and representative Indigenous institutions, 7) good faith, 8) adequate procedures, 9) prior character of consultation, 10) entity responsible for consultation, 11) cases where consultation applies, 12) role of CONADI, 13) outreach, 14) stages of a consultation process, 15) timelines, 16) suspension of a consultation, and 17) final report (Gobierno de Chile, 2013b, translation mine).

> duty of governments; broadening the scope of measures that must be consulted; defining the stages and timelines all future consultations must follow; including mechanisms for Indigenous peoples to request a consultation process to be carried out when they deem it necessary; building a distinct and differentiated Indigenous consultation process into the Environmental Assessment Service; and incorporating intangible concepts – such as traditions and spiritual values – into the assumption of when a measure might affect Indigenous peoples directly (Gobierno de Chile, 2013b: 2, translation mine).

The changes just described do indeed mean an improvement compared to DS124, at least discursively. Let's remember that DS124 framed the duty to consult in terms of "listening to and considering the opinions of Indigenous organization regarding matters that might interfere with or relate to Indigenous issues" (Gobierno de Chile, 2009, translation mine). The re-written regulation was also an improvement compared with the original regulation draft presented by the government, although not always with the same level of depth. Some of the agreements concerned very procedural matters, such as the stages every consultation should follow and timelines for each stage.

A more substantial agreement involved the conceptualization of consultation as a right of Indigenous peoples and an obligation of the state, which elevates the legal status of consultation and makes it consistent with C169 standards. Another important negotiation involved removing all references to Indigenous participation as expressed in Article 7 of C169. This agreement was the result of strong Indigenous opposition to codifying the broad right to participation in a narrow regulatory framework. Indigenous peoples expressed concern that making reference to participation in DS66 would close the door to more substantial discussions about Indigenous participation in Chile – including parliamentary quotas and other forms of political representation – which according to them go well beyond the notion of consultation regarding specific measures.

Perhaps the most radical negotiations in terms of intercultural meaning-making involved discussions about traditions, spiritual values, and considerations beyond tangible impacts of government measures on Indigenous lands. As the next chapter elaborates in greater detail, there were important conversations at the Table regarding how Indigenous peoples and the state understand direct impact differently. These conversations brought to the forefront different worldviews, different ways of conceiving human-environment relations, and also the government's insistence on codifying Indigenous understandings into ways that can be procedurally captured without interfering much with the state's operation flows (see next chapter).

As the Consensus Table moved along and some agreements were reached, the distance between government and Indigenous positions started to become smaller. It is not surprising that less controversial matters were

more easily negotiated than those that involved substantial differences in understandings. In the words of Indigenous Leader 1, "we contrasted [our positions]… and started to quickly build consensus on the first articles, which were actually… the easiest points. But later on, as the pool of articles became smaller, those were more complicated." Reflecting on the mechanics of the writing process, UCAI Planner 2 told me that:

> [While the regulation draft was being discussed with Indigenous leaders at the Table], there were internal meetings with the government… We had meetings with the President, with the Ministers, with the advisers who participated at the Table, to see how we could find a better wording that would get closer to what Indigenous peoples were proposing.

Most of the changes to the original proposal were the result of this back-and-forth negotiation process, where Indigenous representatives also had internal discussion meetings, as one of the earlier quotes described. However, Government Lawyer 2, who worked directly on the final writing of DS66 disclosed that as a result of these internal high-level talks within government, during the negotiations with Indigenous leaders "some articles were edited; the wording of most articles completely changed. But when it comes to the most crucial articles, [UCAI planners] were able to keep the spirit of what the state wanted."

4.4.2 Disagreement on substantial matters

What were the most crucial articles the lawyer was referring to? What was the spirit the government was fighting so fiercely to protect? As mentioned at the beginning of this chapter, the disagreements concerned what administrative and legislative measures should be open to consultation, the definition of what it means for a government measure to affect Indigenous peoples directly, and how consultation should be approached regarding investment projects that might affect Indigenous peoples. Chapter 5 delves in depth into the mechanics of how these matters were approached and negotiated, but let me briefly introduce them here.

Even though the government has assessed the Consultation outcomes as a success, highlighting the 17 out of 20 articles discourse above, UCAI Planner 3 admitted that "the three articles there was no agreement on… are the most important ones, no doubt." Taken together these articles go to the core of what consultation should be about, since they serve to elucidate *what*, *when*, and *whom* to consult. While DS66 as a whole is meant to regulate and give procedural precision to consultation, it is in these articles that the contours and the depth of consultation as a right of Indigenous peoples find substance. It is not a coincidence that these were the most controversial and became the Consultation's key battleground. Reflecting on those three articles, the same planner added:

> We [UCAI planners] knew we had some limitations and Indigenous peoples too. Those sitting at the Consensus Table as well, they clearly knew that we were not able to compromise much. And that is why we did not reach an agreement, because of the demands of Indigenous peoples. Several counterproposals were presented regarding those three articles… Until at one point we had to stop and said: "We can only get this far."

What parameters defined how far government officials could go in the negotiation with Indigenous peoples? I suggested earlier that fear infused the development of DS66. Here I further argue that the negotiation limits the government set are intimately connected to the state's strongest fears – fear of paralyzing the economy, fear of paralyzing the state apparatus, and fear of consulting everything. Linking to earlier discussions, it is interesting how fear was used as a warning tool regarding both the risks of regulating and of *not* regulating the duty to consult. Not regulating was perceived as a risk in the sense that it could trigger further legal action against the state as a result of the failure to fulfill its international legal commitments. Regulating the duty to consult was presented as a risky move if the consultation mechanism ended up being "unreasonable," a concept further explored in the next chapter.

For Indigenous peoples sitting at the Table, the three disagreements amplify the state's inability to engage with Indigenous demands for self-determination. At the same time, however, the Indigenous representatives who participated in the process until the end were not naïve and always anticipated a potential miscarriage. As Indigenous Leader 1 eloquently puts it,

> We worked in good faith. We went to work with a white flag, hoping that the government would lower its threshold a bit, so to speak. We were hoping to reach a consensus that was favourable to Indigenous peoples… Perhaps not even favourable, but at least not detrimental. When we closed the process… we said: "we can get this far…" We even released a statement: "we cannot allow the government pass such a Decree," but [by then] we knew they were going to do it. That had been our initial fear… If they enacted [DS66] imposing those [three] articles it was a defeat for us. But we took that risk anyway… [C169] says that it is not mandatory to reach an agreement. It also says that the ultimate legal authority to make decisions or reach an agreement is the government's. And we knew that.

The fact that the planner blames the lack of consensus on Indigenous demands is particularly problematic, since it signals that for the government substantial matters were never actually up for negotiation. It suggests that – despite the massive deployment of a participatory planning approach and the government's increased "affection for Indigenous issues" – the playing field was always meant to be tilted.

4.4.2.1 *Investment projects with environmental impact – The fear of paralyzing the economy*

Indigenous peoples at the Consensus Table wanted DS66 – which was being developed in what they saw as a valid consultation process – to also regulate consultations related to investment projects with environmental impacts that might affect them, their territories, and their ways of life. However, according to Chilean legislation these kinds of consultations fall under the mandate of the Ministry of Environment through the Environmental Impact Assessment Service (SEIA). In other words, Indigenous peoples advocated for a single consultation legal framework to regulate the state's duty to consult. Why? Because in practice most consultations carried out in Chile since the endorsement of C169 concerned projects – public or private, many times related to extractive activities – that had environmental impacts affecting Indigenous peoples (Gobierno de Chile, ND). Also, because in the words of Indigenous Leader 1 "the SEIA regulation [DS40] had been rejected [by Indigenous peoples] nationally because it had not been consulted [properly]. And [the government] embedded [consultation of investment projects] within the SEIA. Obviously, we could not accept that they brought consultation into the SEIA, because [the process that brought about the environmental regulation] lacked legitimacy." Finally, Indigenous peoples claimed that most investment projects that reach the SEIA only trigger the duty to consult when it is too late (i.e. initial exploration has begun, territories have already been exposed to environmental damage, industry lobby is well advanced, etc.).

However, the government insisted that any consultation related to this kind of project should be carried out according to the parameters set by the Ministry of Environment, as opposed to by the MDS. Why? Government Lawyer 1 told me that they "thought the Environmental Assessment System was a very good place to do [those kinds of] consultation[s]… There was an absolute conviction about that. There was no one within government who said no – both from [UCAI] and within the government at large." When I asked for more specifics about why the government was so convinced that this was the best approach, he added:

> It was not an arbitrary thing… First, because there is a special administrative procedure [in place]. Second, because within this special procedure various public bodies pronounce and make observations to the project under evaluation. And *those observations might perfectly well coincide with Indigenous issues*. So, the idea is that… all of this information enters into conversation before the Environmental Qualification Resolution – which is the approval, the act, the [administrative] measure that approves or rejects the project – is issued. After that also come the suggested modifications… It's a dynamic process too, because the proponent [of the project] can make changes, propose new mitigation measures, compensation and reparation, and the [Indigenous] community can also participate in that dialogue. [Regarding] the timelines, there are [environmental] evaluation processes that get halted, they stop, they are suspended specifically so that Indigenous consultation can be done in a flexible way. In other words, we have an opportunity to carry out the consultation without a deadline, okay? Because

> it is possible to halt [the consultation]. *The only bad thing here is that we are missing an early participation stage*, where the proponent should reach some agreements with the communities before the project enters the SEIA. And that's not regulated, it's not formally done. And when it happens, it's awfully done. Because someone comes, gives you [money], doesn't give [money] to others, and shoot! You already divided the community (emphasis mine).

All of the reasons just listed are precisely the main concerns of Indigenous peoples. In other words, that consultation within the SEIA does not allow for Indigenous involvement before a proponent formally submits a project, because the government measure to be consulted takes place only after the proposal enters the system. As Chapter 5 explains in more detail, the interviews with government officials suggest that, despite the official narrative about the SEIA's technical expertise and about the convenience of having a specialized consultation process for projects that might have an environmental impact on Indigenous peoples, what is really at stake is the fear that so-called development projects will be delayed and private investment discouraged by the lack of legal certainty. The absence of that early participation stage in the environmental assessment process actually works as a protective shield against Indigenous peoples' right to consultation.

How did the government approach this disagreement? By staying firm in their decision to split the discussion and continue to develop DS40 in parallel. In other words, by adopting a compartmentalized approach to consultation standards. Explaining what happened, UCAI Planner 2 told me: "Indigenous peoples stated that the [SEIA consultation] framework was not enough, and we said: 'We think it is enough.'" Talking more broadly about the evolution of the Consultation, at some point UCAI Planner 1 was sharing how they "started from an absolute distrust. Not only because of the historical burden, but also because this was a right-wing government. Many times [Indigenous peoples] thought this government was trying to pave the way for industry, for business." And perhaps they were not so wrong.

4.4.2.2 Administrative and legislative measures to be consulted – The fear of paralyzing the state apparatus

The discussion above links closely to another disagreement – namely the definition of what kinds of government measures should trigger the government's duty to consult. The passage below, shared by UCAI Planner 2, captures well how the state explained what happened:

> The discussion split into two strands. Indigenous peoples said: "All things that may affect us should be consulted." And we replied: "Not everything *should* be consulted, not everything *can* be consulted." "Why?" they asked. And we said: "Because there are [administrative] measures that are not possible to consult due to their nature…" They are not subject to consultation *not*

> *because we do not want to, but because they cannot be consulted*. Because I can't follow an agreement I reached with you if it goes against the law, do you understand? And that is when [Indigenous peoples] said: "We disagree" (emphasis mine).

The government claimed that following the logic of Indigenous peoples – that any administrative or legislative measure that might affect them should be consulted – would slow down the whole government machinery. Framing the discussion in terms of what should and could be consulted brings once again the issue of reasonableness to the forefront. It also makes clear that the bar to assess what is or is not reasonable is the compatibility with existing Chilean legal frameworks. But as Indigenous Leader 6 explained to me,

> What happened was that, to them, administrative measures encompassed everything. Any administrative decision they could make: changing a computer, hiring employees, those are administrative measures. And [they said] those should not be consulted; otherwise everything would slow down… And we had not really thought about that. We wanted to apply [the duty to consult] to measures that affected us – Environmental Qualification Resolutions [of the Ministry of Environment], relevant things, things that mattered to us. We were not going to include everything. But [the government representatives] said: "Okay, but not all [Indigenous peoples] think like you. There will sure be someone who will say [something], who will slow everything down." To be honest, we had not looked at it from that point of view and we never picked up that idea. What we were talking about were all administrative and legislative measures that affected us.

How did the government approach this disagreement? By reducing the conversation to absurdity as just described, state officials pushed for a clear definition of the types of administrative measures that could be reasonably consulted appealing to Administrative Law. Drawing on legal distinctions present in Chilean legislation, they differentiated between so-called regulated (*regladas*) and discretional (*discrecionales*) measures (see Chapter 5), with only the latter being subject to consultation. In imposing this legal filter to the assessment of what can be consulted, the government further proceduralized the right to consultation in ways that conflict with Indigenous peoples' understandings of what measures might affect them or not, as detailed below.

4.4.2.3 Affecting Indigenous peoples directly – The fear of consulting everything

Finally, the third disagreement concerned the definition of what it means that a government measure might affect Indigenous peoples directly. Here the conversation had various related strands. One involved agreeing on what affecting *directly* meant and the types of direct impacts requiring consultation (i.e. impacts on Indigenous lands, ways of life, relocation, traditional knowledge, etc.). Another concerned whether a measure should affect Indigenous peoples *specifically* in order to be consulted, or if any measure that might affect the

whole population – and therefore also have an impact on Indigenous peoples – should also be consulted. Another consideration was whether a measure should affect *an entire* Indigenous nation to require consultation, or if it was enough that a part of an Indigenous nation was affected. Thus, the discussion touched on issues of power to define what count as impact, Indigenous identity, and Indigenous unique status.

As the passage below illustrates, concerns about what should be consulted and how to assess whether a measure affects Indigenous peoples or not are also closely intertwined with the fear of slowing down the machinery of the state described above. UCAI Planner 2 put it like this:

> At some point [Indigenous peoples] said the appointment of the Minister of Social Development should be consulted, because it is the Minister responsible for CONADI and, therefore, for Indigenous affairs. And then we said: "No, but how are we going to consult the appointment of the Minister? That is a position of trust chosen by the President. We cannot consult those kinds of matters. In the end, we will hinder the proper functioning of the state if we consult everything."

The quote also reinforces the supremacy of presidential power and discretion over Indigenous peoples' perceived potential impacts. How did the government approach this disagreement? By merging into one single article the discussion about what measures should be consulted and what affecting directly means during the second last session of the Consensus Table. The result was Article 7, entitled "Measures that might affect Indigenous peoples directly" (*Medidas suceptibles de afectar directamente a los pueblos indígenas*) (Gobierno de Chile, 2014). While there was no agreement on the article as a whole, over the course of the negotiations Indigenous peoples were able to broaden the scope of what impact means to encompass what the government understood as intangible effects that might not be perceived by non-Indigenous peoples, such as those related to culture, traditions, or spirituality. As Government Lawyer 2 explained,

> At the beginning we had a catalogue [of measures that affected Indigenous peoples directly] that resembled the impacts [found] in the environmental legislation. And in the end that was changed to more cultural aspects [on the one hand] and more objective [aspects on the other], which is when Indigenous lands are affected… [The goal] was to encompass [the Indigenous] worldview. Because we also had a discussion at the Table, what is the Indigenous worldview? Because one is not able to understand… but we were able to include cultural aspects, religious aspects, everything that can affect you within your environment.

As a whole, the interviews make clear that as long as the state's core concerns were not deeply compromised there was room for negotiation with Indigenous peoples. It is also possible to see how the government's

approach was to break down and proceduralize the exercise of Indigenous rights in ways that allowed making Indigenous demands amenable to state operations.

4.4.3 Some general criticisms of the process

Besides the substantial disagreements in legal content, spirit, and interpretation just described, several interviewees shared concerns about more general aspects of the Consultation as a process.

4.4.3.1 Low participation numbers

Despite the government's shift towards a more participatory planning process as the Consultation unfolded, there were still accusations of the process not reaching as many Indigenous peoples and communities as it should, given the impacts of DS66 on the lives of so many people. According to official numbers, in the initial stage (March-September 2011) 5,541 people participated in a total of 106 information sessions. Once the process was stopped and redesigned, 6,644 people participated in a total of 192 self-organized meetings between 2012-2013 (Gobierno de Chile, 2013b, p. 23). However, as the process moved along several Indigenous organizations and leaders dropped off, including some CONADI Councillors. While the Great Gathering marked a significant breaking point in this regard, the trend also continued into the Consensus Table phase. At one of the interviews I had with government planners, I asked what were some of the issues that came to the table and motivated Indigenous leaders to refuse to participate. UCAI Planner 3 said,

> One was the issue of land [restitution]. Another was asking us [the government] to intercede before the forestry industry, so that they stop destroying Indigenous lands, taking away their lands. Other reasons for not participating related to having more opportunities for development, access to education, access to university, having more Indigenous scholarships, having farming and livestock subsidies. What else? … That if a company wants to build a hydroelectric plant, for instance, that they create job opportunities. I would say those were the main reasons some Indigenous leaders had to withdraw from, or to decline participating, or to participate with reticence in the process.

Elaborating on the reasons that motivated him to withdraw from the Consultation after the Great Gathering experience, CONADI Indigenous Councillor 1 reflected,

> [When you hold] these kinds of [leadership] positions you interact with people who make decisions. And you realize that we can also have an influence in the same way. But you also realize that some people are [in their political positions] to shape structures in order to… better defend their interests. I think that's what happened during the discussion of C169 and during

> the Consultation. So, when you see those directives clearly you say… "This corpse is not mine, so there is no reason for me to light a candle." And that is what happened when we realized [that the government wanted to move ahead with the regulation at any cost]. I was among the first [Councillors] to withdraw from the table because we felt that there was not a clear understanding of what we actually wanted to build.

There were also accusations that some grassroots organizations not legally recognized by the state – especially those the government labeled as radical[95] – were not even invited to join the process in the initial stages. The planners I spoke with defended themselves from these kinds of criticisms arguing that, as UCAI Planner 3 said:

> Since we had no other option but to create the regulation – because it was a challenge taken on by the Government and by the [UCAI] – we decided: "Okay, unfortunately, those who do not want to participate will not participate. And those who want to participate, well, let's make them a part of this process and let's move forward with those who want to." In that sense, we were quite open and honest with the CONADI Councillors and the Indigenous leadership in general. I am very critical of some people who did not want to participate, because I did not find the arguments or the reasons they put forward were pertinent. But well, as the saying goes, all is fair in politics.

4.4.3.2 Centralization and low representativeness

Connected to the previous point, several people criticized the increasing centralization of the decision-making process, especially towards the latest stages of the Consultation. Centralization on the side of the government was always open and there was no doubt that the UCAI was the unit responsible for leading the implementation of the duty to consult. Even within the UCAI, the leading team was small and this was seen as a way of keeping control of the process. As UCAI Planner 1 told me,

> We kind of centralized everything in a team of three, four people. First the [Consultation] design, the issue of fundraising, traveling across the country to begin connecting with Indigenous leaders… And within the government too, defining the wording of the texts… In a way I feel like I was involved in the whole process. I always illustrate it like this: I was doing from bus ticket reimbursements to Indigenous leaders, to bilateral meetings with the President [LAUGHS], to explaining the themes at the Ministers' Council meetings, negotiating at the [Consensus] Table, convincing Indigenous leaders to not step down when they wanted to leave [the process], meeting with leaders who were against [the Consultation], meeting with the National Institute for Human Rights, with the UN… In short, we had to do all kinds of things… And because this was the first large consultation, perhaps the most important that has been done and will be done in a long time… I think it was necessary perhaps to have such a

[95] They include the Coordinadora Arauco Malleco and the Alianza Territorial Mapuche, among others.

> centralized team like the one we had. I mean, I can't picture a much bigger team, because it was such a complex issue…

Perhaps because of this way of understanding decision-making, all government officials I interviewed saw the atomization of Indigenous leadership as a challenge. The diversity of forms of political organization and approaches to making decisions captured in the opening quote in this chapter destabilizes the hierarchical modus operandi of the Chilean state. As UCAI Planner 3 explained,

> One of the big problems I see in Indigenous politics is the issue of representation. What do I mean? One goes out and starts talking to certain Indigenous leaders that call themselves representatives, but at the same time other 50 people appear saying: "Listen, they do not represent us. They do not represent anybody. Why should I comply with what they say?" So, I think the issue of Indigenous representation remains an unmet need… Because, in the end, the government does not know or does not have someone to talk to. In that sense, it is imperative to create an Indigenous Peoples' Council – call it whatever you want – that is representative, with representatives from all Indigenous peoples across the country.

Maybe that is why the format of a manageably sized Consensus Table was appealing to the state. From the government's perspective, not having a clear counterpart that met its criteria for representation was a problem, as the planner clearly said. And the long-term solution would be to have a national, centralized body with all Indigenous nations sitting at it, which could make decisions and avoid excessive consultation. Indigenous peoples looked at the issue of representation differently. In fact, the centralization of the Consensus Table – which is where DS66 was actually negotiated in the end – was the main criticism among Indigenous circles and one of the reasons several organizations decided to withdraw from the process. Most importantly, as the next chapters suggest, for many Indigenous peoples the discussion is really about the government's inability to understand and engage with more decentralized forms of political organization and decision-making.

4.4.3.3 Lack of legitimacy

All of the factors above tainted the Consultation and DS66 with a veil of illegitimacy. Numerous statements were released by Indigenous organizations questioning the validity of the regulation (Mapuexpress, ND), as well as accusing the leaders who sat at the Table of selling out to the state. As Indigenous Leader 4, who withdrew from the process put it, "we never participated in that consultation table. We rejected it because it gave no guarantee that the process and the regulation that was going to produce was really going to protect Indigenous peoples' rights."

The fact that even the Indigenous representatives who contributed to the Table rejected the document further strengthened the perception that DS66 was an invalid mechanism. Detailing what happened towards the end of the Consensus Table, Indigenous Leader 7 explained that "since in the end there was no consensus regarding those three articles… we said: 'leave in written on the meeting minutes that there is no regulation. There is no consultation regulation while these three articles – which are the pillar of the regulation – are not mutually agreed upon.'" However, as I already mentioned the government went ahead and passed DS66. The instrument entered into force on March 4, 2014 and Indigenous representatives who had been part of the Table "sued the government for violating the rights of Indigenous peoples," as she said.

Reflecting on the process, most Indigenous leaders shared the wide disappointment about the outcomes, but some of them also had a more nuanced assessment. Indigenous Leader 1 told me, "of course [we] had hoped [the regulation] was going to be much better… We didn't say: "this was the best." No. But we did give as much as we could, we made as much progress as was possible. Everything that could be fought in that space, we did. And I think valuing the effort made is also part of [assessing] success." This passage confirms that planning's contact zone in Chile is dynamic, transactional, and relational, marked by tensions that although grounded in the foundational injustice of Indigenous dispossession at the hands of the state, exceed reductionist understandings of Indigenous/state relations as oppressor/oppressed relations only. State-led initiatives have inherent limitations, but at the same time are important spaces of struggle and action – both in opposition and within state structures (Coulthard, 2014; Porter and Barry, 2016). In the end, it is difficult to make a black-or-white assessment of such a multifaceted process, especially in light of the complex historical evolution of state planning of which the Consultation is the legacy.

4.5 Beyond disagreement: Consultation as proceduralization

This chapter has offered a thick description of the Consultation on Indigenous Institutions as a way of delving into how government planning with Indigenous peoples happens in Chile today and the role law plays in shaping this relationship. By looking at the implementation of the duty to consult, I have shown how the international Indigenous rights discourse is being taken up (Ahmed, 2007), as well as how Indigenous peoples and the state are negotiating the contours of consultation as a right (of Indigenous peoples), an obligation (of the state), and a space of encounter (between both) in planning practice.

The analysis suggests a complex and ambivalent picture of the process. I have shown how the decision to regulate consultation has been significantly shaped by fear and ignorance on the side of the state. The fear of legal uncertainty, of consultation paralyzing the workings of the state apparatus, and of economic activities being threatened were the main drivers for the government's decision to create DS66 as soon as possible. Despite historical distrusts, some Indigenous organizations and communities saw the implementation of the duty to consult with pragmatism as one more space to strengthen their struggles for self-determination. Chile's legalist tradition played a big role and provided the institutional grounds for moving this agenda forward through the most ambitious planning process in the country to date. At the same time, the collective inexperience of the people leading the process and the fear of being accused of doing things wrong twice made room for important methodological innovations in participatory planning. Improvisation and practical judgement (Fischer, 2009; Flyvbjerg, 2004; Wagenaar and Cook, 2003) are critical to understand how the Consultation evolved. Most importantly from the perspective of whether (or how) colonial rationalities and sensitivities may be disrupted, the Consultation also created spaces for unsettling experiences for the government planners and for a modest, self-reported indigenization of government. Affect (Porter, 2010; Stoler, 1995), the pedagogical potential of truth-telling (Regan, 2010), and first-hand experiences emerge as important forces unfolding in the planning contact zone and shaping planning practice.

The examination of the case also offers a complex and ambivalent picture of the outcomes. DS66 replaced earlier consultation standards that were inferior in terms of their scope, formulation, and depth. In that sense the new regulation means a minimal but incremental improvement (Lindblom, 1959). However, the process that produced the regulation lacked legitimacy among Indigenous peoples due to its centralized decision-making format, especially as the Consultation evolved. Obviously the most problematic aspect concerns the lack of agreement regarding the core articles of the regulation. All in all, the process failed to do what it explicitly set out to do: develop a mutually agreed consultation framework with Indigenous peoples.

What kinds of questions about the relationships between planning, law, and Indigenous peoples in Chile emerge from the close examination of this case? After the Consultation ended and DS66 was officially in place, the dominant discourse that emerged from government was one of *disagreement*. Indigenous peoples and state officials had *disagreed regarding a consultation mechanism*. But I argue that what happened is much more than that. The compulsive search for legal certainty on the side of the state and the mandate to develop the regulation at any cost suggest that what the government wanted was to make the duty to consult amenable to state operations. Even more, the interviews with government officials suggest that what

the process did was to turn the perceived risk of being obliged to consult into an opportunity to capitalize on Chile's legalist tradition.

In Chapter 2, I talked about how western law and planning have intertwined to facilitate the dispossession of Indigenous peoples in contexts with a settler colonial history. In a recent workshop with Indigenous leaders in Chile – which sought to learn more about how Indigenous peoples assess the status of the duty to consult – Mapuche and Chilean researchers report that DS66 "has added even more tensions to the situation between Indigenous peoples and the state… [since] the implementation of the duty to consult re-enacts historical conflicts, not only because of the actual regulation that was put in place, but also due to the ways of prioritizing the issues to be consulted, which uphold the state of subalternity and negation" of Indigenous peoples (Caniuqueo & Peralta, 2017, pp. 14-15, translation mine). If many of the planning practices I described in Chapter 3 were meant to enable Indigenous dispossession by openly violating or denying Indigenous rights, in the 21st century consultation serves to further dispossession by proceduralizing Indigenous rights, as this chapter has begun to show.

Under the veils of reasonableness and compatibility with Chilean legal frameworks, consultation legislation in Chile resorts to the creation of legal categories and the delineation of spheres of jurisdiction in ways that seek to restrict the scope of Indigenous self-determination. I turn to the next chapter to explore how this happens.

Chapter 5: Making consultation "reasonable:" Chile's planning contact zone as a clash of normative systems

There is a radical dichotomy between the social organization of law as power and the organization of law as meaning.

Robert Cover, 1983, p. 18

Normativity is surely the heavy reality of the law. But law is also imagination, representation, and description of reality. Where, then, is the non-normative dimension of the normative? How is it constructed?

Boaventura de Sousa Santos, 1987, p. 281

Having delineated how the duty to consult is happening (Flyvbjerg and Richardson, 2002; Smith, 2005) in Chile and how it serves to proceduralize Indigenous rights, this chapter delves into the specific ways in which western law and planning interweave in consultation legislation to produce such reduction in scope, spirit, and depth. In this research, I argue that the process of creating a consultation regulation is as revealing of the colonial cultures of planning (if not more) as the practical application and outcomes of such a regulation. What do I mean by that? In previous chapters, I discussed how Barry and Porter (2012) characterize mainstream government planning as a contact zone – a space where Indigenous and state interests "meet, clash and grapple with each other" (Pratt, 1991, p. 34). As cited earlier, the idea of a contact zone evokes the "tension between the modern state's attempt to accommodate [Indigenous] rights within existing institutional and legal arrangements and Indigenous aspirations for a more fundamental reconfiguration of their political and spatial relationships" (2011, p. 2). The concept highlights the relational and dynamic nature of that space of encounter. Contact zones are not static zones. They are sites of contestation and dispute. They are not just fixed out there: they unfold and are performed.[96]

[96] Building on Butler (1999) and Bourdieu (1977), Porter and Barry (2016) elaborate on the performative and dynamic nature of contact zones in the following terms: "contact zones do not magically appear. In many cases they are the result of generations of struggle across multiple fronts, with sophisticated, strategic and often highly variable expressions of Indigenous agency… Contact zones are conceptually constructed through the confluence of state-based systems of planning and recognition, but they must also be 'hailed into being'… through the co-constitutive performance of structure and agency" (2016, pp. 135-136). The authors also highlight the critical role of windows of opportunity, such as "legal decisions and statutory powers that make Indigenous interests visible to state-based planning agencies" suggesting that contact zones "are thoroughly hybrid places: the products of knowledgeable, strategic, visionary Indigenous agents, whose actions draw upon and often transform broader political and legal structures, as well as planning norms and techniques" (Porter and Barry, 2016, p. 136).

Going back to the case, while the practice of consultation as it currently stands is of course a contact zone in Chile's contemporary planning landscape, during the production of DS66 the tensions of the contact zone became more clearly visible, as the nature of future consultations was being negotiated and defined by Indigenous and government representatives. Consultation did not suddenly emerge; it was created. It was through the many discussions that took place over three years of work that its meaning, scope, characteristics, timelines, and practical mechanisms were crafted. And they were crafted using a very specific language: the language of Chilean law. I argue that this language should not be taken for granted. It needs to be put under the spotlight, since one of the main ways in which colonial rationalities and sensitivities are perpetuated to this day is precisely by becoming institutionalized through legal means, as I discussed extensively in Chapters 2 and 3.

As Chapter 4 showed, the Consultation was an ambivalent process. While incremental improvements took place, especially from a methodological point of view, it was a failure from the perspective of the outcomes. The following pages shed light on the mechanics of that failure by looking at law in terms of its world-making capacity and regulation-making in terms of its performative dimensions, as I discussed in Chapter 2. I show how the process of negotiating DS66 – from the initial political decision to regulate early on to the actual drafting article by article – was essentially about making exclusions and inclusions. About drawing boundaries, creating legal meanings, and bringing into life a normative universe where, despite the supposed participatory nature of the process and the partial agreements reached, the limits of what was possible were meant to keep the spirit of what the state wanted and where, as I already suggested, the playing field was always meant to be tilted.

More specifically, I identify four ways in which western law operates and is performed that are crucial to understanding what happened and how the three key disagreements crystalized and produced the Consultation's resounding rupture. Building on the work of scholars in legal studies, legal geography, and legal pluralism, as detailed in Chapter 2, I refer to these features as bracketing, categorization, interpretation, and exclusivity. I demonstrate how the Consultation, as it was set up by the UCAI, ultimately boiled down to creating spheres of jurisdiction that reduced the scope of consultation, producing legal categories amenable to state operations, attempting to have control over meaning making and legal interpretation, and sidelining Indigenous normative understandings, respectively. The interviews offer details as to how the government's appeals to reasonableness – which were grounded in the state's strongest fears, as I elaborated in detail in the previous chapter – in practice translated into restricting the scope of Indigenous rights. While bracketing and

categorization are directly connected to the desire to make consultation manageable, interpretation and exclusivity make visible the impulse to make the terms of consultation compatible with Chilean legal frameworks.

I conclude by connecting this particular case about the implementation of the duty to consult to broader discussions among Indigenous and settler legal scholars. I argue that the Consultation hints that what is really at play in Chile's planning contact zone is not a clash between different ways of planning or planning cultures, or even between different worldviews colliding,[97] as the planning literature has tended to portray the tensions that exist in settler colonial contexts, but more specifically a clash of normative systems.[98] In legalist Chile, the production of DS66 illustrates how government planning is a crucial site where, as quoted in Chapter 2, "rival normative ideas, knowledges, power forms, symbolic universes and agencies meet in unequal conditions and resist, reject, assimilate, imitate, subvert each other giving rise to hybrid legal and political constellations in which the inequality of exchanges are traceable" (de Sousa Santos, 2005, p. 449). In other words, the tensions that characterize planning practice at the intersection of Indigenous and state interests are the frictions that emerge when contrasting interpretations and narratives about "right and wrong, of lawful and unlawful, of valid and void" (Cover, 1983, p. 4) meet. In light of this argument, this chapter leads into the concluding chapter of the dissertation, where I make the case for what planning theorists and practitioners working at

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[97] Hirini Matunga, for instance, suggests that "Indigenous planning is in one sense a process, approach, or indeed activity that links specific Indigenous communities to defined ancestral places, environments, and resources… It uses Indigenous (and other) knowledge, both traditional and contemporary, to make decisions highly contextual to that community, located within its worldview, set of beliefs and values system, how it sees itself and its future" (2013, p. 14). Ted Jojola (1998) argues that "Indigenous planning represents both an approach to community planning and an ideological movement. What distinguishes indigenous planning from mainstream practice is its reformulation of planning approaches in a manner that incorporates 'traditional' knowledge and cultural identity. Key to the process is the acknowledgement of an indigenous world-view, which not only serves to unite it philosophically, but also to distinguish it from neighbouring, non land-based communities… A world-view is rooted in distinct community traditions that have evolved over a successive history of shared experiences" (2008, p. 42). Leroy Little Bear (2000), in turn, frames the tensions of the contact zone saying that "culture comprises a society's philosophy about the nature of reality, the values that flow from this philosophy, and the social customs that embody these values. Any individual within a culture is going to have his or her own personal interpretation of the collective cultural code; however, the individual's worldview has its roots in the culture - that is, in the society's shared philosophy, values, and customs. If we are to understand why Aboriginal and Eurocentric worldviews clash, we need to understand how the philosophy, values, and customs of Aboriginal cultures differ from those of Eurocentric cultures. Understanding the differences in worldviews, in turn, gives us a starting point for understanding the paradoxes that colonialism poses for social control" (2000, p. 77). I have already talked widely about Porter's (2010) conceptualization of western and Indigenous planning as grounded in different cultures. As I elaborate later, I take these understandings as my departing point, but delve into the normative aspects and implications of the differences presented in these lines of argument.

[98] I use the concepts normative system, normative order, legal system, and legal order interchangeably.

the intersection of Indigenous and non-Indigenous interests can gain from understanding planning contact zones in terms of conflicting legal orders in action.

5.1 Bracketing (or the art of delimiting)

In Chapter 2, I discussed how legal geography scholar Nicholas Blomley (2014) uses the term bracketing to describe how western law works by creating particular spheres of meaning "within which interactions take place more or less independently of a surrounding context" (2014, p. 133).[99] It is in this process of creating arbitrary distinctions – of selecting some elements from reality, separating them from others, and establishing particular relations among them – that legal realities are constituted. The institutional ethnographic analysis of regulation making I present here makes visible what these boundary creation processes look like in practice. How decisions are made that exclude certain courses of action from becoming viable, while giving life only to certain possible futures. What is notable is how these arbitrary distinctions take on an unmovable, unquestionable nature that people – in this case government officials and planners – take for granted, as the opening quote by Dara Culhane (1998) in Chapter 2 captures so well.

Below I consider three bracketings that were instrumental in delimiting how the duty to consult should be implemented in Chile in order to make it reasonable, according to the state. The first one concerns the decision to focus on articles 6 and 7 of C169 only, leaving aside UNDRIP and other international law instruments relevant to discussions about Indigenous rights. Another involves the decision to separate consultation related to investment projects with environmental impacts from all other so-called general administrative and legislative measures that might affect Indigenous peoples directly. Finally, the decision regarding which state agencies should be governed by DS66, which excluded local governments despite Indigenous peoples' claims.

While there were discussions between Indigenous peoples and government officials regarding these matters, and important changes took place as the Consultation evolved, the analysis below shows that it was

[99] Although there are some similarities, Blomley's use of the concept is different from the idea of the "battle of the brackets" as examined in the literature about UN negotiations regarding women's rights in the 1980s and 1990s. The idea of the battle of the brackets refers to "the practice of bracketing clauses in the text [of a document, such as a UN declaration] that are not yet agreed on – that is to say, an exercise in resolving the parts of the program that have remained contentious" (Steiner and Alston, 1996, pp. 212-213).

ultimately the state's view that predominated in the final wording of DS66. Blomley argues that "not everyone has the opportunity or the power to successfully frame law in ways that stick" (2014, p. 139).[100] The pages that follow show the opportunities the state and Indigenous peoples capitalized on and what kinds of power prevailed when it came to create the contours of consultation practice. As Blomley argues, bringing to the fore the actual "hard work that goes into bracketing law is useful in that it redirects us from metaphysical abstractions, such as the law or the state, or assumed distinctions between particular and general. It points us instead to an examination of how such categories and distinctions are themselves performed into being" (2014, p. 142). Also, importantly, paying attention to these processes reveals "how certain exceptions and silences are made" (Blomley, 2014, p. 142)

5.1.1 "The Declaration is not binding:" On legalism and leaving UNDRIP aside

Let's go back to the conversation I had with Senior Official 1, when he told me about the political decision to regulate consultation early on. When Piñera mandated the Presidential Commissioner for Indigenous Affairs and the Minister of Social Development to prioritize implementing the duty to consult a first key, high-level bracketing took place. To begin, the purpose of the Consultation was never to implement C169 as a whole and to restructure Chile's legal frameworks in a comprehensive way in light of Indigenous rights, as Indigenous peoples were demanding. It was about regulating articles 6 and 7 specifically. As UCAI Planner 1 put it, "within that framework [we were mandated]… 'You can move within those margins.' I mean, when we went to sit at the table we knew how far we could go, how much we could give." From the perspective of the government, this focused and pragmatic approach made sense, since those are the two articles that refer to consultation and participation, which as I already explained had become a political priority at the time, especially after the Consultation was halted in September 2011 and subsequently reformulated.

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[100] Still, Blomley makes two important distinctions and detaches his argument from views such as James Scott's (1998), arguing that it is important to "avoid the assumption… that bracketing has a straightforward relationship to centralized power… Urban antipoverty activists struggle to perform a purified rights bracket, in which the homeless are understood as universal citizens and rights bearers. Urban authorities, conversely, rely on often highly entangled and fluid framings predicated on police powers, discretion, nuisance, and community… Second, bracketing is not necessarily the same as a top-down process… Moreover, to characterize [bracketing] as a simplification [exercise] risks overlooking the complexity and the heterogeneity within the frame… It also ignores the ways in which a process of disentanglement can go hand in hand with one of re-entanglement. A land survey may cut a whole series of connections in its rendering of the parcel (such as ecology, history, indigeneity, and so on). Yet the survey is itself meaningless unless inserted in dense networks of land markets, registration, and property law; cultural networks premised on visual aesthetics; scientific networks that validate the visual and the geometric as fact; and so on" (Blomley, 2014, pp. 139-140).

I would like to highlight how legalism surfaces as a powerful force here once again. When I asked the same planner for more details about the rationale for this approach, he added: "the [TC had] ruled that the only self-executing articles of C169 [were]… consultation and participation… And what does this mean? It means that they are applicable law. The remaining articles are not." Resorting to this adherence to high-order legal obligations, a well-bounded landscape was being created in order to limit a deeper engagement with and reduce the scope of Indigenous rights.[101] Senior Official 1 reinforced this idea when he explained that in early 2010 "the [TC]'s precedent was already in force and, therefore, there was awareness [within government circles]… that article 6 in particular was self-executing and could be demanded by Indigenous peoples in the courts." Fear of judicialization[102] due to legal vacuums also shows through the cracks of these passages.

However, in order to understand the failure of the process and why so many Indigenous organizations withdrew along the way (or outright never participated) it is necessary to look at the bigger international law picture too. Let's remember that the ratification of C169 happened one year after Chile had voted in favour of UNDRIP in 2007. Chile's vote was seen as a political indication that some movement regarding the protection of Indigenous rights was taking place. In that context, there was an expectation among Indigenous rights advocates that international agreements such as C169 should be read and interpreted in light of other relevant standards, especially when these other standards were stricter and further strengthened the protection of the rights under discussion.

When I pushed a bit more regarding how the government viewed the relation between UNDRIP and C169, and what the perspective of the state was in the face of Indigenous demands for UNDRIP to be considered in the formulation of DS66, Government Lawyer 2 went on in more detail:

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[101]In 2008, section 13 of the TC's ruling had explicitly stated that the duty to consult with "interested Indigenous peoples established in Article 6 number 1 of [C169] shall not, *of course*, be understood as implying the exercise of sovereignty [by Indigenous peoples], since [sovereignty], as clearly stipulated in the [Chilean Constitution], essentially resides in the Nation [capital N in original] and is exercised by the [Chilean] people through plebiscite and periodical elections, as well as [being exercised] by the authorities the Constitution itself stipulates. The method of consultive participation established in [C169] shall not take the form of a plebiscite or a binding popular consultation either, since the [Constitution] regulates those modes of participation in Articles 118 and 128 *in a way that is incompatible with such a possibility*… It shall be understood that where Article 6 number 2 of [C169] stipulates that the goal of consultation is to reach an agreement regarding the proposed [government] measures, [such consultation] does not imply a mandatory negotiation, but *it constitutes a way of gathering opinions, which will not be binding nor will it affect the exclusive power of the authorities the Constitution stipulates*… With this understanding, the [articles of C169 under discussion] are fully compatible with democratic participation as established in Article 1 of the [Constitution], and with the existence and exercise of [Chilean] sovereignty established in Article 5 of the same [Constitution]" (Gobierno de Chile, 2008a, emphasis and translation mine).

[102]According to Vallinder (1994, p. 91), "judicialization essentially involves turning something into a form of judicial process."

> There is a theory there, which has been adopted mostly by the Indigenous world, and does a triangulation between what [C169] indicates, what [UNDRIP] says, and each particular case [laughs]. [This] could [potentially] make [the outcomes of a] consultation binding. That was a key fear [behind] why the Declaration was not included… We believed that yes, [UNDRIP] has a political value, a social value, and its directives must be followed, but that it is not necessarily binding for the state as a whole. It is [a] programmatic [agreement]; it does not have the same requisites as a binding international treaty that is ratified by the state… This is not about restricting the issue or anything like that… The issue is that you can't consult everything. It is necessary to be very clear regarding what [should be consulted] and what shouldn't.

Once again, reasonableness is invoked to constrain the scope of consultation when in reality fear of paralyzing the economy and the state was the heart of the matter. And from the perspective of the government, reasonable meant as narrow in scope as possible, as legally certain as could possibly be achieved, and the least disruptive of existing sectorial legal frameworks, procedures, and institutional arrangements as possible. Reinforcing the use of fear as a justification for this bracketing exercise, Government Lawyer 1 said:

> That decision [to leave UNDRIP aside] was made *in the spirit of prudence that informed this whole process*. If you ask me, [I think UNDRIP] is very beautiful. I find it just and it is an ideal, okay? But it is an instrument that, unfortunately, has to be applied in the real world. And the real world is neither ideal, nor just, nor perfect, okay? It is as if we… tried to implement the policies of a very, super hyper developed country in Chile (emphasis mine).

By placing UNDRIP in the sphere of the ideal government officials felt entitled to disregard its spirit and substantial contributions to Indigenous rights standards. Regarding Indigenous consultation and participation in particular, the most important contribution of UNDRIP is the introduction of the notion of free, prior, and informed consent (FPIC), which goes well beyond C169's understanding of consultation.[103] As a Human

[103] FPIC is "grounded in the fundamental rights to self-determination and to be free from racial discrimination… Consistent with the right to self-determination, indigenous peoples have always had the inherent power to make binding agreements between themselves and other polities. The contemporary concept and practice of mutually negotiated, consensual agreement among indigenous peoples and State governments is deeply grounded in the historic treaty-making process that characterized indigenous-State relations for several hundred years in many regions of the world and persists in many places where those treaties remain the law of the land… even if they have often been dishonoured… Historically and today, it can be challenging for indigenous peoples to negotiate with States under conditions of colonization and the many other limitations that often characterize the situation of indigenous peoples around the world… Yet… the process of negotiation and seeking consent inherent in treaty-making is the most suitable way not only of securing an effective contribution from indigenous peoples to any effort towards the eventual recognition or restitution of their rights and freedoms, but also of establishing much needed practical mechanisms to facilitate the realization and implementation of their ancestral rights and those enshrined in national and international texts" (UN-Human Rights Council, 2018, pp. 2-3). FPIC allows Indigenous Peoples "to give or withhold consent to a project that may affect them or their territories. Once they have given their consent, they can withdraw it at any stage. Furthermore, FPIC enables them to negotiate the conditions under which the project will be designed, implemented, monitored and evaluated… FPIC is not just a result of a process to obtain consent to a particular project; it is also a process in itself, and one by which Indigenous Peoples are able to conduct their own independent and collective discussions and decision-making" (UN-FAO, 2016, pp. 11-13).

Rights norm, FPIC seeks to "restore to indigenous peoples control over their lands and resources, [… as well as] to redress the power imbalance between indigenous peoples and States, with a view to forging new partnerships based on rights and mutual respect between parties" (UN-Human Rights Council, 2018, p. 4). As a recent report by the UN Expert Mechanism on the Rights of Indigenous Peoples states, UNDRIP's use "of the combined terms 'consult and cooperate' denotes a right of indigenous peoples to influence the outcome of decision-making processes affecting them, not a mere right to be involved in such processes or merely to have their views heard (UN- Human Rights Council, 2018, p. 5). Very importantly, it "also suggests the possibility for indigenous peoples to make a different proposal or suggest a different model, as an alternative to the one proposed by the Government or other actor" (UN- Human Rights Council, 2018, p. 5), something that terrified Chilean government officials.

Indigenous peoples involved in the Consultation were of course aware of the implications of not reading C169 in light of stricter applicable treaties. Several of them advocated for UNDRIP and other international agreements[104] to provide the frame for DS66. Indigenous Leader 8 expressed frustration with the government's decision to exclude UNDRIP from the conversation, explaining how it "is an instrument even more powerful than [C169], but unfortunately the state doesn't take it into consideration in order to protect Indigenous rights, despite having ratified it."[105]

[104] Other international law agreements some Indigenous representatives and organizations wanted to include in the discussion about DS66 included: the UN Convention on Biological Diversity; the International Covenant on Civil and Political Rights; the International Convention on the Elimination of All Forms of Racial Discrimination; the International Covenant on Economic, Social and Cultural Rights; the Declaration on the Granting of Independence to Colonial Countries and Peoples (also known as the UN General Assembly Resolution 1514); and the General Assembly Resolution Defining the Three Options for Self-determination (also known as General Assembly Resolution 1541).

[105] While the interviewee talks about Chile having "ratified" UNDRIP, he was actually referring to the fact that the Declaration passed the UN General Assembly with Chile's vote in favour. Unlike conventions such as C169, UN declarations cannot be ratified (or endorsed or signed on) by individual countries. In UN usage, conventions (also known as treaties or covenants) are "international legal instruments which… legally bind those States that choose to accept the obligations contained in them" (UN-UNICEF, ND). Countries bind themselves by ratifying or adhering to the convention, as it happened when Chile ratified C169 in 2008. On the other hand, "international human rights declarations [such as UNDRIP] are not legally binding; the term is often deliberately chosen to indicate that the parties do not intend to create binding obligations but merely want to declare certain aspirations" (UN- OHCHR, ND). However, declarations are not merely aspirational. As Anishinaabe scholar Sheryl Lightfoot argues, UNDRIP "is meant to be used as a persuasive moral and political tool to push state actors toward a new vision and new global imaginings that can accommodate Indigenous ways of being, and thinking beyond the existing international law and the constraints of state sovereignty" (2016, p. 64). As such, UNDRIP "is a political document that became part of the international human rights consensus and its principles are, in some sense, morally binding on all state conduct whether or not an individual state voted for it" (Lightfoot, 2016, p. 66).

In the end, DS66 does make explicit reference to C169 and to a number of other Chilean legislation.[106] Despite this apparent intertextuality (Smith, 2005), several clauses and conditions throughout the document still work to constrain the spirit of C169, as the sections below illustrate. In this regard, Indigenous Leader 9 – whose organization was not invited to participate in the consultation process for being considered too radical by the government at the time – shared his impressions in the following terms:

> [DS66] is pure trick. You start [reading] the headings [and you think]: "Wow! This is interesting." Because it not only refers to [C169], but also mentions a number of international standards. But as you continue reading down everything crumbles and [the document] begins to be full of traps, traps, traps… Like the fact that municipal governments are left out, [for instance].

Despite the participatory nature of the Consultation and the establishment of a Consensus Table, the interviews I had with government officials made clear that the state never really considered to have UNDRIP inform the conversations. In other words, there was a unilateral decision made to delimit the playing field. For instance, UCAI Planner 1 admitted that "the issue of [UNDRIP] came up at the Consensus Table at the request of Indigenous peoples. But from the perspective of the state, *there was never a plan* to include it or to regulate it, or to use it as an input for this consultation process" (emphasis mine). I see this acknowledgement of the null intention to engage with UNDRIP despite Indigenous peoples' requests in a supposedly consensus building space as a clear indication of the spirit guiding the government – namely that the rules of the game were the jurisdiction of the state and were not up for negotiation. As the rest of the chapter shows in more detail, economic interests were among the main forces shaping what the Consultation could accomplish.

It is important to emphasize that bracketing, as an action, does not necessarily involve imposition of the boundaries being drawn. Bracketing refers to the effort to "stabilize and fix a boundary within which interactions take place more or less independently of their surrounding context… [to the] complex and subtle calculations that govern what is, and what is not, to be included within a particular setting" (Blomley, 2014, pp. 135-136). But in this case, unilateral government imposition was inseparable from the definition of the boundaries, bringing to the foreground the state's impetus to monopolize legal meaning making (see sections 5.3 and 5.4). UCAI Planner 4 confirmed what was behind the government's approach and also highlighted the continuities of the state's stance over time when he reflected:

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[106] Legal instruments DS66 makes reference to include the Chilean Constitution, the Indigenous Law, the TC's 2008 ruling mentioned in the previous chapter, and the laws that govern the administration of the state, among other documents.

> I think not only this government, but also [previous ones], have shared the politics that [UNDRIP] is soft law. Therefore, that it can be taken up or not. It doesn't create an obligation. So, *why to take on a higher standard when we don't even have the earlier standard in place*? Although the state ratified [UNDRIP], I think it's more of a adherence to principles… I don't think [future Chilean] governments will take that step yet [either] (emphasis mine).

The quote above is very powerful, since it reveals the minimum necessary approach the government took. Similarly, UCAI Planner 1 told me that "the reason [for leaving UNDRIP aside] is basically that [C169] is the applicable law. [UNDRIP] is not binding. One commits to it, *one tries to respect it*, but it is not an obligation for the state" (emphasis mine). Instead of seeing the non-existence of adequate Indigenous rights standards as an opportunity to engage in deeper conversations as Indigenous peoples were demanding, the government deliberately chose to restrict the discussion and turn it into an exercise about procedural precision. Sheryl Lightfoot (2008, p. 85) refers to this attitude as undercompliance, which is what could be expected from and "inherently self-interested state" when it comes to respond to international treaties, law, and norms. The government"s behavior also echoes a phenomenon widely discussed in the legal and political literature in Latin America since colonial times – namely that "*la ley se acata, pero no se cumple*" (loosely translated as "the law is complied with but not obeyed").

This initial broad bracketing was a key driver for several Indigenous organizations to withdraw from the process. As CONADI Indigenous Councilor 1 framed it, "we could not endorse the situation that was going on, where essentially on the one hand something was being written and right after it was being erased." Those who decided to sit at the Consensus Table until the end also rejected the government's stance, but were generally not surprised with the approach. Talking about the dynamics at the table, Indigenous Leader 1 explained:

> International agreements and international law were not touched [by government representatives] because it wasn't favourable for them. It was us who [brought these topics to the discussion], obviously. They turned to the Constitution [instead, arguing] that they could not go [too far] because of the Constitution… I mean, it was naïve [to think] that they would talk about the Declaration and things like that, because those [standards] are superior, Human Rights go beyond… So they didn't have much to resort to in that regard, but they could turn to the Constitution, [say] that they could not go beyond what the law says. And since Chilean law does not conform to [C169], nor [UNDRIP], nor anything else, so that was the stumbling block, so to speak.

This passage raises a crucial issue that shaped the Consultation and the disagreements it produced – namely the tautological nature of Chilean law, a topic I elaborate more in the sections below. Reflecting on Chile"s decision to ratify C169, despite it being a binding treaty and the implications this would bring for the country,

Indigenous Leader 9 speculated: "I think [Indigenous rights advocates who successfully pushed the government to endorse C169] pulled off a fast one… Even some Indigenous leaders [initially] gave more importance to [UNDRIP], not so much to [C169]. But in practice, even though Chile signed [UNDRIP],[107] [C169] has more weight. That's the point." His reflections refer once again to the country's legalist tradition and adherence to the rule of law, which as I discussed in Chapter 4, Indigenous peoples have used with success in their favour too. Despite his pragmatic acknowledgement, the same leader said: "[but] I think we have to put our efforts more into the idea of [free, prior, and informed] consent. Even if [C169] does not offer much elements in this regard… And this is absolutely evident in DS66." As I explain in the concluding section, this statement begins to show how the government's restrictive approach regarding Indigenous rights is actually helping strengthen Indigenous demands for self-determination in Chile.

What did the decision to exclude UNDRIP from the discussion of DS66 mean in practice? In short, the government capitalized on Chile's legalist tradition to limit the scope of the discussion and avoid legal implications that would have made consultation too complicated and risky. Calling for prudence and appealing to the binding nature of C169, but also to the TC's rulings that limited the application of C169, government officials were able to move the conversation away from broader debates about Indigenous self-determination and FPIC. Instead, they placed the focus on operational matters and reduced debates about the duty to consult to negotiations about a usable consultation mechanism. Besides the obvious proceduralization, excluding UNDRIP from the conversation also indicates the supremacy of western understandings of what legal agreements should be fully followed (i.e. binding ones) and which ones are just referential (see sections 5.3 and 5.4).

As I mentioned in Chapter 2, the process of bracketing is not a feature exclusive to western law and it is actually "endemic to social life" (Blomley, 2014, p. 136). However, Blomley also argues that "bracketing takes on a particular force within law… First, law is particularly invested in producing clarity, legibility, and certainty through the drawing of distinctions. Law's 'nomos,' after all, derives from 'nemo,' which means to separate, divide, and allot. Second, precisely because of its institutionalization, law is a powerfully performative site. The declaration of the judge is not descriptive, but productive" (2014, p. 136).[108] Likely, any normative system

[107] As explained in footnote 105, UN declarations cannot be "signed" by countries. The interviewee was referring to the fact that UNDRIP passed the UN General Assembly with Chile's vote in favour.

[108] He goes on to argue that "for a legal transaction to occur, a space must be marked out within which a subject, object, and set of relations specified as legally consequential are bracketed, and detached from entanglements (ethical, practical, ecological, ontological) that are now placed outside the frame. Law, we might argue, is both a resource and a locus in the

operates by establishing exclusions and inclusions in order to create systems of collective meaning where some futures become possible while others are negated, some actions are deemed socially acceptable while others become undesirable. In that sense, I want to make clear that the decision to exclude UNDRIP from the production of DS66 is not problematic in itself. It is problematic because it illustrates the imposition of the government's will over Indigenous expectations for how consultation as a right should be approached, an imposition that was grounded in the government's fears I discussed extensively already. In other words, some rationalities and structures of feeling were deemed superior and thus legitimated through legal means. The bracketing is also problematic because it openly seeks to limit the state's engagement with the depth of Indigenous self-determination and to constrain the exercise of Indigenous rights, which include territorial rights and the material consequences derived from Indigenous peoples exercising forms of social, political, and spatial organization that pre-date the state. In light of the colonial genealogy of planning in Chile, this bracketing is one more manifestation of colonial rationalities and sensitivities that work to perpetuate the domination by imposition of Chilean law (Burgos et al., 2006) Indigenous peoples have denounced for centuries.

5.1.2 *"It was already decided:" Investment projects and the creation of parallel consultation frameworks*

The second bracketing I want to highlight became the centre of the tensions and lies at the heart of the process' failure. It concerns the government's decision to produce two parallel consultation mechanisms: one for so-called general government measures and one for investment projects (which as I mentioned earlier, are the engine of Chile's economy). In this case, the main justifications were not prudence and legalism. As I explained in Chapter 4, the government resorted to technocratic considerations about institutional capacity and expertise within the SEIA (Environmental Impact Assessment System), which according to them made it the ideal agency to deal with consultations related to environmental projects where Indigenous peoples might be directly affected. The MDS, on the other hand, was deemed the right institutional home to ensure all other consultations the government carries out meet C169 standards.

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negotiation between bracket and relationality. To the extent that bracketing is successful, that which we know as law is produced" (2014, p. 136).

This bracketing materialized formally after the first stage of the Consultation was paralyzed and redesigned in September 2011, as a result of Indigenous mobilization and rejection of the government's approach. However, the interviews made clear that that decision began to brew much earlier. Remember that the Consultation initially considered five proposals – the creation of a consultation mechanism was only one of them. The other four were constitutional recognition of Indigenous peoples, creating a new government agency to replace CONADI, creating an Indigenous Peoples Council, and revising the section of the SEIA Act that regulates public participation, including Indigenous communities. It was after the process was halted that the government decided to prioritize the development of a consultation mechanism. However, the Executive branch also decided to continue internal conversations with the Ministry of Environment about the SEIA regulation. Some legal scholars argue that the discussion about separating environmental consultations from general consultations can be traced to the initial conversations about C169 in the 1990s (Carmona, 2013a).

When I asked Government Lawyer 1 about how the decision to split the conversation into two mechanisms took place, he succinctly said: "that was already decided." While that was important information that confirmed the existence of a highly hierarchical political culture in Chile as I discussed earlier, it did not shed light on the mechanics of the decision. Government Lawyer 2 offered more insights in this regard:

> That [decision was made by] the Ministry of Environment and Ministry of the President's Office, no one else. This consultation duplication – to have investment projects consulted under environmental regulatory framework and the rest simply under the general regulatory framework… [was decided] before DS40 came to light in August 2013. Because we saw [the proposal for the first time] around April-May 2013 and realized that yes, [DS40] talks about Indigenous consultation. The previous [environmental regulation] didn't say anything; Indigenous consultation didn't exist. [It was just considered part of public participation]. And this one does talk about it, it defines the situations [where consultation needs to take place], but it has a big legal vacuum: they don't tell you what to do when you have a consultation within the SEA, they do not offer a procedure. So, yes, it says: "Look, when you have Indigenous communities, when you have relocation of Indigenous communities, when you have ceremonial sites, archeological sites, anthropological [sites], you have to do a consultation [that is led by the SEA]." Perfect, how do I do it? [DS40] doesn't indicate how to do it…

It was that legal vacuum which prompted UCAI planners and lawyers to suggest adding a clause to DS66's Article 5 (Investment Projects), which states that all Indigenous consultations carried out under the umbrella of DS40 need to follow the stages identified in DS66. This was seen as a way of compensating and reducing Indigenous rejection to DS40. As UCAI Planner 2 explained:

> I think we took a big step when we [told Indigenous representatives at the Consensus Table]: "Okay, you think that [consultation within DS40] is not well formulated. But we are telling you that whenever the SEIA has to carry out a consultation – this is our commitment to you, and

> that is what DS66 states – it has to be done in accordance with the stages and procedures we established in [DS66]." Therefore, one way or another we ensured that the [SEIA]'s way of doing consultation mandatorily has to be the same we [the government and Indigenous peoples] defined together. So, we believe [this provision] provides an important safeguard, which might be perfected in the future perhaps, but it is an important step. Because before [DS66 came into force] the SEIA didn't have an obligation to carry out Indigenous consultations following an external regulation.

The government's defense of its incremental approach to Indigenous policy surfaces again here. While there is some merit in redirecting DS40 to DS66 and governing the stages of SEIA consultations according to a mechanism developed with higher levels of Indigenous involvement, this provision does not address the substantial concern that led to the disagreement, which related to how consultation gets triggered too late within the SEIA. Without engaging with the reasons offered by Indigenous peoples against this arbitrary separation, Minister 1 justified the decision by appealing to the distribution of powers within the Chilean administration:

> [The decision was made] for a very simple reason… Besides offering advice [to the Ministry of Environment] we [MDS] did not have any authority… [We could only say:] "There is an international standard you need to follow," but developing [a consultation mechanism] according to the standards was their role… The [MDS]'s role is to coordinate and that means not taking away from, or substituting, the role of other state bodies… Therefore, I think it would have been a mistake [to have a single consultation framework], because the current [situation] actually allows the [Ministry of Environment] itself to take on this challenge from within its own particularities, of course… [Because C169] is very careful regarding its own scope. In no case it says that Indigenous institutional frameworks in a country shall replace other [institutions]. Quite the contrary, it suggests that all [government] bodies should have an [Indigenous] lens.

The passage above makes very clear the unquestioned supremacy of Chilean legal and institutional frameworks. When I asked if at some point the government considered having a unified approach to consultation, Minister 1 said: "No, that option was never taken seriously. Perhaps it was considered in one conversation at some point, but the path that was chosen in the end was 'This has to be done and it has to be done properly, so that it actually meets [C169] standards.'" From his perspective, properly meant the Ministry of Social Development not stepping on the toes of a different government body. However, I encountered diverging views among the several government officials I interviewed, especially among those UCAI planners who were involved in the on-the-ground work of the Consultation throughout the whole process.

For instance, Government Lawyer 2 told me that the immovable decision to have two separate consultation mechanisms "was a problem for us at the Consensus Table… [because] this is not [only] an environmental

issue, it is [also] an anthropological issue; it is [a] social [issue. Investment projects] have other non-environmental impacts… But the decision had already been made. We [UCAI members] didn't have much [influence] there." Senior Official 2 was not part of the Consultation, but had close familiarity with the evolution of the duty to consult in Chile due to his work in Michelle Bachelet's first government, where he was involved in the early debates regarding the implementation of consultation. Reflecting more broadly about the decision to have a dual consultation system, he elaborated:

> I am convinced that what [C169] advances is a set of rights that is different from environmental rights… therefore, we can't [use] an instrument that is conceived to assess the [state's] compliance with environmental rights… to assess compliance with Indigenous rights. Also, because there are matters that can't be quantified [when evaluating] compliance with Indigenous rights. I mean, you can give a score to environmental [matters]. There is a standard and you meet it or not. And it's a number. You can measure pollution, lots of things. So, multi-interpretable things exist regarding environmental [matters]. And that is why there are collective decision-making mechanisms within government, which are the SEIA's Regional Committees [that make recommendations], the Ministers Committee that decides, and the Environmental Court that settles, etc. In other words, a system was put in place with the rules of the game for environmental issues.

The passages are very telling. They show an acknowledgement among some government representatives that projects affecting Indigenous lands exceed environmental impacts – something Indigenous peoples have argued all along. Along the same lines, as our conversation continued Government Lawyer 2 admitted that:

> There is a core problem with the SEIA, because one of the main goals of consultation is for those Indigenous peoples who are being consulted to have the ability to influence when a measure is enacted. And not only *whether* the measure will be enacted or not, but also *how* it will be enacted. One of the big "buts" of conducting consultations within the SEIA is that [Indigenous peoples] do not have much ability to influence. They can influence, but regarding what? Regarding compensation, mitigation, reparation measures. Those things. But [by the point those issues are discussed] the project as a whole is already well tied up (emphasis mine).

The fact that these officials are aware of this "but" is alarming (though not too surprising) because it demonstrates that this bracketing was put in place deliberately. As suggested earlier, despite the official narrative about the SEIA's technical expertise and about the suitability of having a specialized consultation process for environmental projects, the interviews with government officials indicate that what is really at stake is the fear that such projects will be delayed and private investment discouraged by the excess of consultation or the lack of legal certainty. Government officials knew clearly that in drawing this boundary they were delaying and reducing Indigenous peoples' ability to participate. Unlike the previous bracketing, where a new distinction was created that excluded UNDRIP from the legal landscape, this bracketing capitalized on an existing institutional and procedural distinction. The technicality the government took

advantage of is that within the SEIA the administrative measure to be consulted is the Environmental Qualification Resolution (*Resolución de Calificación Ambiental*, RCA), which takes place after a project has already entered the environmental assessment system (see section 5.3.b below). In other words, within the environmental assessment system the duty to consult gets triggered later in the process compared to other government measures.

In addition to this institutional distinction, the government also capitalized on earlier court rulings that reaffirmed that existing sectorial legal frameworks were enough to meet C169 standards (Carmona, 2013a). As I advanced in the previous chapter, not having an early participation stage in the environmental assessment process works as a protective shield against Indigenous peoples' right to consultation, while not openly denying the right to consultation. In the government's imagination, fragmenting the duty to consult by having two consultation standards would help to reduce uncertainty significantly, since investment projects account for a large part of the projects Indigenous peoples generally oppose[109] (Abogabir, 2014). Indigenous Leader 4 saw this bracketing exercise as a clear expression of bad faith on the side of government, as the passage below illustrates:

> Bad faith was always present… We started finding out about decisions [the government] was making, which they had already made in advance, of course. [Decisions] that they introduced when no one would notice, not even politicians. For instance… when we participated in the Human Rights Commission in Congress… around October 2011 [right after the Consultation was halted], the [government] submitted a document about how they were going to develop the consultation to create a [new] consultation mechanism. And we realized they included a tiny item, like the fine print, saying that although they were paralyzing the Consultation on Indigenous Institutions, the consultation about the environmental impact assessment system regulation [was still going ahead]. All of the institutional arrangements regarding Indigenous peoples within the environmental system were going to be consulted with the support of the [CONADI] Indigenous Council, which had authorized [the government] to carry out a separate consultation process regarding the SEIA regulation framework. This was included in a hefty volume… We received the document [in the understanding that] they were leading a clean, transparent process.

CONADI Indigenous Councillor 1 expressed similar concerns and explained his decision to withdraw from the process in the following terms:

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[109] According to a report published by the ILO in 2014, since C169 entered into force 76 investment projects had some connection to the Convention up to that point, either because they had undergone or were about to begin a consultation process, or because lawsuits had been filed due to lack of consultation. Out of those 76 investment projects, 45 involved judicialization due to lack of/inadequate consultation (16 energy generation or transmission projects, 12 mining projects, 6 infrastructure projects, and 11 diverse projects) (Abogabir, 2014, p. 47).

> The consultation to discuss DS66 was taking place, but at the same time the Fishing Law was being approved and Indigenous peoples – in this case Lafkenche communities [part of the Mapuche nation whose traditional territory extends along the Pacific coast] – were being left out of the law. So, what was the level of commitment in the end? … None. Mining projects in the North continued to be approved, for instance. In the South there were hydroelectric [projects] and at the same time DS66 was being discussed. So, it made almost no sense to take part in a table where one could see that our rights continued being cut down from the backstage… And I can say that today, as it is, C169 does not protect any rights for Indigenous communities… When we realized [what was going on] we said no… But well, if someone wants to step forward, go ahead… Those [leaders] who were not informed jumped into a process without knowledge and that's how many people were taken advantage of… Therefore, in my view [DS66] is a regulation that was manipulated, ill-intentioned, and created with a cosmetic purpose.

The Councillor was referring to a number of controversial laws that the government was trying to move forward during the Piñera government, some of which concerned the exploitation of natural resources.[110] These examples are illustrative of how the dual consultation system could hardly be understood on technical expertise grounds only. Indigenous Leader 9 showed his skepticism openly when I asked about his views on the topic:

> I openly think that the business sector has had the most weight in formulating those [consultation] instruments… Because in the end they are the ones who have asked for legal certainty, security, and stuff like that… And today it is also them who are making the most noise to settle the matter, so to speak… They have requested studies about how investment projects are paralyzed due to legal action… So they now want to create consensus to settle this issue for good. How this is going to end up? I have no clue. But I do believe [DS66] is ultimately a mechanism to validate [private] investment, to make [investment projects] friendlier, to legitimate them, you see? That's what we believe. That's what we have talked about [internally] and everything points in that direction. All evidence points in that direction. I mean, the interest of the business sector in regulating [consultation], the fact that in many cases they are getting ahead on work even before the government processes [begin]… approaching local stakeholders, Indigenous leaders, communities… It is all related.

The passage below – part of a conversation with UCAI Planner 4 – supports the suspicion of the Indigenous leader. Recognizing that the duty to consult being triggered so late is problematic, he told me:

> It's necessary to make changes to DS40… I don't know if that means removing consultation from the SEIA and creating a new [specialized] agency, or to strengthen [UCAI] so that [we]take care of all consultations… I don't know, perhaps if there is a Ministry [of Indigenous Affairs] later on there will be a big consultation unit, and within that unit there might be a sub-

[110] They include: the Fishing and Aquiculture Law (*Ley de Pesca y Acuicultura*), which made changes that impacted Indigenous peoples' fishing rights; the 20-year renovation of Decree-Law 701 (*Decreto Ley 701*), a law passed during the dictatorship which intensifies the forestry model through government subsidies to industry; and the Electric Leases Law (L*ey de Concesiones Eléctricas*), which simplifies the process of granting leases to investors.

> unit responsible for investment projects and another one for all other measures. To have that kind of division, of specialization… But that would require making a political agreement with industry, because you would be adding a new stage before [their projects] entering the SEIA. I mean, they also have to include within their operational costs a new consultation process. I think they are already including this, but it would have to be discussed, reaching an agreement with them.

While Senior Official 2 was not part of the Piñera government – or precisely because of that – it was interesting to hear about his impressions in light of the history of Indigenous policy in Chile. Speculating about the Consultation approach in general and this bracketing exercise in particular, he said:

> I think that has to do with the ideological vision of the [Piñera] government regarding Indigenous matters… [The first] Presidential Commissioner for Indigenous Affairs [of that government] believed that there was no justification for having a specialized regulatory framework [regarding consultation with Indigenous people] and that the SEIA was enough to deal with Indigenous issues. Because they [the Right] think there is nothing specific and different [about being] Indigenous that merits having a different framework for analysis. [They think] what the SEIA framework and the Environmental Act indicate is enough. In other words, the Environment Act would fulfill the standards defined in C169. That's their interpretation, which is a very ideological interpretation that implies Indigenous peoples do not have rights different from the rest of Chileans. Therefore, a constitutional reform should not consider recognizing them as peoples, but as individuals [for instance]. That is the stance the Right has always had regarding constitutional recognition… So, their stance [regarding the duty to consult and having two parallel mechanisms] is coherent… I mean, today the dispute is not about profit-sharing, but about the right [of Indigenous peoples] to be consulted about investment projects. All court rulings relate to that. There has never been an incursion into [profit-sharing or FPIC], which is not captured in any [consultation regulation] project [to date]… All legal action [against the state] has concerned the minimum standard, which is the right to informed consultation. But if one starts adding other things you necessarily need a special regulatory framework that is different from the environmental framework… Because there is a point that people who understand environmental issues realize, but many people don't: when according to the Environment Act a project might affect [Indigenous] communities… [that triggers] whether that project will be approved through an Environmental Impact Declaration (*Declaración de Impacto Ambiental*, DIA) or an Environmental Impact Study (*Estudio de Impacto Ambiental*, EIA). That fact that [the project] affects an [Indigenous] community doesn't involve a different assessment *standard*, but a different [assessment] *method* (emphasis mine).

The government framed the bracketing in very different terms. Discussing how the process unfolded after the Consultation was paralyzed and redesigned, the Consultation's Final Report states that:

> In this new scenario, the SEIA carried out an Indigenous consultation process for over a year with the goal of embedding Indigenous consultation into the new SEIA Regulation Framework every time a project that might affect Indigenous peoples directly enters the [environmental impact assessment] system. The main outcome was that the original proposal was substantially modified (five articles were initially consulted and, as a result of the consultation, ten more were

> revised). The product of this consultation [DS40] has been enacted… which for the first time will allow including an Indigenous consultation process in the case of those investment projects that affect Indigenous peoples, considering what C169 establishes in order to take into account Indigenous peoples' demands (Gobierno de Chile, 2013a, pp. 2-3, translation mine).

Again, a quantification approach is used to justify the government's actions and portray the resulting regulation as a success. Instead of acknowledging that the duty to consult within the SEIA does not allow Indigenous peoples' early participation, the government insisted on the practice of enumerating changes irrespective of their substance. In the face of Indigenous peoples' complaints that DS40 ran against C169, the government argued that the regulation "met international standards, since all [necessary] previous stages were carried out in order to validate a consultation plan, [which was] followed by an informational process and, afterwards, a dialogue stage took place. Moreover, [the government] answered each one of the observations and comments received, reflecting several of them in the final regulation" (Gobierno de Chile, 2013a, p. 55, translation mine).

Despite the reflections offered by Senior Official 2 earlier, the high level political decision to split consultation into two parallel systems was the materialization of a deeper and longlasting attempt by the Chilean government to mutilate the application of C169. While the official justification appealed to the technical suitability of the the SEIA, such technical suitability still found support in Chile's legalist tradition. As I mentioned, this bracketing exercise capitalized on the TC's and other previous court rulings that supported the sufficiency of domestic legal and institutional frameworks. It also capitalized on the definition of administrative measures to be consulted, since the duty to consult within the SEIA happens late. In doing so, what this bracketing did was to make a large percentage of consultations – which not surprisingly happen to be the most controversial ones (Abogabir, 2014) – subject to a process where consultation happens too late and where the consultation mechanism was developed in a way that Indigenous peoples see as invalid. While legitimate according to Chilean law, this move violates the spirit of consultation. In this way, a highly political decision grounded in economic concerns was dressed as a technical decision.

As a whole, this bracketing serves to dilute substantial Indigenous rights by merging them with existing institutional and operational procedures. What is more important, it suggests a very limited engagement with land concerns that clash with Indigenous understandings and expectations about how the duty to consult should play in Chile, favouring instead the protection of economic interests. Indigenous rejection of DS40 is basically the refusal to allow Indigenous territories being left at the mercy of Chile's economic model and tautological sovereignty claims. As I elaborate in sections 5.3 and 5.4, the government's insistence in this

compartmentalized approach and refusal to engage in negotiation are thus an open assault on Indigenous normative orders, which are grounded in connections to the land.

5.1.3 *"One can't modify via regulation something that has a higher hierarchy:" Excluding municipalities from DS66*

Another key bracketing concerned the decision about what state agencies should be obliged to do consultations according to DS66 (Article 4). Indigenous peoples advocated that municipal governments should be governed by the regulation, since they are the visible face of the state at the local level and their decisions are among the ones that most directly affect Indigenous communities' everyday life. Government officials argued that this was not possible due to the way the administration of the state delegates power. As Government Lawyer 1 explained to me:

> We were unsure whether to include municipalities or not… My personal opinion and suggestion was: "Let's include them… It's something very important for [Indigenous] communities. It is also fair, because municipalities have to fulfill the duty to consult anyway." The alternative position we had was that… the President of the Republic can't enact regulations [that apply] to municipalities because they are autonomous [bodies]; in other words, they are not affected by the legal power of a regulation. But that is a view that can also be contrasted with opposite views. I mean, it is an issue that can be discussed. There are [Administrative Law] professors that say yes and others say no… The dominant view is that it can't be done. And *the only reason why we fought for [excluding municipalities from DS66] is that we didn't want the National Audit Office to turn [the regulation] down*… And there was a point in the final stages, when the document reached our hands and I told [my colleague at SEGPRES] and the rest of the ministries: "This issue [including municipalities] is a win-win. If we include them, in the worst case it will be the National Audit Office that will say no. It won't be our fault." But in the end a more purist understanding of law was chosen, [a] more conservative [decision] in the sense of not risking the National Audit Office to reject [DS66]. Which also makes sense, because if the National Audit Office asks for the re-submission of a regulation there is one more argument to say that it is illegal. Therefore, I believe it was also a matter of convenience (emphasis mine).

As the passage makes clear, in this case the bracketing was justified on the grounds of adherence to the Constitution and to avoid the risk of DS66 being challenged by the National Audit Office. The supremacy of state institutions superseded any consideration regarding the spirit of C169. The lawyer's words also point to the importance of legal tautologies – how legal decisions are recursively justified in relation to other pieces of legislation – what Smith (2005) calls intertextual hierarchies – that are equally the product of a particular normative universe. Finally, the passage also makes clear something quite obvious but often unexamined in Chilean Indigenous policy circles – namely that interpretation is a critical part of legal practice (see section

5.3). In the same way that the definition of whether municipalities should be considered autonomous bodies in a case like this or not is open to different interpretations, so is any other legal precept in the Chilean legal imaginary. However, the Consultation shows how the creation of DS66 selectively understood the flexibility of the interpretive task, opening the door to some interpretative flexibilities that favoured state interests – such as how to understand UNDRIP, the TC's reading of C169, etc. – while closing the door to others. Government Lawyer 2 framed the situation in the following terms:

> Obviously, [Indigenous peoples] wanted [DS66] to apply to all [organs of the state's administration]… especially to municipalities. That was a triggering subject… But we were clear, I mean, we thought and still think that we cannot regulate [municipalities' duty to consult] with a regulation [*reglamento*], because municipalities are a constitutionally autonomous body… [For the consultation mechanism to be mandatory for municipalities] it would have to be a law.

This passage points to another crucial bracketing decision, namely what kind of legal instrument to use in order to implement the duty to consult. When I asked when the decision was made to do it via regulation – *reglamento* in Chile, which can be enacted by the President directly – as opposed to via law – which has to be discussed in Congress – the same lawyer elaborated:

> [The decision was made] well before the proposal [UCAI presented] in August [2012]… We said… "Is there any impediment to do it through a regulation? No." … The TC ruled [that the duty to consult] was self-executing, so it could be applied immediately. What does the [consultation] instrument have to do [then]? It is not to make [consultation] applicable, but to have a procedure in place essentially. And that, we realized, we could do via law or via regulation. And we reached the conviction [that regulation was the best option]. There were doubts too. There were legal studies done that supported [our] position. But the regulation [option] had virtues and disadvantages. *The virtue was timing – it could be done in less time than a Bill, of course*. A Bill [would have] had to be consulted [with Indigenous peoples] before submitting it to Congress. And the discussion in Congress can take one, two, five, ten years. That was an issue. *Also, [with a regulation] we could have a certain control over the text we developed*, which we would have not had with a Bill. You can submit a text that has been mutually agreed with [Indigenous] peoples [to Congress] and anything can come out. Also, we didn't see much insistence on the side of the legislative branch [asking us to] send the discussion there [laughs]… But well, [by choosing a regulation over a law, some government bodies] were excluded [from the obligation to use DS66 to carry out consultations], such as municipalities or the Congress itself… That's why we included an article [in DS66] stating that while it does not apply to [municipalities] they can use it to guide their consultation [processes. But] it is voluntary (emphasis mine).

It is hard to know whether the government chose to use a *reglamento* deliberately to exclude municipalities, or if timing was the most relevant factor. Based on the conversations with Senior Official 1 in the previous chapter, I am more inclined to think the government wanted to move quickly in order to ensure legal

certainty. The reference to the UCAI having more control over the text of DS66 is also very significant, since it suggests the interest the executive branch had in the matter. The quote also links back to the centralization that characterizes Chile's political system I mentioned in Chapter 4 when talking about the limits to the Indigenization of government. In this case, the planner refers to the need for UCAI members to work in close coordination with the lawyers at the Ministry of the President's Office (SEGPRES). So, while the UCAI "drafted the articles [of DS66]… those articles were shared back and forth with [SEGPRES]… who continued to have control, so to speak, of the articles. In the end it was them who provided the final approval [of DS66]," as UCAI Planner 3 explained. This detachment from democratic principles (i.e. the fact that it was not a Congress comprised of elected officials, but groups of non-elected representatives who were the ones drafting the regulation) certainly provided more flexibility. In fact, it also allowed those Indigenous peoples who participated until the end of the process to be directly involved in the wording of DS66. However, given the questionable representativeness of the Consensus Table and the fact that the wording of the regulation was unilaterally altered right before its enactment diminish the value of this discussion altogether.

Explaining the technicalities of why a municipality cannot be obliged to carry out consultation according to a regulation such as DS66, Government Lawyer 2 told me:

> The [law that governs municipal governments] requires a very high quorum [to be modified]… [DS66] was a crosscutting regulation that applied to the whole state… [But] a regulation and a law do not have the same [legal] hierarchy. That is the point. One can't modify via regulation [i.e. DS66] something that has a higher hierarchy [i.e. law that governs municipal governments]. That was one of the main issues… That was the entertaining part [laughs]. In the end one was entertained with these things [laughs]… So, when we were at the Consensus Table and talked about municipalities, we defended the position that they should not be included [in DS66], because we believed that we couldn't and we believe that up to this day. But on the other side, Indigenous representatives said: "Municipalities are the [level of government] that affects us the most in our everyday lives. They affect us daily. We might not be too impacted by what a ministry here in Santiago does, but what my municipal government does, it does affect me." So, they thought we were defending municipalities *per se* and it wasn't like that. I mean, we had our small meetings and said: "Listen, municipalities don't really make a difference." But our concern was to submit a regulation that the National Audit Office (*Contraloria*) would not question later on… Because we were mandated to be the lawyers of the state. And when the National Audit Office spots a mistake that might cost someone their job. We are supposed to avoid [that to happen]. So… Indigenous peoples said: "[Include municipalities and] let the National Audit Office to reject [DS66]." And we replied: "We can't do that. We have to be advisers." … Our main defense was: "Listen, it is not that municipalities can do what they want. They have to carry out consultations. However, they are not obliged to follow this regulation. If they want to do it in their own way, they have to establish a [consultation] procedure with the [Indigenous peoples to be] consulted." Thus, it is convenient for them to use [DS66]. That was kind of the idea. [But it can also happen that] you end up with a disorder, where each mayor wants to do consultation in their own way and you end up with 350 consultation mechanisms,

> which is not viable… I think a next step… would be to modify the constitutional law that governs municipalities. Insert an article, two lines, saying: "In the event that municipalities have to enact a measure that might affect Indigenous peoples as per [C169], they shall follow [DS66] or the regulation that replaces it." That's it.

What did this bracketing exercise do? By excluding municipalities from being governed by DS66 many of the government measures most relevant to the everyday lives of Indigenous peoples are not consulted through the only consultation mechanism that – despite all of its shortcomings – was developed in collaboration with Indigenous peoples in an openly participatory planning process. These measures might include key planning decisions regarding land use planning, health, and education, to name a few. As Government Lawyer 2 explained, local governments are still required to consult when any measures they enact might affect Indigenous peoples directly. However, it is up to the municipality to make the call. This is in addition to the fact that the judicial branch was excluded from DS66. This exclusion, however, finds legal grounding in C169 itself, because the Convention restricts consultation to legislative and administrative measures, leaving aside judicial measures. This issue also became a site of contestation, since in Chile mining exploration permits, among others, are issued by the Courts and not by the Congress or the Executive, as described in section 5.2.b.

Like the previous bracketing, leaving municipalities aside suggests a move away from land concerns and from local realities more broadly. The insistence on adhering to the Constitution also brings to the forefront the tautological nature of Chilean law, which seemed to be the only resource to which government officials resorted in order to validate their actions.

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As a whole, what did the bracketing exercises I just described do? And how did they contribute to the proceduralization of Indigenous rights I am arguing? Taken together, the three processes just described served to create a well-demarcated playing field where Indigenous peoples' space to manoeuvre was limited and where power imbalances consolidated. They produced a constrained universe that began to pave the way for the further mutilation of Indigenous rights as the Consultation unfolded. On the one hand, these bracketings reduce the scope of the duty to consult to many less cases than could otherwise be consulted. This is particularly clear in the decision to create parallel mechanisms and to exclude municipalities. Most importantly, these exclusions limit the depth of engagement with Indigenous rights and begin to build a detachment from land concerns. The refusal to read C169 in light of UNDRIP and the insistence on referring to domestic legislation instead show how the supremacy of state authority was never questioned. These decisions begin to guide the discussion into a conversation that is basically about procedure as opposed to

substance, as I introduced in the previous chapter. And while procedural precision is important and has been demanded by Indigenous peoples for decades, here operational feasibility took precedence over the protection and exercise of Indigenous rights and self-determination. Perhaps this should not be surprising, for as Porter and Barry argue,

> The work of producing, regulating and maintaining these boundaries is a core project for planning. Boundaries, edges and margins have been thought to offer transformative potential to planning theory… Yet in contexts like these, where colonial relations of power and the politics of recognition are seductively normalizing, we see a darker dimension of the work that boundaries do in planning. While settler-state planning is now claiming a role for itself in the politics of recognition, the limits are clear: Indigenous people must simultaneously perform an authentic traditionality alongside a suitably Western form of governance, and limit their claims to sites unaffected by modernity. Such are the costs of recognition in contemporary planning contact zones (2016, p. 171).

To reiterate, what I find problematic about the bracketing exercises I described is not the creation of manageable spheres of jurisdiction where DS66 can become implementable. Blomley suggests that "law's brackets need to be assessed not by their truth, but by their success. Success, in this sense, can be determined not by the objective fit of an enactment or statement with a prior world, but rather according to the degree to which it is able to create a world in which it becomes true" (2014, p. 143). The problem here is whose concerns and visions are prioritized, what worlds become true. The problem is the violence of the contact zone, especially in a space that was supposedly meant to enable intercultural meaning making.

5.2 Categorization (or the art of defining)

> *Legal categories are not everyday ones (in fact, lawyers work hard to distinguish everyday and legal categories), but produced, refined, and sustained through generations of legal practice and inculcation. We are not making distinctions here between, say, world music, jazz, and folk music, but between acts and omissions; easements and profits à prendre; freehold and leasehold. The production and stabilization of such lawyerly categories, and the hard work that goes into sorting the world into them, should be a focus of our attention.*
>
> Nicholas Blomley, 2014, p. 140

The decisions about what to include and exclude in the development of DS66 I just introduced are closely linked to the production of legal categories that, while they might not be new, are re-actualized to consolidate Indigenous dispossession in new ways. If the bracketings above are about creating a macro

normative universe with a broad brush by "carv[ing] out a realm of law that operates according to a distinct set of exclusions" (Blomley, 2014, p. 137), categorization is about delineating specific situations where consultation becomes (im)possible. It is about putting so many conditions for the duty to consult to be triggered that consultation loses its spirit as a space where the state and Indigenous peoples could enter into dialogue. While it is hard to know if this was a deliberate strategy, this section sheds light on the mechanics and rationale for how important definitions were made that have a significant impact on the scope of consultation.

As I explained in Chapter 2, categorization can be seen as a particular bracketing technology according to Blomley (2014). However, I decided to examine it as a stand alone practice. The reason for this is that DS66 was most of all an exercise in producing definitions – that is what the wording of the regulation article by article at the Consensus Table was about. Once the bracketings above provided the big frame, it was through the production of categories that planning and law cooperated to enable some courses of action to become a reality at the expense of others. As Government Lawyer 1 said, "[the goal] was basically to define, to specify what had to be consulted. And an analysis was done and the conclusion was reached that it was necessary to offer a definition of administrative measures, [and] a definition of affecting [Indigenous peoples] directly that made consultation reasonable and… just." It was also in the process of producing these categories that intercultural negotiation and contestation became particularly visible, as these definitions were fought word by word between Indigenous peoples and government representatives.

While every legal category present in DS66 could be analyzed, this study focuses on the two most contentious ones introduced by Government Lawyer 1 in the previous paragraph, which coincide with key disagreements that ruined the Consultation. As Government Lawyer 2 put it, "these [are the issues] that trigger Indigenous consultation or not." While the disagreements discussed in the previous chapter began to brew at the broader level of bracketings, they found precision and materiality in the actual wording of DS66 and the definitions it established. In fact, let's remember that both disagreements ended up being merged into one single article – Article 7 "Measures that might affect Indigenous peoples directly" (*Medidas suceptibles de afectar directamente a los pueblos indígenas*) – as mentioned earlier. Despite the consolidation of these legal categories towards the end of the process, it is still important to consider how these definitions were negotiated and contested, and how they serve to reduce the scope of Indigenous rights and self-determination in specific ways.

5.2.1 *"Let's try to be very specific:" Defining what it means to affect Indigenous peoples directly*

Discussions about this issue were highly contested, since this categorization exercise defines *who* should be consulted and *when*, as well as what kinds of impacts are deemed pertinent and who decides about those impacts. Simply put, if Indigenous peoples are not affected directly a measure does not need to be consulted. End of the story. Given the government's aversion to the prospect of consultation paralyzing the economy and state operations, the incentives to try to restrict as much as possible are obvious.[111]

As introduced in the previous chapter, the conversation had several layers. One definition involved settling what the adjective *directly* meant and the types of direct impacts requiring consultation. In this regard, the government advocated for having a clearly defined list of cases that would trigger the duty to consult (i.e. impacts on Indigenous lands, ways of life, relocation, traditional knowledge, etc.). Another aspect of the definition concerned whether a measure should affect Indigenous peoples *specifically* in order to be consulted, or if any measure that might affect the whole population – and therefore also have an impact on Indigenous peoples – should also be consulted. In a similar vein, another consideration involved whether a measure should affect an entire Indigenous nation in order to trigger the duty to consult, or if it was enough that a part of an Indigenous nation was affected. As a whole, this article sought to draw boundaries regarding Indigenous peoples' identity and unique status, about authority to determine what counts as impact, and about impact quantification. As the quotes below illustrate, the discussions involved in these categorization exercises also illustrate with great detail the government's inability to engage with Indigenous worldviews. Even more, they make clear the state's attempt to impose a worldview and to justify this imposition by appealing to the Chilean Constitution.

As briefly mentioned earlier, the government initially had considered the development of a catalogue of impacts open to consultation that resembled the SEIA's regulation. As Government Lawyer 2 explained:

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[111] Following Cameron (forthcoming), this trend can be seen in light of the "dual dilemma" Latin American countries face in the context of struggles for inclusive citizenship. In his words, "the term inclusion refers to the process by which participation in public decision-making is extended to previously marginalized groups. For those in power, inclusion entails a political dilemma: whether to allow previously marginalized groups a say in public decision-making or to perpetuate their exclusion. A key constraint on this decision is whether inclusion threatens the interests of powerful political actors by expanding the political arena in ways that may cause a crisis of social domination… Previously marginalized groups struggling for inclusion also face a dilemma: in addition to seeking a place at the table they may also want a new menu. Since they typically seek to transform political institutions as well as occupy them, they often fear that their demands will be met with half-measures, with efforts to co-opt and control them, or with concessions that weaken their autonomy and neutralize their capacity to mobilize" (Cameron, forthcoming).

> The instruction was always to try to define [what it means that a measure affects Indigenous peoples directly] a bit more. "Let's try to be very specific regarding [this]. If it is [done] through [a] catalogue [of cases], that's good. If it can be further specified, even better." Because we [UCAI planners] always talked about affecting significantly. So, everyone [else in government] said: "Okay, you are saying that it [has to] be significant, but you are not defining what significant means. What does it mean that it [affects] significant[ly]?" Unlike the environmental legislation, which tells you "significant impact" and [details] a full catalogue [of cases].

However, as the conversations at the Consensus Table evolved the matters to be considered expanded. In fact, one of the key reasons why this article was rejected is precisely that DS66 does not apply to measures led by the SEIA, which are evidently among the ones that most directly affect Indigenous peoples. Elaborating on why Indigenous peoples rejected consultation to take place within the environmental system, UCAI Planner 2 explained:

> Because they think there are more reasons that deserve carrying out a consultation than the SEIA establishes. In other words, the SEIA says that there shall be consultation when Indigenous communities are relocated, when their life systems are altered, or when their cultural heritage is affected. And they say: "No, there is more [than that]." They say: "Those are environmental impacts, but there are other potential impacts [to Indigenous peoples] that are not considered in the environmental regulation." We think that they are considered, so that is where we have a difference.

What from the perspective of the state was a difference actually points to deeper discussions about Indigenous connections to their territories, which seemed incommensurable to government eyes. Despite this difficulty in understanding, the government representatives did engage in conversations about these matters when Indigenous peoples brought them to the Table and some partial changes were made to the initial draft of DS66 in this regard. As Minister 2 framed it:

> Another characteristic of the new regulation, which differs from the old norm… is that impact [on Indigenous peoples] is not restricted to lands, material, physical, geographical [aspects]. We also incorporated elements as important as culture, religious practices, traditions… Those are extremely important steps, which are difficult to incorporate within the state. It is difficult to reach consensus among different interests within the state. And President Piñera took the risk to incorporate those elements that are more volitional, more subjective, ehmm, more ethereal, [more] difficult to specify, but that we believe represent with more rigour the spirit of [C169].

Detailing the changes that the original DS66 draft experienced as a result of the negotiations with Indigenous peoples, the Consultation's Final Report explains the evolution of the wording in the following terms:

> In relation to this article [likelihood of a measure affecting Indigenous peoples directly], the first big move forward – which was a response to one of the key observations made by Indigenous representatives – concerns removing the concept "general" from the administrative measures that should be consulted. In this way, shall be consulted not only those measures that have

> general effects, but also those that have a particular effect – always in cases when they might affect Indigenous peoples directly… Similarly, the reference to measures that have an impact on Indigenous peoples "exclusively" was removed. That concept was replaced by "specifically," which allows broadening the application of the regulation compared to the previous wording… [This change means that] shall be consulted not only those measures that affect Indigenous peoples exclusively, but also those that having general effects on the population at large also produce a specific effect on Indigenous peoples. This is consistent with the observations made by [former UN] Special Rapporteur on the Rights of Indigenous Peoples, James Anaya, who states that all those administrative and legislative measures that "affect Indigenous peoples in a different way given their specific conditions and rights" should be consulted. Regarding [the likelihood of a measure] affecting [Indigenous peoples] directly, the [original] wording proposed by the government at the Consensus Table stated that the measure should affect the exercise of [Indigenous peoples'] "traditions and ancestral ways of life; religious, cultural, or spiritual practices; or the relationship of these with Indigenous lands." In a way [this framing] could have been understood as reducing the scope of the [need for consultation], since in order to be consulted a measure had to affect the relationship between culture, tradition, or ways of life, and Indigenous land. Considering this, the government decided to remove the relationship between culture, traditions, or religious practices with Indigenous land with the goal of broadening the application of consultation… [With this new formulation] it will suffice that a measure might directly affect the culture of an Indigenous [nation] for the duty to consult to get triggered. Similarly… [there might be cases where consultation gets triggered] regarding Indigenous lands only, provided that the impacts are significant (Gobierno de Chile, 2013b, p. 148, translation mine).

As already mentioned, Indigenous peoples rejected the final version of the article, since it did not capture how they understood their own impacts on their own territories and livelihoods. In this regard, UCAI Planner 2 tried to minimize the nature of the refusal in the following terms:

> I have the impression this is a semantic disagreement, because in practice we did include part of [the Indigenous] demands. The [previous regulation, Supreme Decree 24] stated that a measure might affect Indigenous peoples directly only if it had an impact on their lands or on Indigenous Development Areas. This time, the conversation focused on: "This is not only about land, but also about our worldview, our territory." And we said: "Look, okay, we agree and that is not a problem… But a regulation that is targeted to public servants… because the duty to consult is a responsibility of government bodies. Therefore, the regulation has to be worded in a way that public servants can understand, that public entities can implement…" And [Indigenous leaders sitting at the Consensus Table] said: "No, we want to include the term worldview." Sure, but worldview is not a concept that is part of the public servants' vocabulary. Do you understand me? By public sector I mean [government] employees. That's why I think it's more of a semantic difference, because the concept [of what it means that a measure affects Indigenous peoples directly] they are thinking about is quite similar to the [definition] we proposed.

This passage is very revealing, since it sheds light on how despite the openness of some government officials to engage in conversations about these matters, still in the end the state sought to make the intangible tangible. Elaborating more on the changes in wording, UCAI Planner 2 added that:

> Even a provision was added stating that… [the duty to consult might get triggered] when [a measure] affects Indigenous peoples in a specific and significant way. In other words, even if [the measure] affects the population as a whole but Indigenous peoples are affected differently. Because we received complaints that the Tobacco Law should have been consulted [for instance]… [The same with the Fishing Law]. Today, with this definition in place, the Fishing Law might need to be consulted. There is [room for] discussion there, but the definition we incorporated in the new regulation opens the door for measures [affecting] the general population to be consulted if they affect Indigenous peoples in a special way, which is different to the [impacts experienced] by the rest of the society. So, we believe we have taken an important step.

Government Lawyer 1, on the other hand, reflected on the meaning-making process with a more critical eye as follows:

> Regarding [this definition], that's where there are more doubts maybe. Until the very last minute new texts came up that refined, that made changes – removing a comma, adding a comma, adding an action… Later we realized: "Hey, the answer was in front of our eyes all the time." It's Article 7 of [C169], which describes to a certain extent [what] affecting directly [means]. Where it says: "Interested [Indigenous] Peoples shall have the right to decide their own priorities… blah, blah, blah… to the extent that [a government measure] affects…" – and there's the content of [what] affecting [means] – "their lifestyles, beliefs, institutions, and spiritual wellbeing on the lands they occupy or use…" We could have used that [wording] and then develop the idea further, or [leave it] as it was, in that omni-comprehensive way that didn't restrict consultation… It came to our mind… at the last minute, [when] the discussion was already closed… Looking in retrospect… perhaps [the definition of] affecting [Indigenous peoples] directly] is one of the things where there is more room for improvement in this regulation. And that would allow [us] to refine consultation even more, in the sense of including themes and of opening [it] up a bit more, because it ended up being too narrow.

The doubts and difficulty in reaching agreement permeated the government itself. While this study takes the Chilean state as a unity – to the extent that despite the self-reported Indigenization of some of them, all government representatives shared a single official stance – the passage below highlights the tensions involved in the negotiation of DS66 within government circles. Once again, the search for legal certainty and the compulsive fixation with reasonableness show through the reflections of Government Lawyer 1:

> One may ask: "Why making the definition of [what measures might] affect [Indigenous peoples] directly so complicated?" It is like defining I don't know, like trying to define something in the sense of making it reasonable. Vague concepts, which are very difficult to put limits to, [very difficult] to describe. Hence, it was also difficult [to reach agreements] within government. There wasn't a single voice. I mean, there were ministry advisers that criticized the concepts that were under discussion. Work regarding those articles was very, very tense.

Indigenous representatives sitting at the table illustrated the differences in understanding regarding what measures might affect them directly with stories such as the one below. For instance, Indigenous Leader 3 said:

> We requested [the company] to… place the tailings somewhere else, not in that ravine. Because that ravine, even though it wasn't very big, for us who live high in the mountains [was very important]. There was a spring that feeds three other ravines downhill. Do you understand? There is not much population [living there], but the guanacos go there. We know because that's where they do their [physiological] needs, because they sleep there, and that's where their food is… That's why – with our Indigenous view – we would say: "Find another ravine or look for another alternative, but don't do it there." But the [government] employees would come and tell us: "But that would require too much investment." And I would reply: "But why do you care about that! You are the state. The private company should give me that answer, but why are you giving me that answer?!" … That's why we wanted to participate in [the Consultation] process. Because all of that was happening and we experienced it.

Indigenous Leader 4 went further and told me:

> I think we should make progress [regarding the implementation of the duty to consult, but] perhaps not [in terms of] regulations. Perhaps [making] a pact regarding… some matters that should be… untouchable. Such as the total protection of waters [for instance]. I mean, there should not be space for a community to decide whether their waters can be contaminated. There has to be a national, mandatory agreement [stating] that waters are untouchable… You can't consult whether you want your waters and your lands to be polluted, or your native forest to be destroyed… [or mining] concessions. That shouldn't be [allowed]. It must be mandatory that before… [issuing a mining] concession there must be a consultation [process]. But that is not protected within [DS40], and within [DS66] even less so, because [the government] removed all items related to investment projects… We have to reach an agreement that there are things that are untouchable and others that can be discussed. That has to be crystal clear, because what [the government] is trying to do with [these regulations] is that [companies] go to the territory and then carry out the consultation afterwards, once all damage has been done… It shouldn't be like that… These [two] regulations were imposed on us. So well, we will continue our work of denouncing and raising awareness about these [legal instruments] that are violating [Indigenous] peoples' rights.

This categorization exercise is particularly complex. On the one hand, it shows the government's openness to expand its understandings regarding what they saw as intangible, volitional, and difficult to define matters. While limited and insufficient, engaging in discussions about worldviews offers some hope regarding the Indigenization of government, as well as regarding the power of intercultural planning work. Linking back to the discussions presented in the previous chapter, this openness to engage in these kinds of discussions was largely informed by the ignorance and affective curiosity of the UCAI planners. On the other hand, however, the process of negotiating this categorization also shows the limits of such efforts and the government's expectation that Indigenous needs should fit into western definitions and languages. Despite the

incorporation of more intangible aspects into DS66, the impulse to make consultation manageable and amenable to government operations is clear. The emphasis moves away from the exercise of Indigenous rights towards the ability of bureaucrats to understand what is involved in a consultation. In other words, Indigenous self-determination and the ability of Indigenous peoples to define what affecting directly means is superseded by the state's need to make consultation implementable. As several Indigenous leaders suggest, the lack of agreement regarding the impact of investment projects reinforces the detachment from land concerns.

5.2.2 "Not everything should be consulted, not everything can be consulted:" Defining government measures open to consultation

The other crucial categorization exercise I would like to discuss concerns what government measures should be consulted. As UCAI Planner 2 put it, the government's rationale for merging this article and the one I just described is that "in the end a measure shall be consulted as long as it affects [Indigenous peoples] directly." As I introduced in the previous chapter, this discussion was mostly driven by the fear of paralyzing the whole public administration, paralyzing private investment, and paralyzing Congress, but framed in terms of reasonableness by reducing the conversation to absurdity. As Government Lawyer 1 argued:

> During a presentation to the Congress [regarding the implementation to the duty to consult]… Americo Incalcaterra [UN High Commissioner for Human Rights at the time] said: "Well, of course this is not about suffering from 'consultitis.'" I think that's a widespread opinion. No one thinks that we should consult all and each administrative measure the government enacts. But it looks like that is what some Indigenous organizations understand. And the reason [for limiting consultation] is very simple: there is no money to carry out so many consultations. Second, Indigenous communities themselves have no time. They receive no money for participating in a consultation, so they can't take care of 1,000 consultation [processes] each month. Because following that idea of consulting everything we should carry out a consultation for each decision that is made.

Similar to the previous point, this categorization exercise had more than one layer. Since C169 states that the measures open to consultation are only those administrative and legislative measures that might affect Indigenous peoples directly, this automatically excluded measures emanating from the judicial branch from the discussion. Even though in Chile some of the most controversial measures demanded by Indigenous peoples are in the hands of the courts – such as mining exploration concessions and the allocation of water rights – in practice they were not formally part of the Consultation. Some Indigenous peoples who demanded this to be part of the negotiations ended up withdrawing from the process. In a sense, the

exclusion of judicial measures can be seen as an unquestioned bracketing grounded in Chile's legalism, as opposed to a categorization exercise such as the ones discussed here.

Regarding legislative measures there was clarity, but the government saw the need to narrow down what kinds of administrative measures should be consulted.[112] Again, the need to make manageable and reasonable according to state standards comes to the foreground. As Government Lawyer 1 explained:

> A series of analyses were done regarding administrative measures, because [C169] does not specify. It just talks about administrative measures. And administrative measures means administrative acts. And administrative acts according to Chile's Law of Administrative Procedures (*Ley de Procedimientos Administrativos*) are a vast number of things. [It] can be a letter, a written notice, a report, a procedure conducted by a public agency.

When I asked him for more details about how the process unfolded and what criteria they used to filter, he elaborated in the following terms:

> The baseline was that administrative measures have to be consulted *in order to reach an agreement. You [can only] reach an agreement regarding those things that can be [legally] stipulated*. I mean, you can't negotiate whether you stop breathing – to put a very absurd and extreme example. You can't say: "Okay, let's negotiate whether I stop breathing or not," because if I don't breath I die. In other words, there are things I can't decide; they are not within the scope of my will… And that is when the distinction between ruled and discretional measures came to be. And a position was taken [by the government] that only discretional measures would be consulted. In other words, those where the [relevant] authority can pronounce… against or in favour, reject or approve [the request]. That [the authority] had a margin to be able to decide. That they had discretion. On the other hand, ruled measures can't [be approved or rejected]. Ruled [measures] meet a certain requisite established by law and the [government] authority have to approve them. Hence, we argued – and until now I think it is the right position – that there are certain measures that you can't open to consultation because you will never be able to reach an agreement. That decision was already made by the law. It is already decided and what the [public] administration does is to carry out that decision. For instance, issuing a permit that only requires presenting certain documents to meet certain requisites (emphasis mine).

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[112] Following Cordero's (2013) legal interpretation of the early stages of the implementation of the duty to consult as reflected in DS124, these attempts to mutilate the spirit of C169 dated to the early stages of the legislative discussion about the ratification of C169. In his words, "the government's strategy was two-fold. On the one hand, it established that for the purpose of Indigenous participation 'administrative measures' meant 'policies, plans, and programs,' thus attempting to exclude single content 'administrative acts' such as Environmental Qualification Resolutions. On the other hand, [DS124] reaffirmed that in case of investment projects on Indigenous lands for which there were specific procedures in place – which obviously referred to the SEIA – [such consultations] should comply with the aforementioned specific procedures, suggesting that the consultation standard enshrined in [C169] was already met" (2013, pp. 73-74, translation mine). DS66 expands this definition to also encompass discretional administrative measures.

This reflection is interesting and shows the inseparability of bracketing and interpretation. In other words, the creation of certain spheres of jurisdiction depends on the legal meanings associated with particular alternative futures. Unlike some of the other conversations, which were led and involved UCAI planners at large and representatives from other ministries, as the Consultation progressed the process started to become more and more centralized, and more and more in the hands of the legal units of the MDS and SEGPRES. Government Lawyer 1 kept going deeper into the nitty gritty of the conversations:

> And well, how did we make that distinction? It was within the team, we talked about it, we though about it over and over again, and there was a team meeting with different lawyers… And we started with a brainstorming session. "Well, you need to reach an agreement regarding administrative measures." Okay, but can you reach an agreement [regarding any measure]? It doesn't look like, right? For instance, can you reach an agreement regarding the rulings of the National Audit Office? When the National Audit Office pronounces about the legal interpretation that shall be given to the laws that govern the public administration? … It doesn't seem so. Because it would be a bit absurd to consult [those kinds of things]… It's like consulting a sentence of the justice courts. In other words, we are asking the court to make a resolution, but first we are going to tell [the court] to consult with us. [So we said:] "No, it shouldn't be like this, right? It kind of sounds illogical." So then we started saying: "You know what? It looks like there are some types of [administrative] measures where there is justification for not consulting them…" For instance, an administrative measure can perfectly well be… a Police order that says: "They are committing a crime. [The Police] has to break in." In the presence of a flagrant crime [the Police] doesn't need a judicial order [to break into a place]. You could say that is an administrative measure. "And does it affect Indigenous peoples directly? It might be. So it should be consulted." Perhaps it would be absurd to open up for consultation administrative acts of the Police. So, then we started leaving aside [government] organs… the measures of which [we thought] should not be consulted.

The lawyer's reflections are illuminating in many ways and make visible the government's modus operandi with much detail. Bracketing, categorization, and legal interpretation seem crucial, at the same time that the supremacy of Chilean legal orders is reaffirmed as the absolute and unquestionable frame of reference, as I elaborate in section 5.4. Essentially, the lack of logic the lawyer refers to concerns the lack of consistency with existing Chilean laws, which he never examines as a construct subject to further analysis.

Speaking from his political role, Minister 2 reinforced the same message about the tautological nature of Chilean law when he told me that "there are measures that the state, the administration, the executive [branch] is legally obliged to apply provided that certain requisites are met. [Measures] where the [government] has no discretion [to act]… because they do not depend on the [government] authority… If their requirements are met the [government] does not have the power to reject some measures. Or the courts, they do not have the authority to not issue a [mining exploration] concession, for instance." It looks

like Chilean law acquires life and power of its own, which is totally detached from any agency. It is as if laws were not made by people; as if normative universes were independent from the social contexts they emerge from and did not acquire meaning through common narratives, as the next sections argue. Government Lawyer 1 reinforced that idea when he told me: "Because otherwise how could you as an authority say 'Yes, I made a different decision because I consulted it'? Where is the law that authorizes you to change what the other law says regarding what you have to decide if all requisites are met?"

The process of negotiating DS66 shows clearly how the state sought to codify the duty to consult as much as possible, in an effort to reduce legal uncertainty and find procedural precision, the ultimate result of which is to reduce the scope of C169 and limit Indigenous rights. The discussions about what can and should be consulted begin to make visible the unquestioned supremacy of Chilean law. All arguments go back to the Constitution, Administrative Law, the discretion of Chilean authorities, suggesting the tautological nature of consultation legislation. I think it is fair to argue that consultation is not meant to bridge and offer a space of encounter with Indigenous peoples, but to find within the existing universe of Chilean law those categories that allow embedding legislation in a seamless way.

Similar to the decision to keep consultations within the SEIA described earlier, this categorization exercise capitalized on existing categories – ruled and discretional measures – in order to proceduralize Indigenous rights. Government Lawyer 1 was actually very proud of the legal exploration the small team of lawyers made into the depths of Chilean Administrative Law. As he admitted: "We were very happy, because we thought the proposal about administrative measures was very beautiful… It had been our idea. We were ultra convinced, it seemed reasonable to us. It seemed sensible… And [it was ready], there was nothing else left to do. Just inflating it a bit more, embroidering it, giving it a little bit more support and that was it." The interviews make evident how the objective was to make consultation manageable at the expense of running counter to the spirit of C169.

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As I have suggested, taken together these processes of bracketing and categorization that marked the development of the Consultation produced a legal universe that sought to make Indigenous rights broadly, and the duty to consult specifically, manageable according to state standards. What is more, the processes above begin to make visible deeper clashes that go well beyond the disagreements the government referred to publicly. Perhaps the most significant concern explicit attempts to detach DS66 from land concerns. In short, the Consultation produced a universe where Indigenous ways of planning and making decisions,

Indigenous sovereignty and self-determination, and legal orders were rendered marginal, if not non-existent. Where Indigenous concerns about territory and self-determination were dismissed with arguments that dressed the conversation with technical and operational veils. Where Chilean law took precedence essentially through the use of tautological intertextualities (Smith, 2005) that arguably have no more intrinsic validity than international agreements endorsed by the country or than Indigenous legal orders. Western law is used to enable the absorption of Indigenous expectations about what the duty to consult should mean into something legal infrastructures seek to assimilate, not to enable intercultural dialogue. This leads me to the next two features – interpretation and exclusivity – that show the government's impulse to make the duty to consult compatible with Chilean legal frameworks and illustrate with more clarity the depth of the contact zone's tensions.

5.3 Interpretation (or the myth of unclear law)

There is no doubt that the Consultation was to a great extent an effort to provide legal certainty to the duty to consult through the bracketings and categorizations introduced above. However, I want to argue that the process and its outcomes were most of all about the monopolization of meaning making in the hands of the state, about the supremacy of state authority, and about a renewed attempt to impose one legal order over others. The following sections engage with these ideas more deeply, beginning with the role that legal interpretation played in the production of DS66.

In Chapter 2, I made clear that this research begins from an acknowledgement that Chile's legal landscape is legally plural. In other words, that multiple legal orders exist that are the product of different ways of disentangling reality (Blomley, 2014), and that they are intrinsically equal in value and legitimacy even if one of them feels "legitimated to suppress, marginalize or even destroy" (de Sousa Santos, 2005, p. 450) the others. In this context, the bracketing and categorization exercises introduced above only become possible through interpretation; through the way in which they relate to an existing normative universe that gives them meaning. Following Cover (1983, 1986), in the next pages I argue that the disagreements at the heart of the Consultation's failure are not the product of "unclear law." Rather, they are the expression of "too much law," what I refer to as multiple legal orders clashing. In other words, the failure of the Consultation and the tensions that characterize planning contact zones in Chile do not require "remov[ing] uncertainty, lack of clarity, and difference of opinion about what the law is" (Cover, 1983, p. 42), as government officials in Chile desperately tried to do. What this clash requires is

> To acknowledge the nomic integrity of each of the communities that have generated principles and precepts… to posit that *each* "community of interpretation" that has achieved "law" has its own *nomos* - narratives, experiences, and visions to which the norm articulated is the right response. And… to recognize that different interpretive communities will almost certainly exist and will generate distinctive responses to any normative problem of substantial complexity (Cover, 1983, p. 42).

Despite the Indigenization of government and the attempts by some officials to engage with Indigenous worldviews, this did not happen in a way that substantially transforms Chile's planning contact zone. The passage below clearly illustrates that the government understood the implementation of the duty to consult as a space to reduce what they saw as lack of legal clarity. Talking about the measures that should be consulted, for instance, Government Lawyer 1 told me:

> So, [we said:] "How do we do it?" Okay, you have a good concept: administrative measures… [but it's just] air. If you try to apply it to a case, it can be everything or it can be nothing. It would depend on the judgment of the authority making the analysis. If you hand [C169] to a service manager they can say "A" and another service manager can say "B," which is too broad. Therefore, the exercise was: "Okay, how do we make it reasonable?" And trust me, we reviewed all over the place [in other countries] to see if there were criteria [regarding how to define what administrative measures should be consulted] and we didn't find anything… That is why I have the peace of mind, almost at the spiritual level, that the whole Consultation, the [writing of] the regulation was done in good faith. And that given all the difficulties, all the obstacles there might have been… [we] produced the best that could be done in that scenario.

Adding more details about the distinction between discretional and ruled measures, the same lawyer justified their decision in the following terms:

> We might be wrong… But we thought that this interpretation led us to an implementation of the duty to consult that is reasonable. Otherwise, we would have ended up in a scenario where consultation was not going to be applied, there was going to be absolute rejection, no one was going to talk about consultation because you were going to have to consult everything, [we were] going to be asked to carry out consultation regarding all kinds of things. I thought that [was] to plant the seed of rejection and, eventually, [Chile's] withdrawal from [C169] ten years after its ratification.

Regarding the discussion about measures that might affect Indigenous peoples directly, Government Lawyer 2 reflected:

> Then I think there [should be] room for discretion… room for negotiation between the parties. [But] to be honest, I don't see real room for negotiation… in terms of the contents [of DS66]… There are some demands coming from the [Indigenous] leadership world that repeat over and over again, and that I know are impossible [for the government to accept]. I've had to get upset with them at times [laughs]. I mean, they have gotten upset with me [laughs]. Because all of them ask for the Minister [of Indigenous Affairs, once the ministry is created] to be Indigenous

> and to be elected by Indigenous peoples. And constitutionally we can't do that. I mean, because of politics it's likely that the Minister will always be Indigenous… But I can't put that in a law, because that would be an arbitrary discrimination in favour of a group of people. That's the first thing. And on the other hand is the [request for the Minister] to be elected by Indigenous peoples. I can't [do that] either. That's the authority of the President of the Republic. [They] will never delegate [that task], they can't do it. I mean, even if they wanted to do it, they can't… You know what's missing? There is no [clear] base line and [clear] limit… in terms of what the state can and can't give. I think when one goes to a negotiation table one always has to say: "My limit is here and I can raise my bar up to here and can get as low as this [making gestures with the hand]."

Another brutally honest conversation took place with Government Lawyer 1, who made transparent the pragmatics of world-making (Delaney, 2010) in the Consultation in the following terms:

> [The definition of what measures might] affect [Indigenous peoples] directly was the big theme where there was… less certainty or conviction, for lack of better words, regarding how we should word it. And in the end, having so many people giving their opinion created confusion. What we had was this [the most updated version of DS66] and it reached the hands of the President and he said: "Okay, yes, it seems reasonable to me." And he signed. And [DS66] was enacted. That's how regulations are made… It's very funny, because when one is outside [of government] one thinks that things are done differently. But no – it's discussion, dialogue, exchange of ideas, very informal. There are no [official government documents] that say: "Look, this is my opinion" and then you give your opinion and the document is shared back and forth. No, in these situations we meet, brainstorm, phone, email, "Okay, let's get together to discuss the proposals we received." At the next meeting we discuss, everything floating in the air, we say "Will we make any changes?" "Yes, like this?" "Okay, like that is fine." Done. And that [document] is submitted. And then it reaches a higher level of advisers… The level of ministers, deputy ministers, they play the same game where they give their opinions regarding the proposal that was presented to them. "Look, there is consensus regarding this proposal, so don't touch it much. Because if there is agreement why to include more things that will only create disagreement." So [in these internal conversations] many things were kept. And then [the document] finally reaches the President… and the President also has the right to get involved. Actually that's why we vote the President, to get involved [in things like this]. And he got involved and there were several modifications made, I can't recall which ones. I think more than presidential modifications it was like "I like it" or "I don't like it." And if he didn't like it we had to submit something different… And those were the modifications.

This passage offers the clearest portrait of presidential control in Chile, as well as unsettlingly direct insights into the arbitrariness of the interpretative task in western law. It is the underlying shared narratives Cover talks about that explain why this interpretation seemed valid to government officials while Indigenous peoples interpretations did not. As he argues, "to live in a legal world requires that one know not only the precepts, but also their connections to possible and plausible states of affairs. It requires that one integrate not only the "is" and the "ought," but the "is," the "ought," and the "what might be."… The intelligibility of normative behavior inheres in the communal character of the narratives that provide the context of that behavior"

(Cover, 1983, p. 10). The issue, then, is not that interpretation is a relative, arbitrary, always contingent exercise. That is actually the nature of legal meaning making. The issue is that some interpretations – the state's – are deemed valid while others – Indigenous peoples' – are placed in the sphere of the unacceptable. Not only that, but Indigenous peoples are actually blamed for not conforming to Chile's normative precepts. As Minister 1 explains:

> I feel the big achievement of the… Piñera government regarding Indigenous affairs is to have gotten these [new Indigenous] institutional frameworks off the ground. Regardless of the levels of contention, which I think will always exist and are part of the nature of the dialogue with Indigenous communities, *because of their diversity of opinions*. I mean, it is very difficult that you carry out a consultation that generates unanimity; regardless of how you do it. I mean, I think that is almost impossible (emphasis mine).

While all three disagreements I have presented in Chapter 4 make evident differences in legal interpretation, the one concerning investment projects is perhaps the clearest manifestation that what is really at stake are radically differing normative universes. In a broader reflection about the value of engaging in conversation with the state and what measures are most relevant to Indigenous peoples, Indigenous Leader 9 told me:

> We have no problem sitting down [with the state] and discussing, okay? But [it has to be] about concrete and clear issues. For instance, what will the mechanisms for territorial restitution be? How will we come together to address matters related to ancestral territories? How to deal with the issues [C169] itself stipulates regarding… subsurface natural resources? How will we address the issue of water scarcity [in Indigenous communities], of water rights, of [private] water ownership, and of the meaning of water as a life element that is being lost? [Are we going to address this] with water cistern trucks [as it currently happens]? With forestry plantations? What other issues? The forestry industry; the invasion of the forestry industry with pine and eucalyptus monocultures. I mean, [those projects] do not even go through [environmental] studies, not even through environmental impact declarations, they are not captured in the relevant legislation. [Despite spreading over massive stretches of land] they are not considered mega-projects, because the [companies] might have one million hectares [planted], but they subdivide them into 500-hectare lots and that's it, they get away with it… When are we going to sit down to talk about land use planning? That's essential for the region and it doesn't exist, you see?

His words leave no doubt that for many Indigenous communities and organizations the gap between their expectations and how the government envisions the duty to consult is extremely wide. When I asked if his organization saw any value in C169, the same leader said:

> I mean, as a tool for specific and concrete situations [C169] has in fact been used and there are some outcomes that might be called positive… At least it [has been possible to] halt some [situations], very specific, very concrete… Now, well, [regarding] the context from which [C169] emerges… [it is clearly] a colonial structure anchored in the 19th century, which reproduces a model of state that is hegemonic and monocultural. But for [Indigenous] peoples that are

> dominated in the context of [modern nation-]states these kinds of tools can still be useful in some specific cases. That is the concrete value we see [in C169]. But we don't place our hopes [in C169. We don't think] we will halt extractive projects, save the waters, [save] the mountains by that means. That we will do as we have done so far… through direct action and by halting some projects on the ground. For how long we will be able to keep this going? That's a different issue. But that's the only thing that has worked so far.

The last message is very powerful, because it directly confronts the state's precepts and assumption of authority, and enters in the realm of disobedience (Cover, 1983), something I elaborate later in this chapter. This refusal stance is closely linked to the non-binding nature of consultation and to the supremacy of the state's legal authority over Indigenous rights and sovereignty. Talking about this, UCAI Planner 2 explained the government's stance as follows:

> I don't like talking about [whether C169 is] binding or not for a silly reason, which is that consultation is always binding in the sense that… the duty to consult is always binding. I mean, I have to carry out a consultation when I am [obliged] to do it. I can't avoid the obligatory nature of the duty to consult. Therefore, carrying out consultations is binding for states, for companies as long as the [duty to consult] is triggered. Now, what happens is that right, a consultation will not always result in an agreement. If an agreement is reached, that agreement is binding and must be obeyed by the [Indigenous] community, by the company, or by the government. Therefore, the agreements that are reached in a consultation [process] are binding and must be obeyed by all parties. In case there is no agreement reached, the ILO itself and [C169] state that… the state shall decide how to proceed, you see? And according to [C169] there is only one situation where consent is required, which is in cases of relocation. And that also applies to [DS66]… But for all other measures, in the event that no agreement is reached the decision always belongs to the state. And that was worded [that way] in [DS66]… And that's one of the issues some [Indigenous] organizations have complained about.

As Cover beautifully puts it, "the normative universe is held together by the force of interpretive commitments - some small and private, others immense and public. These commitments - of officials and of others - do determine what law means and what law shall be" (1983, p. 7). In other words, "a legal interpretation cannot be valid if no one is prepared to live by it… The transformation of interpretation into legal meaning begins when someone accepts the demands of interpretation and, through the personal act of commitment, affirms the position taken" (1983, pp. 44-45). What does this mean for DS66? What does the rejection of the regulation by Indigenous peoples – as expressed by Indigenous Leader 9 above – mean? From this perspective, the Consultation's disagreements and Indigenous refusal to engage in negotiations with the government point to Indigenous peoples' lack of commitment to the state's precepts, as well as the state's inability to engage with and commit to Indigenous normative aspirations. This case shows how the imagined alternatives envisioned by the state differ and enter into conflict with Indigenous expectations about what the duty to consult means.

In sum, the disagreements that marked the development of the Consultation concern differences in legal interpretation, understood as a "system of tension or a bridge linking a concept of a reality to an imagined alternative - that is, as a connective between two states of affairs, both of which can be represented in their normative significance only through the devices of narrative… A *nomos*, as a world of law, entails the application of human will to an extant state of affairs as well as toward our visions of alternative futures" (Cover, 1983, p. 9). Those shared narratives and visions of alternative futures – which in this case are for the most part not shared – relate mostly to concerns and understandings of how Indigenous peoples are affected (or not) in their relation to their traditional territories, their livelihoods, and their forms of organization when those territories are affected. As I elaborate in section 5.5, I suggest that these different understandings in relation to land should not be framed as a worldview issue. Not because it is not a worldview issue (which of course it is), but because planning in Chile is such a hyper-regulated, legally-mediated practice that bringing the discussion to the realm of legal orders might push the boundaries of the conversation and make it more productive. By framing the disagreements in terms of unclear law, the solution resides in the courts. By framing it as too much law might begin to displace the debate towards self-determination.

Cover argues that "'interpretation' suggests a social construction of an interpersonal reality through language" (1986, p. 1602), but that in practice "the jurisgenerative principle by which legal meaning proliferates in all communities never exists in isolation from violence. Interpretation always takes place in the shadow of coercion" (1983, p. 40). I already mentioned how this research starts from the premise that the exercise of Chile's legal power ultimately rests in the use of physical power. While the Consultation might not explicitly connect to physical violence at first sight, the passages above demonstrate how the development of DS66 was embedded in a coercive atmosphere where the supremacy of state legal interpretation was continuously imposed on Indigenous peoples by the government. More specifically, the TC remained as a ghost and was used as the gatekeeper of acceptable legality. Similarly, the Chilean Constitution was the shield against which any Indigenous demand would be contrasted and the justification for not engaging with Indigenous precepts. This leads me to the final feature of Chilean law I want to discuss – the assumption of exclusivity.

5.4 Exclusivity (or the monopoly of the regulation and control of social action[113])

So far, I have argued that the implementation of the duty to consult in Chile through the development of DS66 has essentially served to proceduralize Indigenous rights. Trying to understand how this reduction in scope, spirit, and depth has been performatively produced through western law, I have suggested that bracketing, categorization, and interpretation have been essential practices. They have respectively helped create spheres of jurisdiction that reduce the scope of consultation, produced legal categories amenable to state operations, and attempted to impose state approaches to legal meaning making and interpretation on Indigenous peoples. All of these processes can hardly be understood without referring to a fourth feature that I call exclusivity – in other words, the tendency in western legal systems by which "in order to operate adequately, a given… [law] must not only negate the existence of other normative orders or informal laws… that might interfere in its realm of application, but also revoke all… [other] laws that have regulated the same or similar social relations in the past" (de Sousa Santos, 1987, p. 282).

As explained in the previous section, while the Consultation was framed as a discussion about disagreements in concepts, semantics, meanings, and procedural aspects, it was actually about much more than a dispute about unclear law. As Cover puts it:

> To state the problem as one of unclear law or difference of opinion about *the* law seems to presuppose that there is a hermeneutic that is methodologically superior to those employed by the communities that offer their own law… Alternatively, the statist position may be understood to assert implicitly, not a superior interpretive method, but a convention of legal discourse: the state and its designated hierarchy are entitled to the exclusive or supreme jurisgenerative capacity. Everyone else offers suggestions or opinions about what the single normative world should look like, but only the state creates it (1983, pp. 42-43, emphasis in original).

However, this formulation is highly problematic, because taking the "position that only the state creates law… confuses the status of interpretation with the status of political domination… Although this second position may be good state law - the Constitution proclaims itself supreme - the position is at best ambiguous when viewed as a description of what the various norm-generating communities understand themselves to be doing" (Cover, 1983, p. 43). Nonetheless, that is the view that predominated from the government's perspective and shaped the Consultation in every single aspect.

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[113] Concept borrowed from de Sousa Santos (1987, pp. 281-282).

For instance, going back to the quote by de Sousa Santos, the reference to the revocation of DS124 was self-evident during the Consultation. Both government officials and Indigenous peoples involved in the process understood the Consultation in those terms, as the interviews suggest. I have already shown how the government's key concern was legal certainty and preventing the creation of loopholes. However, the government's attempt to impose its legal precepts did not end with the impetus to find legal certainty through DS66 and DS40. The interviews with government officials have already demonstrated that the state's concerns run deeper and also touch on issues of Indigenous representation and political organization, for instance. Senior Official 2 explained his perspective in the following terms:

> I think at least the [Indigenous] leaders that participated in the Consultation as the counterpart of the MDS started to understand over time that in order to govern the country it is not possible to consult everything… And therefore it is necessary to demarcate what will be consulted and when and how. I don't think the government should do nothing, [should] stop making decisions because everything has to be consulted… What the government has to [do is] solv[ing]certain issues around [Indigenous] political representation. And [that will not be solved] until we have an Indigenous Peoples Council that is representative and that becomes the body responsible for fast consultation regarding a large amount of matters. Because that's the issue. I mean, if we expect to have consultations about all general measures that have to go through the 3,800 [Indigenous] communities, it becomes operationally impossible to consult anything. It will be very difficult [in the case of] general [national] consultations. Local and specific consultations are much more feasible, because they are small. They are four, five, ten communities. But for… general consultation we must have an Indigenous Peoples Council that represents all peoples.

UCAI Planner 5 shared the view that the government needs a single interlocutor, but also recognized the limits of the approach and how it is grounded in legal understandings that might differ from Indigenous expectations, as the following passage demonstrates:

> The issue of representation is a central theme that the state has been willing to solve and wants to solve… through the Indigenous Peoples' Council. It's a western solution to the problem… And once again there is this clash, cultural clash if you want, between the way Indigenous [peoples] and the state understand the problem. But at the same time the state needs an interlocutor that allows it to fight, to negotiate, to reach agreements, because that's part of politics and also part of the state's game. In that sense, it is necessary to understand the state. [Understand] that it seeks an [Indigenous] institution, whatever it is [to have as a counterpart]. "You go and do elections, do whatever you want." But again, it is a western approach to elections.

I already showed how Indigenous peoples who decided to engage in the Consultation until the end approached the task with pragmatism. They saw the implementation of the duty to consult as one more trench where the struggle for self-determination can be fought. While fully aware of the inherent limitations

of state institutions, they were open to working within the margins of the state, with the vision of using all available platforms. Indigenous Leader 4, for instance, referred to her participation as follows:

> We see that [C169] opens up a space. It tells the state how it has to do things with Indigenous peoples. And it is the voice of international law, a voice that tells you clearly that the ways in which [different] states have been treating Indigenous peoples must change and must at least adjust to this minimum [standard]. Because [C169] does not explicitly define self-determination, for instance, which is essential for [Indigenous] peoples. But it does provide a framework regarding several issues that are key to Indigenous peoples, which have to do with reparation, with protection, with prevention, with development. [And] that touch on all domains: education, territory, lands, environment, cultural rights, economic [rights]. All of that within the framework of collective rights. [Because] we argue that Indigenous peoples must be recognized as subjects of collective rights, not only individual [rights]… And in that sense, because this country is legalist and needs the law, we have to invoke [C169]. This country needs someone to order and say: "Hey, you are obliged to this" for [Indigenous rights] to be respected. That is why [we] have focused on that. Because [Indigenous] rights' violations have always been the same, they keep increasing. And well, using [C169] it is possible to confront the unfulfilment of those rights in the courts. Without [C169] what could we invoke? Maybe the Indigenous Law, but the Indigenous Law is not very clear regarding [Indigenous] territor[ies] and related matters.

But beyond the search for a marginally improved consultation regulation in procedural terms, most Indigenous peoples involved in the process still pushed for the protection and exercise of substantial Indigenous rights. This refusal to accept state monopoly was generally clearer among Indigenous leaders who withdrew or never participated in the Consultation. Indigenous Leader 4, for instance, rejected the outcomes of the process accusing that DS66 "is full of tricks. [The government] has put in place a series of legal tricks, incomprehensible to Indigenous peoples. Some of us [people in leadership positions] could understand, because we have some level of training or have studied more… But even then… Because [these discussions] are framed within a complex administrative structure." She then was more specific and said: "And the timelines… The regulation's timelines are an issue, [because] they are bound to western timelines, not to Indigenous timelines that are different… I mean, everything is based on [the state's] legal order and not on [Indigenous] peoples legal order[s] or cultural practices… such as [our] customary law."

It is possible to see how Indigenous concerns broadly exceed the procedural focus of the government. Not only that, but they are actually reaching in other directions. The passage by Indigenous Leader 9 below captures well where the deeper differences in interpretation happen, in line with Cover's argument about too much law:

> What happens is that once we begin talking about territory and natural resource matters – including water, and the forestry issue, and land use planning – we are fully getting into the

> realm of autonomy, of governance if you wish. Because for many [Indigenous] people [the discussion] is merely about making declarations: "Let's make *Mapudungun* [Mapuche language] the official language" and everything stays the same. "Okay, perfect, let's declare this region as plurinational." Sure, plurinational – in other words German [settlers], Swiss [settlers], and Mapuche [people]. Like a very light thing. Just a formality, a concept that is linked to a project of decentralization of the country. That's not useful for us. It's not useful because in the end… the powerful actors that are asking for decentralization [are doing it in the search for] power in their respective localities. [Their demands] are not necessarily the demands of [the Mapuche] nation, which is what we are advocating for as Mapuche… For instance, some [Indigenous] people insist in working towards seats [for Indigenous peoples] in Congress. We are not thinking about that. Honestly, you can have six members of Congress and decisions will probably be the same. I mean, that is [useful as a space] for denouncing, but it is always within the institutional framework of the state. You are constrained by the state's structures and institutions. Because their goal is for us to incorporate [into their institutions] and be happy… And we reject that, of course. Because in the end, in the long term, that involves us stop being Mapuche. And we insist in continue being Mapuche… I think those are the big discussions that will need to happen – either by fair means or foul [laughs]. I don't know if that's the best way to put it, but those are the issues that directly affect the lives of Mapuche people.

The conversation radically changes here. As I briefly introduced in the previous section, what the Indigenous Leader is referring to is "the decision to act in accord with an understanding of the law validated by the actor's own community but repudiated by the officialdom of the state, including its judges, [which] is commonly understood as a decision to engage in justifiable disobedience" (Cover, 1983, p. 46). This is in many ways what some Indigenous organizations strongly committed to Indigenous legal orders are doing in Chile today. All of these organizations are portrayed by the Chilean state as radical and most of their actions judged as terrorist. That is the extent of the clash in legal orders I am arguing for here. But again, let's not confuse interpretation with political domination. I share Cover's view that from the perspective of Indigenous peoples interacting with the Chilean state, "the community that has created and proposed to live by its own, divergent understanding of law makes a claim not of justifiable disobedience, but rather of radical reinterpretation" (1983, pp. 46-47). Thinking otherwise is to deny not only Indigenous peoples worldviews or ways of planning, but more specifically "the integrity of a law of its own" (Cover, 1983, p. 47).

Seen from this perspective, the seemingly minor 3 out of 20 disagreements are not just three pending items in the pipeline of incrementally improving Indigenous-state relations. Rather, they are an indication of the state's willingness to "exercis[e] its superior brute force… to [shut] down the creative hermeneutic of principle that is spread throughout [Indigenous] communities" (Cover, 1983, p. 44). The disagreements mean an aggression to one of the most fundamental aspects of a social group – namely its power to create a collective vision for alternative state of affairs that is grounded in common narratives connected to an ethic (Cover, 1983, p. 9). In

the end, the government's insistence in enacting DS66 is just the continuation of the same modus operandi I began to describe in Chapter 3. As Indigenous Leader 9 put it:

> [The Consultation] reproduce[d] the same practices… there is no difference [compared to the ways the state has historically interacted with Indigenous peoples]… First, because the themes put [on the table] are the interest of the state, the goals of the state… I mean, whom did they ask what the priority themes should be? The [Indigenous] Peoples Council, the Ministry of Indigenous Affairs, they are all part of the government's agenda… What governments do [with these kinds of proposals] is to address their own concerns, basically. There is no topic of interest to us…

Regarding C169, the same leader went further to elaborate in the following terms:

> If you want a more cultural and socio-political critique, every instrument is founded in a cultural matrix, you know? And in that sense, the whole [Consultation] process – from design to implementation – was developed from within the culture of the state. From standpoint that is monocultural, western, Chilean, whatever you want to call it. And one of the consultation principles concerns good faith, [another] concerns adequate procedures. [None of that was respected] either, zero consideration… In the end, it ended up being a political [and] communicational manipulation, because the [state] ended up designating [Indigenous] delegates who supposedly endorse the approval of the matters that were consulted.

Placing the Consultation in historical perspective, Indigenous Leader 4 shared the following reflection:

> I don't think there is much difference in the state's relationship with Indigenous peoples [today compared to the past]… As many graffiti all over [Santiago] say, it's just another form of domination. There's no real change [in the sense] of [the state] willing to engage with Indigenous peoples' rights in a respectful way. All progress regarding Indigenous peoples' rights… has been made through resistance, deaths, domination, exclusion, discrimination, and several violations to the lives of [Indigenous] peoples. Even torture… So I think the relationship hasn't changed for the most part. The most that can be said is that the modes of domination are different, [now] with a focus on national development… The general message states always try to convey is that Indigenous peoples are doing better than before. Like we have to be thankful for the things that have been done in favour of Indigenous peoples. And we think that whatever has been done is not a favour at all. What has been done is to make minimum progress regarding what Indigenous peoples are demanding, which is the total protection of the territory, of the life of our peoples… Today we see a big part of Indigenous peoples' territories dominated by the forestry industry, which have forced people to migrate, to basically disappear from some territories. The health of [Indigenous peoples] has been impacted. [Some communities] face military and police occupation and aggression on a daily basis. That is not progress. That speaks really badly about how this particular country has approached the situation with [Indigenous] peoples… The stance of [government] authorities towards Indigenous peoples is like: "But we are giving you lots of land," lands that are actually not ours… it's not the land where our ancestors were born, where they suffered, the lands they defended and took care of, but other [Indigenous peoples'] lands… Because the [state] authorities will never give you the best; they will give you the worst. I mean, not *give*, but *give back*... What they will give you back is not what you lost… So today these spaces [such as the Consultation] open

> up because of an obligation… because they ratified an international treaty that at least embeds things into legislation… We have to invoke that international legal obligation that is being breached for them to comply. Because they have not developed awareness; they have never said: "Honestly, we have treated Indigenous peoples badly and even if there is no [international] law in place we will do things right." That vision doesn't exist in this country. Quite the contrary, Indigenous peoples are seen as the big opponents to [Chile's] development. Development understood in a way that has nothing to do with the development model we have as Indigenous peoples. So I think that's the key conflict – that the state… keeps have a way of governing that is totally conservative, traditional, and discriminatory… I mean, there are key [Indigenous] rights that have been negated, such as the right to autonomous political participation of [Indigenous] peoples. [Chile] keeps sticking to this ancient notion of the state where a non-unitary state cannot exist… where there [can't] be [several] nations within a state, such as Indigenous peoples… [A state] that where multiculturalism, ethnic pluralism is accepted. I think this country has not reached that level of maturity (emphasis mine).

When I asked Senior Official 2 to do a similar exercise and look at the Consultation in light of Chile's historical relationship with Indigenous peoples, he said with conviction that these are "traces of a problem that has always been present in the Concertación [political coalition contrary to Piñera], which is not a secret. In other words, 'Okay, let's deal with Indigenous peoples, yes. But let's not give them too much ability to play, let's not give them too much room, let's restrict [the issue].' That's an existing tension… that has a lot to do with how Chile deals with the problem of multiculturalism. I mean, this didn't started now; this has always been like that. It has to do with the history of this country."

As I stated in Chapter 2, law's search for exclusivity and dominance is actually a consequence of legal pluralism. This institutional exploration of the implementation of the duty to consult in Chile has examined the ways in which a plurality of Indigenous legal orders try to engage with a single, homogenizing normative universe that "aspires to be exclusive, to have the monopoly of the regulation and control of social action within its legal territory" (de Sousa Santos, 1987, pp. 281-282). In this context, as Cover would say "the question, then, is the extent to which coercion is necessary to the maintenance of minimum conditions for the creation of legal meaning in autonomous interpretive communities" (Cover, 1983, p. 44) such as Indigenous peoples in the legalist Chilean context. Indigenous Leader 1 shared with me how they "always fought for the right each [Indigenous] territory has to decide, or to design the right kind of consultation, by itself." If that fight continues strengthening there is much hope for the transformation of Chile's planning contact zone.

5.5 Concluding thoughts on pulling the rope

I have never been much of a team sports kind of person, but as a child I remember enjoying playing *tirar a la cuerda* with my friends and cousins. Literally translated as "pulling the rope,"[114] far from being a traditional Chilean game as I used to think, I later learned that it is an ancient activity played for centuries across the world. The rules are well-known: two teams pull the opposite ends of a rope and try to make the other team cross a line marked on the ground. It is essentially a sport, but also a test of strength and endurance, as well as a proof of team collaboration and coordination. As the dozens of interviews I conducted during the seven months of fieldwork moved along, it felt like I was listening to testimonies of people playing the tug of war. Until Indigenous Leader 1 actually used that metaphor openly during our conversation:

> At the beginning, it wasn't clear how the dialogue [at the Consensus Table] was going to unfold. I mean, someone speaking on this side, someone speaking on that side, presenting [arguments] here, presenting [arguments] there. It was a huge mess in terms of coordination. The only thing we were clear about was that we were there; we knew our purpose, but nothing else. How everything was going to unfold was a mystery actually. In a way [this chaos] was actually beneficial [for Indigenous representatives], because at times, when we were able to unite [and join efforts], we were able to make our ways prevail [over the government's ways]. This worked best for us, because if everything had been too structured we would have not been able to [achieve this]… It was like the rope, we pulled, we all pulled together and we [were able to] move closer to this side. In other words, we convinced [the government] a bit, we made them understand, although they had their baseline clear, the line they couldn't cross. But we took them to the limit of what they had to give and they also pulled the rope, of course. And we also had our limit too, but well, we knew that [this] was a negotiation.

I heard similar stories from government planners, lawyers, and other officials who were on the other side of the line. Government Lawyer 2 summarized his experience of the process saying:

> We had the 11 counter-proposals, we had the opinions of all ministries, also [the opinions] of the business unions, and we had to see how to relate all of them. We understood that it was not just about answering… "This is accepted, this is not accepted, for this and this reason." It was necessary to sit down at a table [to discuss]. And that's when the idea of the Consensus Table came up, where all of the actors from government, ministries, Indigenous representatives [came together]… So, how should we do it then? At the beginning we were able to respond to things that were more technical. But when we reached a more complicated issue, or when there was no agreement among government representatives… we would ask for time off and would go to another room to discuss. All government representatives, [to negotiate] what was going to be the position, including calls to the red phone, all you can imagine… We could easily have two negotiations each day. [One] at the Consensus Table and then [with high level government officials] to share what we had negotiated and, many times, how far past the

[114] In English the game is known as tug of war.

> mandate we had gone. Because it happened many times to us: "We had to cross [the line regarding] this. Why? Because we achieved something more beneficial in another article"… Many times we asked for forgiveness instead of asking for permission… "Okay, we have to go in this direction, or in this other." And then we shared the [President's] opinions with the other ministries: "Look, regarding this article we think it has to go in this direction." If a ministry had an issue – and there were several cases – [we would say]: "You go talk to your minister and then your minister calls our minister. But do it swiftly because this [article] will be shared tomorrow at the [Consensus] Table. You have ten hours starting now. And in ten hours you have to make a briefing note, explain it to your minister, have the minister agree with you and call [the] Minister [of Social Development], and if he convinces him, we will make the change."

You already know what the outcomes of that process were. In the words of Indigenous Leader 1, "towards the very end there was a rupture, when we stood up from the table and went away. We withdrew because [the government representatives] said: 'We can't keep on going anymore.' That was the limit. And when was that? [When we reached the issue of] investment projects… That was the limit because they would go away with our proposal [to discuss] and bring back a counter-proposal that was far away from what we wanted… They would bring a proposal that was worst than the previous one. I mean, at that point it was like bouncing, there was no progress… And they told us: 'We can't do more.'" From the other side of the table, UCAI Planner 1 admitted that "in a way, having the limits set was also the strategy… I mean, when we sat at the table I did not say: 'Hey, I can only go this far.' No, it was a negotiation. The articles were proposed, the arguments were presented. Then, one party proposed a set of articles, the other party analyzed them, and then there was another counterproposal and we agreed on the text." But in the end the three key texts were not agreed.

In the previous chapters, I presented the story of this process through the voices of many of its protagonists – both those directly involved and those openly refusing to be involved. It is the story of more than three years of encounters, resistance, contestation, pulling, and being pulled in Chile's planning contact zone. And a story at the end of which, despite the closeness achieved regarding some matters, the gap left by those matters that were not agreed upon seems to be wider than before. Perhaps precisely because the gap was the result of what resembled an intercultural negotiation. But it was a negotiation taking place on an uneven playing field.

I have described extensively how the Consultation – and in particular the work that happened at the Consensus Table – was to a great extent about fighting word by word to produce a document that offered the promise of an encounter. I have shown how through bracketing, categorization, legal interpretation, and the assumption of the Chilean state's exclusive authority to produce legal meaning, western law and planning interweaved to proceduralize Indigenous rights and limit the scope and spirit of C169. As the words of Indigenous Leader 1 confirm, there was a rupture and the Consultation failed to achieve what it was set up to

do – develop a mutually agreed consultation mechanism with Indigenous peoples through a participatory planning process.

What happened in the process? How should this gap be understood? While the government framed it in terms of three disagreements between Indigenous and government representatives regarding key matters – consultation in the case of investment projects, what administrative and legislative measures should be consulted, and when a government measure might affect Indigenous peoples directly – I have begun to argue that the nature, process, and outcomes of the Consultation suggest that these differences are the visible face of different legal orders clashing. Or more specifically, these disagreements materialize the forced enactment of precepts emerging from the Chilean normative universe at the expense – or in spite – of a multiplicity of Indigenous normative universes that were in the search of alternative visions. In other words, the tensions that characterize planning practice at the intersection of Indigenous and state interests in Chile today are the frictions that emerge where contrasting interpretations and narratives about "right and wrong, of lawful and unlawful, of valid and void" (Cover, 1983, p. 4) meet. As I already argued, they are the result of too much law, not of unclear law. I now turn to the final chapter to explore in more detail what planning might gain (theoretically, conceptually, and pragmatically) from understanding the tensions in the contact zone in terms of conflicting legal orders in action, of one community not being willing to commit with its behaviour to the precepts and alternative futures that emerge from an alien set of normative narratives that are not grounded in the community's common collective lives and experiences.

Chapter 6: In search of radical reinterpretation: Beyond state reasonableness in planning

> *What does it mean to refuse a passport…? What does it mean to say no to these things, or to wait until your terms have been met for agreement, for a reversal of recognition, or a conferral of rights? What happens when we refuse what all (presumably) "sensible" people perceive as good things? What does this refusal do to politics, to sense, to reason? When we add Indigenous peoples to this question, the assumptions and the histories that structure what is perceived to be "good"… shift and stand in stark relief. The positions assumed by people who refuse "gifts" may seem reasoned, sensible, and in fact deeply correct. Indeed, from this perspective, we see that a good is not a good for everyone.*
>
> Audra Simpson, 2014, p. 1

> *Law is that which licenses in blood certain transformations while authorizing others only by unanimous consent.*
>
> Robert Cover, 1983, p. 9

A few days ago, when I was finalizing the writing of this concluding chapter, I received a message from someone in Chile informing me of the death of a young Mapuche leader a couple of hours earlier. Camilo Catrillanca was murdered by a squadron of militarized police called *Comando Jungla* (Jungle Commando), which was recently created by the Government of Chile allegedly to combat terrorism.[115] It would be an act of disrespect to him, his family, and his community to offer details about his death – which can be found in the news – here. I will only say that he was coming back from doing agricultural work and not involved in any kind of criminal activity at the time he encountered the police on his way home and was shot. Not to mention engaged in terrorist activities. He is not the only one. He joins at least four other young Indigenous leaders who have been killed at the hands of the state since 2001 in a supposedly democratic country, some of whom I mentioned in previous chapters.[116]

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[115] According to the Ministry of Interior and Public Safety, "the new anti-terrorist team will be staffed with 80 police officers specifically trained [for this purpose] in the United States, Colombia, and Chile, who will operate in the provinces of Arauco, Cautín, Malleco, and in the Alto Biobío [area]. To perform their duties the forces will be equipped with drones, thermal [imaging] cameras, rangefinder binoculars, GoPro cameras, and nightvision [devices]. In addition, they will have [Toyota] Tundra trucks, and MOWAG and Panhard armoured vehicles" (Gobierno de Chile, 2018b, translation mine).

[116] They include: Alex Lemun (2002), killed by Major Marco Aurelio Treuer during the occupation of a private estate called Santa Elisa, property of forestry company Forestal Mininco; Matías Catrileo (2008), killed by police official Walter Ramírez during the occupation of the Santa Margarita estate, owned by the Luchsinger family and reclaimed by the Mapuche community Lleupeco Vilcún; Johnny Cariqueo Yañez (2008), who died in a police station at the hands of the Group of

The days that followed have been marked by inept, contradictory, and piecemeal official statements by government authorities, the resignation and dismissal of six police officers (including the one who killed Camilo), public declarations and videos by Indigenous and non-Indigenous people repudiating the extra-judicial killing, numerous protests across the country, direct action in solidarity by several Indigenous communities and organizations, an outpouring of disturbing racist comments in social media (including some made by members of my own extended family), and strong police repression to such expressions of anger and social unrest. Thousands of kilometers away, as I have tried to sit down to close this dissertation in a way that brings all the threads introduced in the previous pages together, this new iteration of state violence against Indigenous peoples only makes any work – academic or otherwise – that does not engage with the violence just described, seem futile and myopic at best, irresponsible and contributing to perpetuating such violence at worst.

What does the murder of Camilo Catrillanca this week mean in light of the examination I have made so far about state planning, law, and Indigenous dispossession in Chile? Is the implementation of the duty to consult – with its emphasis on procedural aspects and its wilful efforts to reduce the scope and weaken Indigenous rights through bracketing, categorization, interpretation, and exclusivity – of any relevance to this case? Are planning's soft infrastructures of everyday life (Healey, 2007) implicated in this violence? While this is a dissertation about consultation, it seems impossible not to expand the focus and connect this recent "confusing incident" – as the Government has insisted on framing it – to the colonial genealogy of state planning, and to the seemingly technical tools and instruments of planning, such as consultation regulations, I have examined here. After all, Camilo was killed on the ancestral lands of his nation, which have once again turned into a militarized landscape over the past decades due to long unresolved territorial disputes where planning has had a key role, as I extensively discussed in Chapter 3. His death can only be understood in this context of historical dispossession.[117]

The pages that follow are the conclusions of the formal research I did in the context of my dissertation and emerge from the data collection I described in Chapter 1 as such. However – and most importantly – these

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Special Operations (GOPE) of the police, right after the inauguration of a new park; and Jaime Mendoza Collio (2009), killed by police official Patricio Jara Muñoz during the occupation of the San Sebastián estate. In addition to these killings by the Chilean state, nine other Mapuche individuals have been murdered or disappeared since 2001 without the court system either prosecuting or sanctioning the perpetrators until this day (Werken, 2018).

[117] A context of historical dispossession that, in turn, cannot be understood apart from the gendered nature of settler colonial violence, including the treatment of Indigenous masculinities.

are also the broader conclusions I have reached as a result of seeing the relationship between the state and Indigenous people unfold over the past years; of the many conversations, visits, first-hand experiences, and readings I have encountered since I started this study and that were – formally speaking – unrelated to my PhD work. They include several cases where Indigenous individuals have been framed and spent years in pre-trial detention using police-fabricated testimony only to be later released with no charges due to lack of evidence;[118] at least two cases of Indigenous minors being wounded or assaulted by police forces;[119] several hunger strikes by Indigenous political prisoners asking for justice in the face of unfair trials or treatment; the suspicious death of an Indigenous land defender who was opposing a hydroelectric plant;[120] and the paralyzing of several extractive projects on Indigenous territories through direct action led by Indigenous peoples,[121] among others. Together, these experiences and new understandings have had a profound impact on my ways of thinking about and engaging with the often-tense relations between Indigenous and non-Indigenous peoples, and between the state and Indigenous peoples more specifically. Reducing the concluding chapter to an analysis within the scope of the Consultation only would be counterproductive and apolitical. Or in other words, it is not possible to understand the argument I put forward here without paying attention to this bigger picture.

Before bringing the analysis to an end let me recap the argument I have put forward so far. In the first chapters I outlined my focus on how planning has intertwined with western law to facilitate institutionalized Indigenous dispossession over time, and laid out the conceptual and methodological approach I adopted to explore how that relationship unfolds today. I then traced the evolution of state planning since early colonial times, suggesting that contemporary planning practice – which takes place in the context of the international Indigenous rights discourse – is inseparable from this colonial genealogy. In light of this historical analysis, I used the implementation of the duty to consult as an entry point to explore how contemporary planning

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[118]The Luchsinger-Mackay case – where two elderly German settlers were killed in their home through an arson attack in early 2013 – is emblematic. Eleven Mapuche individuals were detained in March 2016, having weak police evidence to prosecute them, and spent more than a year and a half in pre-trial detention. In June 2018, eight of the accused were absolved from all charges due to lack of evidence. Three were charged (two of them to life sentence) and are currently convicted. For the full Supreme Court ruling, see Gobierno de Chile (2018c).

[119]In December 2016, 17-year old Mapuche Brandon Hernandez Huentecol was involved in an identity check procedure at the hands of the police, where he was forcefully thrown to the ground, threatened, and shot in the back. He survived the assault (Mapuexpress, 2017). In March 2018, four Mapuche school kids (between 12-14 years old) were subject to an identity check procedure at the hands of the police, where they were forced to get undressed (Mapuexpress, 2018).

[120] Macarena Valdes was found dead in her home on August 22, 2016. The police have claimed that it was suicide, but her family argues that it was foul play. There is still no clarity about the circumstances of her death (El Ciudadano, 2017).

[121] For the paralyzing of the Doña Alicia hydroelectric plant in the Curacautin region, see El Ciudadano (2016). For the permanent closure of Barrick Gold's Pascua Lama gold mine see Reuters (2018).

practice in Chile's contact zone happens and the role of legal regimes in shaping these spaces of encounter. I reached the partial conclusion that consultation policy has essentially served to proceduralize and restrict the scope of Indigenous rights, and attempted to limit Indigenous people's exercise of self-determination under the veils of reasonableness and compatibility with Chilean legal frameworks. Specifically, despite the contestation and tensions that marked the development of DS66, in the end the Consultation largely served to create spheres of jurisdiction that limit the scope and spirit of C169, produced legal categories amenable to state operations, and attempted to monopolize legal meaning making and interpretation. These attempts at mutilating Indigenous rights were grounded in the state's strongest fears – fear of legal uncertainty, of consultation paralyzing the workings of the state apparatus, and of economic activities being threatened – and triggered the Consultation's failure. I ended the previous chapter arguing that although the Consultation's breakdown was framed in terms of three disagreements in concepts, semantics, meanings, and procedural aspects – about "uncertainty, lack of clarity, and difference of opinion about what the law is," as Cover (1983, p. 42) would say – it was actually about much more than a dispute about unclear law. It was actually the result of too much law, of "the need to suppress law, to choose between two or more laws, to impose upon laws a hierarchy" (Cover, 1983, p. 40).

When discussing the tensions that characterize planning contact zones at the intersection of Indigenous and state interests, the planning literature has tended to portray them as emerging from different planning traditions (Jojola, 1998, 2008) or planning cultures (Dale, 1999; Porter, 2010). More deeply, these frictions have been understood as differences that emerge from worldviews colliding (Little Bear, 2009; Matunga, 2013). In other words, as the manifestation of particular ontologies and epistemologies which, in turn, are expressed in ways of planning that differ substantially, as I discussed earlier. More recently, some authors have brought these discussions to the realm of Indigenous sovereignty and jurisdiction (Dorries, 2012; Porter and Barry, 2016), although without engaging with the normative dimension. These lines of thought have influenced my own thinking in important ways and were the starting point for my inquiry. However, I have argued that the failure to reach a mutually agreed regulation and Indigenous refusal to engage in the process suggest that what is really at play in Chile's planning contact zone is more specifically a clash of normative systems. In other words, tensions arising from multiple contrasting interpretations and narratives about what is considered

acceptable or unacceptable, allowed or forbidden, legitimate or invalid regarding Indigenous and non-Indigenous coexistence in shared space[122].

My argument is two-fold. First, the Consultation seems to reveal a deep tension between normative precepts emerging from non-land based narratives (i.e. those of the Chilean state) and those normative precepts emerging from land-based narratives (i.e. those of Indigenous peoples).[123] To a great extent, the failure of the Consultation relates to the state's deliberate effort to detach land concerns from the production of DS66 (and DS40), something Indigenous peoples refused to validate outright. If, as Black (2011) argues and as I elaborate below, "land is the source of the law," no legal planning framework that negates such relationship will contribute to disrupting colonial sensitivities and rationalities in planning practice.[124]

Most significantly, the alleged radicalization of Indigenous demands in Chile over the past years – which following Cover (1983) could be understood as the manifestation of so-called civil disobedience emerging from a legally pluralist reality or too much law, as mentioned earlier – finds its normative grounding precisely in Indigenous connections to territory (Melin et al., 2016), which oftentimes are in tension with dominant

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[122] It is important to clarify that I am not suggesting that this is about two coherent and fully independent normative systems in friction, especially because there are several Indigenous nations in Chile who inhabit their own and diverse legal orders. Paraphrasing de Sousa Santos again, my argument is that planning's contact zone in Chile is a space "in which rival normative ideas, knowledges, power forms, symbolic universes and agencies meet in unequal conditions and resist, reject, assimilate, imitate, subvert each other… giving rise to new constellations of legal and political meaning. As a result of the interactions that take place in the contact zone both the nature of the different powers involved and the power differences among them are affected" (2005, p. 449). My argument is also that this framing might offer new grounds to understand those areas where tensions do openly exist in planning practice.

[123] I take the distinction between land-based and non-land based normative precepts from Jojola (2008). While schematic and of course a simplification, it serves to explain some of the tensions resulting from historically diverging relationships to land. In his words, "land tenure in land-based communities is distinguished by long and sustained patterns of ownership… over successive generations. Land became the embodiment of collective groups whose intent was to sustain the productivity of the land for those who would inherit it… Given this legacy of land tenure, it becomes apparent how traditional communities evolved their own distinctive world-views. Such world-views embody values that are essential for attaining a balanced and symmetrical interrelationship between humankind and the natural ecosystem that it occupies… On the other hand, land-use as applied in conventional Western planning practice is both temporal and corporal. It bases its community development upon the regulation of land usage in a manner that balances private property rights and dominant notions of public welfare. Land-use becomes the embodiment of a corporate entity that develops it with the primary intent of raising capital valuation. After or when its value is maximized, land is resold. There is little incentive to hold land as property longer than necessary, especially after it becomes unproductive" (Jojola 2008, pp. 42-43).

[124] In her book comparing Indigenous legal regimes in New Zealand, the USA, and Australia, Black argues for the need for a "refocusing of jurisprudence towards the 'rights' of the Land and the 'responsibilities' of the human towards the Land" (Black, 2011, p. 168). In light of these claims, she further argues that "legal pluralism from the North needs to acknowledge that within Indigenous legal traditions individuals are patterned into Nature, not outside of Nature; and, with that patterning comes responsibilities. The logos of law is in the land. There is a symbiotic relationship between humans and the earth/cosmos, and more specifically, between humans and place" (Black, 2016, p. 165).

government understandings of territory.[125] Since state-led planning in Chile is such a hyper-regulated, legally-mediated practice, I argue that bringing the discussion to the realm of legal orders might push the boundaries of the conversation and make it more productive than keeping it in the realm of culture or worldview. I need to clarify that this is not because the tensions of the contact zone do not relate to cultural or worldview clashes – of course they do. My argument is that framing this clash in terms of legal orders brings to the forefront the normative dimension that is constitutive of planning practice in a way that discussions about culture and worldview do not, as I discuss below. Foregrounding legal orders brings a concern for the ways in which planning helps to "constantly create and maintain a world" (Cover, 1983, p. 4) that dictates "what should be done" (Flyvbjerg, 2002) in ways that might offer more robust grounding to challenge existing planning practices and systems in the country.

The remainder of this chapter explores how and why understanding the tensions in the contact zone in terms of conflicting legal orders in action might present new ways of thinking about and practicing planning in settler colonial contexts. I first discuss planning theory's longstanding interest in the normative nature of planning and connect it to the notion of *nomos*. I then show why the Consultation's three key disagreements can be seen as clear examples of legal orders clashing. Then, the discussion takes one step further to suggest that the decision by some Indigenous people not to engage in the Consultation, as well as the government's inability to engage with Indigenous demands, illustrate a refusal to commit to normative precepts emerging from other collective experiences – in other words, the process makes visible the existence of too much law, as introduced earlier. The following section explores how Indigenous engagement in direct action in Chile – especially regarding the protection of Indigenous territories – can be understood as the exercise of Indigenous self-determination and a claim for radical reinterpretation. The chapter concludes by speculating what a claim for radical reinterpretation in planning might mean, and how engaging in this kind of thinking opens the door to planning practices that are grounded in legal pluralism rather than in domination by imposition of Chilean law.

[125] For the Chilean government "land is just a thing, available for naming, claiming and owning – individually or collectively. On this reasoning, the land is the object that becomes the subject of law whenever disputes arise concerning its naming, claiming and owning. Thus the land is not the source but the object of law" (Black, 2011, p. xi).

6.1 *Nomos* and planning

There seems to be wide agreement within the planning theory literature that planning is a normative discipline and field of practice. Critiques of the rational-comprehensive paradigm that prevailed during the 20th century have successfully shown that all planning action is value-laden and informed by particular sets of beliefs. Planning's concern with the future necessarily implies having a vision for what that future might look like – "who gets what, when, where, why, and how" (Davidoff, 1965) and "what should be done" (Flyvbjerg, 2002) to get there. The questions that follow, then, are whose visions and interests should prevail, whose knowledges should count when making planning decisions (Rydin, 2007; Sandercock, 1998), and what the contexts such decisions emerge from are (Healey, 1990). Very importantly, as a profession and as a practice planning is concerned not only for the future, but also for the public interest. If there is not one single public interest, making visible the forces shaping planning processes and outcomes becomes a central concern. There is also general agreement that western mainstream planning – the focus of this study – is intimately connected to law and institutions. As I showed in Chapters 2 and 3, the evolution of planning in Chile is inseparable from the processes of colonization and nation building, which were consolidated through the establishment of institutional infrastructures and legitimated through legal means.

Taking these common understandings as a point of departure I have used Robert Cover's work (1983) to begin to argue that planning can be understood as a *nomos*, "a normative universe… [where] we constantly create and maintain a world of right and wrong, of lawful and unlawful, of valid and void" (1983, p. 4), which sanctions what ways of coexisting in shared space (Healey, 1997) are legitimate and which others should be supressed. Since western mainstream planning theory has already a solid understanding of the normative nature of planning, bringing the conversation to the realm of legal orders is not a big stretch. Quite the contrary, I suggest that these theorizations offer fertile ground to understand planning contact zones in settler colonial states.

It is important to make clear that I am not referring to the legal-technical dimensions of planning – which are of course part of planning's normative universe. While for Cover the formal rules and institutions of the law are relevant for the existence of a *nomos*, he understands normative universes as much more than that. Instead, he places emphasis on narrative since "the codes that relate our normative system to our social constructions of reality and to our visions of what the world might be are narrative. The very imposition of a normative force upon a state of affairs, real or imagined, is the act of creating narrative" (1983, p. 10). The links to the linguistic turn and the focus on storytelling in planning are evident (Fischer and Forester, 1993;

Forester, 1999; Sandercock, 2010; Throgmorton, 2003). What is more important for planners, "once understood in the context of the narratives that give it meaning, law becomes not merely a system of rules to be observed, but a world in which we live. In this normative world, law and narrative are inseparably related… And every narrative is insistent in its demand for its prescriptive point, its moral" (Cover, 1983, pp. 4-5).

In using the notion of *nomos* to think about planning I am both understanding planning practice as emerging from a particular normative universe and as contributing actively to materializing such a normative universe through expected patterns of behaviour that are considered acceptable and to which people are obligated. From this perspective, planning is certainly a cultural practice (Porter, 2010; Sanyal, 2005) grounded in particular worldviews (Jojola, 2008; Little Bear, 2009), but most importantly it is a practice flowing from a set of collective actions that are connected to a moral. The emphasis moves from a focus on the rationalities and sensitivities described in previous chapters towards the normative precepts planning engages with and embodies in practice. Legal orders are a sub-universe within what a worldview involves. In that sense, a clash of legal orders is also a clash of worldviews and moral principles. However, normative systems load actions emerging from a particular worldview and its cultural expressions with a normative weight. What motivates people to act vehemently and commit to living according to certain precepts is not only that their particular understanding of the world dictates it, but rather that those precepts cover actions with meaning about what futures are desirable and what futures are not. In its most essential sense, a normative world and the narratives that make it possible are about connecting the present to an imagined alternative future – "a system of tension between reality and vision" (Cover, 1983, p. 9).

Such normative precepts and their associated behaviours are grounded in collective experiences and shared meanings, "in the communal character of the narratives that provide the context of that behaviour… [Actually, it is] the fact that we can locate [a certain action] in a common 'script' [what] renders it 'sane' – a warrant that we share a *nomos*" (Cover, 1983, p. 10). What this suggests is that there might exist countless *nomos* as long as there are groups of people whose common lives make them aspire to the same desired futures. Most importantly, he argues that law and the behaviours associated with its normative precepts are only possible through acts of commitment by people who are willing to live according to such norms. In other words, it is not only the collective meanings that give substance to a particular normative world, but the willingness of a social group to act according to those meanings. In his own words, "the *nomos* is but the process of human action stretched between vision and reality, a legal interpretation cannot be valid if no one is prepared to live by it" (Cover, 1983, p. 44). A final critical idea Cover puts forward is that jurisgenesis – the

process by which a normative or legal world emerges – is a natural phenomena in social life.[126] It follows, then, that if different *nomos* can exist simultaneously and be equal in status and legitimacy, so can different planning universes exist, grounded in different normative precepts and materialized through common shared commitments.

Understanding planning through the lens of *nomos* – both by looking at planning practice as emerging from a particular normative universe and as materializing particular conceptions of what is deemed right and wrong – has important implications for how the relationship between Indigenous and non-Indigenous understandings of planning is conceived. While it is not new to suggest that different ways of planning coexist, what a focus on normative systems does is to foreground what kinds of futures are considered desirable and acceptable, and at the expense of which alternatives. Libby Porter's conceptualization of planning as a cultural practice, which I have used extensively in this dissertation, is a clear attempt at making the ontologies and epistemologies of planning available for analysis, as quoted earlier. She argues that "that what shapes planning practice in settler societies – the structures of meaning and authorities of truth that give planning agency in the world – are drenched in colonial historiographies, and so the colonial relations of domination and oppression are ever present" (2010, p. 16), as this study of the Chilean case has confirmed. She adds that "if planning started out by convincing itself it was rational, that myth has been deeply unsettled by the continuing work of those exposing how planning is political and social," and summarizes her theoretical contribution saying that her book "show[s] how planning is also culturally enframed – a structure of feeling that continually reproduces its sensibilities and rationalities through its daily practice" (Porter, 2010, p. 16). To that project I now add how planning is most of all about the enforcement of normative precepts related to specific notions of which alternative futures should become a possibility and which should not.

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[126] Cover identifies "two corresponding ideal-typical patterns for combining corpus, discourse, and interpersonal commitment to form a *nomos*. The first such pattern, which… is world-creating, I shall call 'paideic,' because the term suggests: (1) a common body of precept and narrative, (2) a common and personal way of being educated into this corpus, and (3) a sense of direction or growth that is constituted as the individual and his community work out the implications of their law. [In this model law] is pedagogic. It requires both the discipline of study and the projection of understanding onto the future that is interpretation. Obedience is correlative to understanding… Interpersonal commitments are characterized by reciprocal acknowledgment… vision of a strong community of common obligations… The second ideal-typical pattern… is 'world maintaining.' I shall call it 'imperial.' In this model, norms are universal and enforced by institutions. They need not be taught at all, as long as they are effective… Interpersonal commitments are weak, premised only upon a minimalist obligation to refrain from the coercion and violence that would make impossible the objective mode of discourse and the impartial and neutral application of norms… Of course, no normative world has ever been created or maintained wholly in either the paideic or the imperial mode… Any *nomos* must be paideic to the extent that it contains within it the commonalities of meaning that make continued normative activity possible" (1983, pp. 12-14).

6.2 Consultation disagreements as normative orders clashing

What does a focus on planning as a *nomos* contribute to the analysis of the Consultation? The first contribution is to move the discussion about the three disagreements away from semantics, interpretation, and procedural details, as government officials and planners did, and to instead re-frame them as frictions emerging from normative worlds in tension. In other words, the failure of the implementation of the duty to consult – which crystalized in the abovementioned key disagreements – at a deeper level reveals radically different understandings and expectations of what desired futures a regulation such as DS66 and the practice of consultation should make possible.

I showed how those divergent narratives and visions of alternative futures relate mostly to how Indigenous peoples are affected (or not) in their relation to their traditional territories, their livelihoods, and their forms of organization when those territories are affected.[127] While the government wanted possible futures where economic interests – particularly those related to the growth of extractive activities that support Chile's export-based economy – would not be threatened, where state operations would not be hindered, and where nation-state sovereignty and authority would not be challenged, Indigenous representatives aimed for futures where their ancestral territories would be protected and under their control, where their rights as pre-existing nations as expressed in international agreements would take precedence over Chile's domestic legislation, and where self-determination – including forms of political organization and making decisions – would be exercised. In the absence of collective meaning regarding such fundamental matters law and legal precepts find no grounding. Read in this light, Indigenous rejection of consultation in Chile can be understood as the refusal to be governed by alien laws, as explained in the following pages.

Framing the conversation in terms of legal orders clashing is important because it *assumes the existence of multiple legal orders*, in the first place, and because it locates upfront Indigenous and state legal orders as intrinsically equal (and, as such, potentially antagonistic). While the Consultation demonstrates the state's

[127]Chilean legal scholar Cristóbal Carmona argues that the semantic difference between the notions of *land* and *territory* in Chile, "which in the specialized literature and international law might already seem trivial, helps to distinguish with clarity the existence of two normative universes, two specific *nomos*, the frictions of which situate antagonistically and subalternally the relationships between the two cultures [Indigenous and non-Indigenous]. In that sense, a semantic fight regarding 'land' is nothing but the metonymy of a larger conflict – namely, the [conflict] between Indigenous customary law and the Chilean legal order. Everybody knows that today that antonymy finds ground in the quasi-ontological supremacy of state law vis-à-vis Indigenous [law]" (2009a, p. 10, translation mine).

impetus to impose its normative universe on Indigenous peoples through coercion, the idea of *nomos* assumes that legal pluralism is a reality and reinforces the equal weight and legitimacy of all normative orders. Seen from this perspective, legal orders express the collective action of a group of people operating according to the normative precepts that emerge from their collective "narratives, experiences, and visions to which the norm articulated is the right response… [Because] different interpretive communities will almost certainly exist and will generate distinctive responses to any normative problem of substantial complexity" (Cover, 1983, p. 42). The legitimacy and validity of law is tied to those shared narratives, experiences, and visions.

As I argued in the previous chapter, the disagreements at the heart of the Consultation's failure are not the product of unclear law. They are the expression of too much law. What is more important, from this perspective this case is not only about Indigenous peoples rejecting state-sanctioned precepts and actions, but also about the state rejecting Indigenous precepts and behaviours. It is about different sets of social groups, each inhabiting their own normative world, and not sharing the collective lived experiences those understandings have emerged from. Since,

> Law must be meaningful in the sense that it permits those who live together to express themselves with it and with respect to it. It must both ground predictable behaviour and provide meaning for behaviour… The meaning of that which must be done, and the sources of common commitment to the doing of it stand bare, in need of no explication, no interpretation… They combine to create precepts and principles enough to fill our lives, as well as to fit those precepts into the common narratives locating the social group in relation to the cosmos, to its neighbours, to the natural world (Cover, 1983, p. 14).

In saying this I do not mean to minimize state violence and coercion, and the domination by imposition of Chilean law (Burgos et. al, 2006) to which I have recurrently referred. But a real engagement with a legally pluralistic paradigm is necessarily grounded in the acknowledgement that any process of *jurisgenesis* produces legitimate normative worlds that acquire meaning in a particular circumstance. Adopting a nomic lens confirms the violence involved in Chile's attempt to impose a single normative universe on Indigenous' peoples diverse collective experiences, while at the same time offering a conceptual way of accounting for such inherent multiplicity. Power imbalances are made visible, but not at the expense of invisibilizing or negating Indigenous peoples' legal orders. Because it is precisely "the fact that never only one but always many worlds are created by the too fertile forces of jurisgenesis – that leads at once to the imperial virtues and the imperial mode of world maintenance. Maintaining the world is no small matter and requires no less energy than creating it" (Cover, 1983, p. 16).

Re-conceptualizing the Consultation – and planning's contact zone in Chile more broadly – in terms of legal orders clashing also brings to the forefront the power of shared narratives and commitments. Because, as I already mentioned, "a legal interpretation cannot be valid if no one is prepared to live by it" (Cover, 1983, p. 44). The depth of the tensions that can be observed in Chile's planning contact zone – which sometimes reach such levels of violence as the killing of Camilo Catrillanca – cannot be understood purely on the grounds of planning interests, preferences, cultures, traditions, or ways of planning. A focus on legal orders allows seeing peoples' willingness to use force or die if necessary in order to protect the integrity of their normative world, as I elaborate below. These are different rationalities and sensitivities at play (Porter, 2010), for sure, but more deeply they are *moral* understandings people are committed to adhere to. Because "just as the meaning of law is determined by our interpretive commitments, so also can many of our actions be understood only in relation to a norm" (Cover, 1983, pp. 7-8). This is where the underlying detachment from land concerns and local realities that marked the government's approach, along with the reliance on legal tautologies and the unquestioned supremacy of state authority take on new light.

Remember that the three visible disagreements concerned what administrative and legislative measures should be open to consultation, the definition of what it means for a government measure to affect Indigenous peoples directly, and how consultation should be approached regarding investment projects – the key articles of DS66 where the contours and depth of consultation as a right of Indigenous peoples find substance. Dressed by the government under the veils of legal clarity and technical competency, together these matters boil down to discussions about territory (when it is affected, what counts as an impact, how it should be protected) and self-determination (who decides about the issues just mentioned and with what authority), which are intimately connected. Seen from this point of view, the Consultation reveals the frictions between land based and non-land based normative precepts. In other words, the frictions between different sets of shared narratives, emerging from different sets of shared collective experiences, tied to different sets of commitments to action regarding how to articulate the relationship between humans, non-humans, and the environments that sustain us and of which we are all part. While the Government of Chile was moved by understandings grounded in an exploitative relationship to land, Indigenous peoples at the Table were moved by understandings grounded in interdependence and land protection.

In making only discretionary measures subject to consultation, the government was telling Indigenous peoples that the power for legal interpretation resides in the state only, and that the supremacy and autonomy of Chilean legal frameworks is absolute and unquestionable, because there are measures that not

even government officials can override. In narrowing down the definition of what affecting directly means, and separating consultation related to projects with environmental impact from other matters, the government was telling Indigenous peoples that their connections to territory and expectations for how such relationships unfold will always be superseded by state understandings of Indigenous identity and of the so-called public interest.

The failure of the process of regulating the duty to consult is a story of how discussions about planning and Indigenous peoples are ultimately discussions about planning's impossibility to engage in legal pluralism fully without questioning its own authority and jurisdiction (Porter, 2013), or without being willing to diminish it. Despite looking like an effort to find procedural precision and provide clarity in the face of unclear law, the discussion – and in particular the three areas of disagreement – is about competing normative precepts of what is deemed desirable and acceptable according to a shared moral imagination. Western law in Chile does not allow for legal pluralism in practice, only in theory. Law offers the promise of coexistence, but the actual process of collective regulation making demonstrates that what western law ultimately did in this case was to exclude any possibility of engaging with Indigenous legal orders, and on the contrary it actively constrained possibilities through categorization, bracketing, interpretation, and exclusivity. Similar to the landscape in other settler contexts, in Chile,

> The contact zone… is bound to pre-existing systems and norms of planning… Bureaucratic naming conventions and institutional designs are applied to Indigenous peoples, mirroring established practices and norms. The potential risk that [Indigenous] people represent to the certainty of planning approaches and settler development rights is managed by regularizing and standardizing Indigenous involvement and engagement (Porter and Barry, 2016, pp. 170-171).

As I mentioned earlier, the Consultation produced a normative universe where Indigenous ways of planning and making decisions, Indigenous sovereignty and self-determination, and legal orders were rendered marginal, if not non-existent. Where Indigenous concerns about territory and self-determination were dismissed with supposedly technical and operational arguments. Where Chilean law took precedence essentially through the use of tautological references to other pieces of legislation, thus reinforcing state supremacy and authority. As I mentioned earlier, by framing the tensions of the contact zone in terms of unclear law the solution resides in the courts. Framing them as too much law begins to move the discussion towards legal pluralism and self-determination.

6.3 Refusing the Consultation as refusing Chile's legal order

> *To accept these conditions is an impossible project for some Indigenous people, not because it is impossible to achieve, but because it is politically untenable and thus normatively should be refused.*
>
> Audra Simpson, 2014, p. 22 (emphasis mine)

When I started this dissertation I was not yet familiar with the literature on refusal as developed by Indigenous scholars in North America. In fact, Audra Simpson's seminal book *Mohawk Interruptus* (2014) had not yet been published then. However, I feel like I had intuitively aligned with this line of thinking when designing the data collection for the project. Given that my initial goal was to explore and better understand how the Consultation had happened, it was obvious to me that I should not only interview those people who had been engaged in the process, but also those who had not been part of it – either because they had never been involved or because they had chosen to withdraw later on. I thought that whatever had happened "inside" during those three years was as important as whatever had happened – or not happened – at the margins or in opposition. In that spirit, approximately half of the interviews with Indigenous leaders and representatives involved individuals who were not engaged in the process. Similarly, I examined official documents produced in the process, as well as several statements, reflections, and other materials that challenged or rejected the Consultation and its outcomes.

Although I am not well positioned to speak on behalf of Indigenous peoples, I would like to offer some thoughts from my standpoint as witness in the contact zone. My emphasis is on how bringing the discussion of planning in the contact zone to the realm of normative orders might expand the understanding of what refusal to engage in the Consultation means. As conceptualized by Simpson, refusal "is a political alternative to 'recognition,' the much sought-after and presumed 'good' of multicultural politics" (2014, p. 11) I introduced in Chapter 3, which underlies Chile's contemporary policy and engagement with Indigenous peoples. As such, refusal is also an "ethical stance that stands in stark contrast to the desire to have one's distinctiveness as a culture, as a people, recognized. Refusal comes with the requirement of having one's *political* sovereignty acknowledged and upheld, and raises the question of legitimacy for those who are usually in the position of recognizing: What is their authority to do so? Where does it come from? Who are they to do so?" (Simpson, 2014, p. 11, emphasis in original). Refusal not only represents an alternative to the politics of recognition (Coulthard, 2007, 2014), but an expression of Indigenous self-determination that operates at the

same time by resisting, confronting, challenging, and not engaging with state-sanctioned sovereignty, structures, and principles.

From this perspective, the Consultation can be seen as a space where refusal was expressed in several ways – refusal to engage in the process, decision to withdraw from and not validate the process, and refusal to endorse the outcomes. While Simpson's work places emphasis on Indigenous political sovereignty in the face of settler colonialism, here I look at these acts from the perspective of normative orders. Connecting this discussion to the idea of *nomos*, a politics of refusal would involve a deliberate non-commitment to alien normative precepts and authority, in this case the state's. The important distinction is that *it is* a refusal of state law and legal systems as such, but it runs deeper than that. Going back to Cover again, the formal institutions of the law are only one part of a normative universe. The legal universe of the state – and also those of each Indigenous nation – far exceeds the formal manifestations of law. So, for instance, Indigenous leader 4, Indigenous leader 9, and CONADI Indigenous Councilor 1 (whom I quoted extensively) refused the Consultation as a process and DS66 and DS40 as such. But perhaps most importantly, their refusal is the visible face of a much deeper rejection of how the state understands and denies Indigenous peoples' jurisgenerative power.

As expressed by the Indigenous leaders I interviewed, refusal to engage in the process was a disavowal of the state's jurisgenerative power. When Indigenous Leader 9 dismissively told me that his organization "was not going to be part of that [the Consultation]" he was at the same time not validating the state as an authority and showing total lack of commitment to the state's normative precepts. Even before the process was well underway and decisions had been made, some Indigenous peoples had already made the decision not to engage. They were questioning the legitimacy of the process and its outcomes upfront. As one of the quotes by Indigenous Leader 9 I mentioned earlier makes clear, they have "no problem sitting down [with the state] and discussing… But [it has to be] about concrete and clear issues" defined by them as self-determining peoples. As Simpson suggests, refusal is an answer to the question of "how to proceed as a nation… [if you are] viewed not as a people with a governmental system, a philosophical order, but as a remnant, a "culture," a minority within an ethnocultural mosaic of differences. This speaks of settler manageability… [not] of sovereign political orders with authority over land and life" (Simpson, 2014, p. 10). More important for my purpose here, refusing to take part in state planning signals disapproval of and lack of commitment to the alternative futures envisioned by the government, which were grounded on western conceptions of land as a commodity and of the nation-state as the sole sovereign entity in Chile. In short, some Indigenous people did

not even have to check out the Consultation to know that they were not going to live by the norms that emerged from the process, since they were not the product of narratives they validated.

Similarly, in deciding to withdraw from the Consultation as the process moved along, several Indigenous leaders and CONADI Councilors were refusing to contribute to and validate what they saw as a flawed and void jurisgenerative process. As the three disagreements started to emerge, it became clear to some participants that the playing field was uneven. Leaving projects with environmental impacts aside was a triggering point for several representatives, as already mentioned. The government's decision to continue to develop DS40 in parallel despite Indigenous opposition was not only perceived as an act of bad faith and a disrespect for the potential common narratives that could have been negotiated, but more importantly and open assault on Indigenous normative orders, which are grounded in connections to the land. Withdrawing is a powerful way of showing that there was an initial commitment and expectation that there might be spaces for encounter and legal pluralism, but that such expectation was betrayed. As CONADI Indigenous Councilor 1 put it, they "could not endorse the situation that was going on, where essentially on the one hand something was being written and right after it was being erased."

Finally, there was the refusal to endorse the outcomes of the process – DS66 and DS40. This rejection was actually shared by all Indigenous leaders, even those who sat at the Consensus Table until the end. Testimony to this was the lawsuit I talked about in Chapter 4, which was submitted by the group of Indigenous representatives to the ILO denouncing that the government went ahead and enacted DS66 despite the lack of consensus. At first sight, this situation might look like a refusal of the terms of the consultation, of the state's inability to honour the collective work, or of the lack of agreement as such. However, as I have argued, I read this as a refusal to accept the state's authority to draw boundaries regarding Indigenous peoples' identity and unique status, about authority to determine what counts as impact, and about impact quantification – in other words, refusal to live by precepts defined by external sources of authority and conceptions of right and wrong. What the state saw as a difference was actually a discussion about Indigenous connections to territory and the desired alternative futures necessary for such connections to continue to exist, which I showed were incommensurable to government officials. Indigenous peoples refused the final version of the article about administrative and legislative measures to be consulted because it did not capture how they understood their own impacts on their own territories and livelihoods. In keeping with long-lasting trends in Indigenous policy in the country, DS66 and DS40 contributed to keep moving "Indigenous peoples and their polities in the settler imaginary from nations, to people, to populations [to be administered to by the state]…

Most important[ly]… these categorical shifts set Indigenous peoples up for governmental regulation… [reinforcing an] imagined space of just settlement, of settler nationhood (and statehood)" (Simpson, 2014, pp. 21-22). In refusing the regulatory frameworks the Consultation produced, Indigenous leaders were tacitly also refusing the process several of them took part in.

In light of Simpson's work, Indigenous refusal to participate in the Consultation, and to engage in and validate state planning more broadly, can be seen as acts of resistance – to the extent that state precepts have been systematically and institutionally imposed on Indigenous peoples as a mechanism for assimilation and elimination (Wolfe, 2006). In the face of this ongoing violence, refusing engagement is "to fundamentally interrupt the sovereignty and the monocultural aspirations of nation-states, but especially those that are rooted in Indigenous dispossession" (Simpson, 2014, pp. 21-22). To those acts of Indigenous refusal that marked the Consultation, I want to suggest that another kind of refusal also took place – namely the state's refusal to engage with Indigenous peoples' legal orders and normative precepts. There is no doubt that the Consultation was to a great extent an effort to provide legal certainty to the duty to consult, as extensively discussed in earlier chapters. However, I have argued that the process and its outcomes were most of all about the monopolization of meaning making in the hands of the state, about the supremacy of state authority, and about a renewed attempt to impose one legal order over others. In that sense, the state's behaviour is a refusal to understand that legal pluralism is a reality and that sources of legal authority other than the state have pre-dated the establishment of Chile and continue to exist. Because, as Porter and Barry suggest,

> [State] planning… does not recognize any pre-existing political authority for Aboriginal peoples arising from specific laws and customs of individual nations… it has forced Indigenous systems… to partially mirror and emulate those of the settler state… There is little space in this system for recognition of another coexisting or underlying authority, as the entire jurisdictional space is saturated with the decision-making power of the settler state (2016, p. 161).

Looking at the duty to consult more specifically, "the claim for political authority, then, cannot be heard because there is no model in planning participation or consultation for those stakeholders to have a coexisting, underlying and entirely separate domain of law and authority from the state" (Porter and Barry, 2016, p. 160). Under current conditions, only *inclusion* of Indigenous peoples in planning is possible. And even then, "this inclusion, or juridical form of recognition, is only performed… *if* the problem of cultural difference and alterity does not pose too appalling a challenge to norms of the settler society, norms that are revealed largely through law," (Simpson, 2014, p. 20, emphasis in original) as this case demonstrates. But if Simpson's argument is taken seriously, "[Indigenous] sovereignty has not in fact been eliminated. It resides in the

consciousness of Indigenous peoples, in the treaties and agreements they entered into between themselves and others and is tied to practices" (Simpson, 2014, p. 20) such as the ones I elaborate in section 6.4 below.

To summarize, Indigenous rejection of DS40 and DS66 can be seen as the refusal to allow Indigenous territories to be left at the mercy of Chile's economic model and tautological sovereignty claims. The government's insistence on this compartmentalized approach and refusal to engage in negotiation are thus an open assault on Indigenous normative orders, which are grounded in collective connection to land and the shared narratives emerging from such relationships. Following Simpson's opening quote in this section, "to accept [the] conditions [imposed by the government] is an impossible project for some Indigenous people, not because it is impossible to achieve, but because it is politically untenable and thus normatively should be refused… by refusing to agree to these terms and to be eliminated [Indigenous peoples] are asserting *actual* histories and thus legislating interpretive possibilities in contestation… These are contesting systems of legitimacy and acknowledgment" (Simpson, 2014, p. 22, emphasis in original).

In the particular case I have examined, the state went ahead with the enactment of the regulation anyway, continuing a longstanding tradition of normative imposition on Indigenous peoples through planning and Indigenous policy. The government's appeals to reasonableness – which I showed were grounded in the state's strongest fears – in practice translated into restricting the scope of Indigenous rights. While bracketing and categorization made consultation manageable, interpretation and exclusivity made consultation in Chile compatible with the state's legal frameworks. Given the nature of the issue under discussion – creating a mechanism that would at some point be used to guide consultation processes that would take months to be carried out – perhaps the impacts of this jurisgenerative process were not so obvious or immediate. But I want to make an important point here. Regardless of the fact that the creation of DS66 might not have had any immediate material consequences for Indigenous peoples – it certainly did later on – the act of creating it and bringing it into force in spite of Indigenous peoples' opposition is in itself a highly violent act. Especially given the never-seen-before participatory nature of the process that led to its creation. Why was it so violent? After all, the Government of Chile has always done this and there is no reason to be surprised. All of that is true. However, remember that I am looking at the process from the perspective of normative universes, of the creation of legal meaning, of what makes people act in accordance with legal precepts. And from that standpoint, what the state did in trying to impose the monopoly of legal meaning to ensure social control was to actively trigger Indigenous refusal and non-commitment.

Cover argues that "the proliferation of legal meaning" is inevitable and warns about "the impossibility and undesirability of suppressing the jurisgenerative principle, the legal DNA" (1983, p. 46) in social life. What is more important, he makes clear that this proliferation of legal meaning clashes "with the effort of every state to exercise strict superintendence over the articulation of law as a means of social control. Commitment, as a constitutive element of legal meaning, creates inevitable conflict between the state and the processes of jurisgenesis… [leading] to the problem of unofficial interpretation – the elaboration of norms by committed groups standing against the state" (1983, p. 46). Would it be too bold to suggest that the implementation of the duty to consult in Chile is contributing to creating inevitable conflict and strengthening the perceived civil disobedience Cover talks about? I do not think I can answer that question. As any rigorous social scientist would probably tell me, implying causality from correlation is a risky move. I do think, however, that I can suggest that the process of creating DS66 and DS40 did contribute to the erosion of trust between several Indigenous peoples and organizations and the state. I also think that it helped to make more visible the existence of multiple and differing legal meanings, which are often at odds with each other. In that sense, perhaps it would not be a big stretch to suggest that these kinds of experiences pave the ground for radical political action, as the opening quote below insinuates.

6.4 Direct action as enacting Indigenous legal orders

> *The lack of respect towards [our] political actors, the spread of intensified neoliberalism on Mapuche territory, the criminalization of protest, and the breach of agreements pave the ground for [groups with] more dissenting stances to elevate or radicalize their political action in the current scenario.*
>
> Fernando Pairican, 2015b, p. 30 (translation mine)

> *The nomos that I have described requires no state… The state becomes central only because an act of commitment is a central aspect of legal meaning. And violence is one extremely powerful measure and test of commitment.*
>
> Robert Cover, 1983, p. 11

Extending the ideas I have presented so far, this brief section connects the dots and supports the argument made in recent years by Indigenous researchers in Chile (Melin et al., 2016; Pairican, 2015a, 2015b), who state that land recuperation and other forms of direct action that seem to be directly confronting state precepts are actually an expression of their own legal orders in action. While this dissertation has focused on the

process of regulation-making involved in the implementation of the duty to consult in Chile – and not on the *application* of DS66 or DS40, which had been just recently enacted and never applied at the time I conducted my field work – it is still important to extend the argument even if only briefly to consider its relevance to the realities that surround and confront the practice of consultation in the country.

Up to this point, my attempt to understand the tensions of planning in Chile's contact zone as *nomos* has remained deliberately abstract and conceptual. Essentially, I have suggested a way of theorizing the clashes I observed in Chile's efforts to implement the duty to consult using Cover's (1983) ideas of how normative worlds emerge and are maintained. I have argued that the tensions that characterize the relationship of state planning with Indigenous peoples – such as the ones observed during the Consultation – might be more fruitfully understood as a clash of normative orders than as differences in semantic disagreements, unclear law, planning cultures, or worldviews. This decision to keep the discussion broad is in part because my research only began to open the door to that line of thought. But most of all, because I do not feel I can speak fully and respectfully about the details of normative precepts that have not emerged from the shared narratives and collective experiences that I am a part of, beyond what was shared with me during the interviews. Therefore, here I draw directly on the recently published work of Indigenous and Chilean scholars working at the intersection of Indigenous nationhood, legal thought, and legal pluralism in Chile who are thinking about Indigenous-state relations in ways that connect with the argument I have made in this study.

As I mentioned in the introduction to this chapter, the claims I make here are also informed by how the relationship between the Chilean state and Indigenous peoples has unfolded over the past decade – including the recent killing of Camilo Catrillanca. Finally, this section also draws on a number of experiences working with a group of Indigenous communities – beyond my PhD work – that have informed my thinking and led me to think about the Consultation's failure as the visible face of legal orders clashing. In bringing all of these conversations together, I align with Dorries' (2012) concern that any analysis of planning with Indigenous peoples in settler states needs to be politically and historically situated, even if it focuses is on everyday planning practice. Let me start with the following passage by Mapuche historian Fernando Pairican to set the context:

> The month of October was underway; one more anniversary of the arrival of Columbus to what would be [later] named America. On the early morning of October 10 – but in 1989 this time – nearly five hundred Mapuche from Lumaco occupied the Santa Clara farm owned by the Rukert family and killed three of the farm's heifers to have food during the occupation. Regarding this action, they stated: "we have a right to eat not only one of their heads of livestock, but two, three, or four more. Because rich people have something to eat everyday

> thanks to our lands." As a result, after the eviction led by a hundred and fifty policemen the next day, forty of the Mapuche occupants were detained, accused of land usurpation and cattle theft, and sent to prison in [the town of] Traiguen. This is how this part of the Mapuche nation entered [Chile's democratic] transition, opening up a new dynamic of [Mapuche] political action during the 1990s. Months later – with four Mapuche community members still in jail – they said the decision to occupy those lands was a result of the poverty they faced, which forced many Mapuche people to migrate. Their main concern – they said – was the attitude of government officials [at the time], which "does not recognize our situation as Mapuche, does not recognize the historical rights we hold over these lands"… The future [*Consejo de Todas las Tierras*, Council of All Lands] started to spread a political ideology grounded in the re-interpretation of Mapuche history – an approach that was not understood nor taken into account by the [Chilean] political class – thus initiating a historical rupture that ended up turning into what we have called "the new Arauco War" starting in 1997. At that time, arson attacks to forestry industry trucks in Lumaco signaled a qualitative change in the Mapuche movement, which two years later would crystalize in the emergence of the Arauco-Malleco Network of Communities in Conflict [*Coordinadora de Comunidades en Conflicto Arauco-Malleco*, CAM]… In addition to making evident the "dispossession" of what they called "our traditional territory and our identity as Mapuche [people]", the Five Hundred Years Commission [*Comisión Quinientos Años*] had also started to talk about… "*the right to govern ourselves according to our own Mapuche laws*" (Pairican, 2012, pp. 26-29, translation and emphasis mine)

Fast-forwarding two decades, in 2016 a group of Mapuche legal scholars led and published a community-based research project entitled *AzMapu: Una Aproximación al Sistema Normativo Mapuche desde el Rakizuam y el Derecho Propio* (loosely translated as *AzMap*u: Approaching the Mapuche Normative System from the Perspective of *Rakizuam*[128] and Customary Law). The project involved interviews with Mapuzugun-speaking Mapuche elders and knowledge keepers in order to gather stories and principles of Mapuche law, which according to the authors still live in the oral traditions transmitted through generations. Methodologically, the project was grounded in Mapuche conversational protocols and all interviews were conducted in Mapuzugun. The researchers then systematized the stories collected thematically, identifying the normative sources of Mapuche legal thinking, key precepts, the role of traditional authorities as guarantors of law, and general situations that have been historically governed by Mapuche law – *AzMapu*. The book concludes saying that,

> For Mapuche people, land recuperation is nothing but the mechanism to materialize their right to self-determination. That is the meaning of *taiñ mapuche gen*,[129] to the extent that a

[128] Loosely translated from Mapuzugun into Spanish into English as "Mapuche way of reflective thinking".

[129] *Taiñ mapuche ge*n "could be loosely equated with the western idea of self-determination. Although it exceeds the scope of such a term, it points in the same direction: the control of the Mapuche nation over its own decisions in the political, economic, and legal realms, as well as over other spheres that fall under what the west defines as culture" (Melin et al., 2016, p. 104, translation mine).

> Mapuche cannot be a person nor can Mapuche society [as a whole] exist apart from [their] territory, apart from their own ways of life and organizations. The occupation [at the hands] of the state, territorial and cultural dispossession, [and] internal colonialism are confronted today through processes of territorial recuperation, which for the Mapuche mean the exercise or the struggle for [their] rights, while for the state mean an infringement to its legal system and, therefore, must be prosecuted. Thus, *what according to Mapuche [law] is [a] valid [action], according to Chilean law is a crime* (Melin et al., 2016, p. 113, translation and emphasis mine).

This passage is tremendously powerful and speaks directly to the reflections on justifiable disobedience introduced in the previous chapter. In other words, to "the decision to act in accord with an understanding of the law validated by the actor's own community but repudiated by the officialdom of the state" (Cover, 1983, p. 46). From this standpoint, "only obedience to the movement's own interpretation… [is] fidelity to the understanding of law by which the movement's members would live uncoerced. Thus, in acting out their own… protesters say, 'We *do* mean this in the medium of blood' (or in the medium of time in jail); 'our lives constitute the bridges between the reality of present official declarations of law and the vision of our law triumphant'" (Cover, 1983, p. 47, emphasis in original). However, a focus on civil disobedience is highly problematic, because it conflates legal interpretation and normative validity with political domination, such as the one experienced by the Mapuche and by Indigenous peoples in Chile more broadly. As Cover further elaborates,

> If one addresses the status of "civil disobedients" from the perspective of the state's courts, one can hardly avoid framing the jurisprudential question as one of the individual's obligations to the state's law. From a general jurisprudential perspective, however, to concede so central a role to the courts (in any sense other than as a sociological datum…) is to deny to the jurisgenerative community out of which legal meaning arises the integrity of a law of its own (1983, p. 47).

Alternatively, the situation can be understood as the "invocation of the prior experience of sovereignty and nationhood, and their labour in the present… [as] people thinking and acting as nationals in a scene of dispossession" (Simpson, 2014, p. 33). For, as Simpson reminds us, "like Indigenous bodies, Indigenous sovereignties and Indigenous political orders prevail within and apart from settler governance" (2014, p. 11). Cover seems to agree when he argues that "the persistent effort to live a law other than that of the state's officials presupposes a community already self-conscious and lawful by its own lights - not a mass inarticulately seeking realization in the face of the brute fact of domination" (1983, p. 50).

The issues I am describing lay at the base of state violence against Indigenous peoples in Chile today. For "although resistant groups affirming their own laws need not realize themselves in violence, they always live in the shadow of the violence backing the state's claim to social control" (Cover, 1983, p. 50). It is the state's

perception that Indigenous peoples – and Mapuche people, who make more than 80% of the total Indigenous population (Gobierno de Chile, 2017), in particular – pose a threat to the integrity to Chile's sovereignty and legal system which has motivated the creation of the Jungle Commando, for instance. It is precisely the state's framing of the situation as one of civil disobedience that has provided the militarization context in which Camilo Catrillanca was killed.

What does all of this mean for planning? How do these conversations about direct action, justifiable civil disobedience, and state violence connect to the duty to consult and to the case I have examined in this dissertation? While consultation processes related to legislative and administrative measures such as the ones regulated by DS66 might not seem to be directly related, the whole notion of consultation as a practice of the state vis-à-vis Indigenous peoples implies the definition of possible alternative futures, which are always grounded in particular normative understandings of what should be done, of what the right course of action should be. If settler colonialism is a territorial project, as Wolfe (2006) argues, Simpson suggests that "the 'Indian Problem' is one of the existence of continued life (of any form) in the face of an acquisitional and territorial desire" (2014, p. 19). The state's efforts to detach the conversation about DS66 from land concerns are the clearest acknowledgement that settler colonialism is a territorial project. It is precisely for this reason that diluting Indigenous rights – which are territorial rights – through proceduralization helps to consolidate state supremacy. While such proceduralization might seem to move away from open violence, the state's lack of engagement with Indigenous substantial demands and the imposition of narrowly defined consultation standards is actually opening up spaces for justifiable civil disobedience every time that a consultation process (or the lack thereof) transgresses Indigenous self-determination. As Cover reminds us, "the state's claims over legal meaning are, at bottom, so closely tied to the state's imperfect monopoly over the domain of violence that the claim of a community to an autonomous meaning must be linked to the community's willingness to live out its meaning in defiance" (1983, pp. 52-53). This is what Indigenous Leader 9 was pointing to when he laughed and said "we insist in continue being Mapuche… either by fair means or foul."

Camilo Catrillanca was killed by a police officer, not by a planner. However, his death in inseparable from the institutionalized violence necessary to make Indigenous dispossession possible, which is at its core the violence of enforcing Chile's normative universe on Indigenous peoples through legal and policy instruments, among which planning instruments have been central. In this context, focusing on civil disobedience will not take the conversation too far. As long as the Chilean state insists on the supreme authority of its normative system and refuses to acknowledge the inevitability of jurisgenesis and the validity of alternative Indigenous

normative orders, and as long as Indigenous peoples refuse to commit to such normative precepts and continue to live by the narratives emerging from their collective visions for the future, violence will continue to take place. Because "if there is a state and if it backs the interpretations of its courts with violence, those… who participate in extrastate jurisgenesis must consider the question of resistance and must count the state's violence as part of [their] reality… when state and community offer conflicting interpretations, the community must elaborate the hermeneutics of resistance or of withdrawal" (Cover, 1983, p. 53). Instead of ending the conceptualization with the examination of justifiable civil disobedience and state violence, I would like to conclude by considering whether there might be alternatives. For, as Cover also argues, "from its own point of view, however, the community that has created and proposed to live by its own, divergent understanding of law makes a claim not of justifiable disobedience, but rather of radical reinterpretation" (1983, pp. 46-47).

6.5 Radical reinterpretation and legal pluralism in planning

I made clear early on that this dissertation assumes that legal pluralism – "the presence in a social field of more than one legal order" (Griffiths, 1986, p. 1) – is a reality. However, it is one thing to recognize the obviousness of this statement and another thing to examine how this normative multiplicity might unfold in practice and what its implications may be for a discipline like planning. Engaging with Cover's ideas (1983), I suggested that looking at the tensions of Chile's contact zone through the lens of too much law, as opposed to unclear law, offers ways of expanding predominant understandings based on the idea of planning cultures or different ways of planning. What I have attempted to do is to advance a way of thinking about the tensions that characterize the space where state and Indigenous interests meet through planning practice in places with a history of settler colonial Indigenous dispossession, which I think has more specificity than framing these tensions in terms of cultural or worldview differences because it emphasizes the normative aspects that are central to planning practice. Bringing the conversation to the realm of normative orders is particularly relevant to understand the violence involved in the process of imposing state planning on Indigenous peoples, as well as the violence resulting from Indigenous peoples' refusal to engage with the reasonableness of state planning.

Following the argument I have presented so far, state-sanctioned normative precepts are not inherently more valid or superior than normative precepts emerging from Indigenous peoples.[130] It follows from this assumption that Indigenous direct action as described in the previous section is as valid as state action, since it expresses the collective action of a group of people operating according to the normative precepts that emerge from their collective "narratives, experiences, and visions to which the norm articulated is the right response" (Cover, 1983, p. 42). That is what gives them validity and legitimacy in their given social context. Nonetheless, the fact that the state "appear[s] to have a monopoly on institutional and military power" (Simpson, 2014, p. 10) easily produces a landscape marked by coercion and violence (which also infuses planning practice) where these actions can be rendered illegitimate and subject to suppression.

While the domination by imposition of Chilean law that has characterized the relationship between the state and Indigenous peoples frames planning in important ways, I want to end this dissertation by speculating about what it might mean for non-Indigenous planners working in settler contexts to engage in what Cover calls radical reinterpretation. In other words, going beyond state reasonableness and instead siding with and working within the normative order(s) exercised by Indigenous peoples. To put it in a nutshell, what does legal pluralism look like in practice when the contact zone is characterized by clashing legal orders? I do not have a definitive answer to this question. Therefore, rather than suggesting solutions or prescriptions regarding how "a mutual, respectful coexistence conceived through negotiation between Indigenous and Western perspectives in which each has equal weight, and neither is positioned as dominant" (Porter and Barry, 2016, p. 188) would look like I want to talk about what I see as embodied experiences of legal pluralism.

In her grounded analysis of legal pluralism in Canada, Kwakwaka'wakw scholar Sarah Hunt argues that "law might be simultaneously understood as a powerful force with a far-off center of power, as well as a set of norms which are felt and enacted in the lives, bodies, homes and communities of individual people" (2014, p. 206). Referring to Indigenous experiences of law in particular, she adds that "the legal consciousness of Indigenous people are [sic] formed within relationships to multiple legal orders" (2014, p. v). Along similar lines, Melin et al. reflect on the current state of Mapuche law and argue that,

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[130] Looking at the Chilean case, Carmona argues that "reading different spheres of Indigenous customary law – [such as] complementary gender relations, medical procedures that do not follow [World Health Organization] guidelines, political organization grounded in [social] prestige or seniority, holistic understanding of the territory, community justice, etc. – as different forms of violence – gender violence, assault against life, tyrannical government regime, property rights violation, infringement of guarantees in criminal proceedings, etc. – finds ground only in a certain [kind of] western violence that legitimizes and understands itself as apolitical, as inherently non-violent. In other words, grounded in transcendental and objective reason and, therefore, superior to Indigenous normative expressions" (2009a, p. 23).

> Today – under the logic of symbolic cultural resistance – still persists an underlying layer of [Mapuche] ancestral knowledges anchored in [our] oral and historical collective memory, especially among *fvchakeche* or elders who live in the communities on historical Mapuche territory. We see [the elders] as knowledge sources of Mapuche history and culture. At the same time, we understand that the current correlation of forces between the legal system of the state and that of the Mapuche nation is the product of a historical process, where a legal system that is alien to the Indigenous world has been introduced. [This system] has not only enabled territorial dispossession, but it has also ignored [our] ancestral approaches to dispute resolution, thus diminishing the validity of rules of coexistence according to Mapuche culture and the jurisdiction of [our] traditional authorities [to play the role of law enforcers]… Notwithstanding, we consider that [our] capacity to generate norms remains alive in Mapuche culture. This allows us to also say that the state is not the only source of norms and legal practices. Quite the contrary, [both of them] coexist (2016, pp. 68-69, translation mine)

The reality of internal colonization in settler contexts today means that Indigenous peoples continuously operate in plural normative universes. This fact alone is the clearest and most indisputable testimony that legal pluralism is an action, not just a conceptual construct. In the coercive context of settler colonialism, inhabiting these multiples *nomos* might not be an option, but rather an imposition, for Indigenous peoples. However, from the theoretical perspective this study has adopted, legal pluralism does not necessitate violence or coercion in order to be exercised.

Actually, I would dare to argue that most people inhabit – or walk through – plural normative universes more often than may be apparent. Since I started my PhD, my engagement with the reality of Indigenous-state relations in Chile has changed substantially. On the one hand, my familiarity with archival historical material, my knowledge of relevant theories, and my proximity to government operations expanded radically in the process. On the other hand, several personal relationships with Indigenous individuals have grown independent from, but in close proximity to, this research project. As time passed and these experiences grew, I started to find myself learning about and navigating within different *nomos*. I am not talking about myself seeing, acknowledging, or understanding other ways of planning or other formal legal systems. I am talking about myself realizing that new understandings of what is right and wrong, valid and illegitimate – which were not part of my normative repertoire before – had entered into my moral universe in a subtle, almost invisible way that resembles practical wisdom. Maybe that is why when I ran into Cover's reference to radical reinterpretation the concept rang a bell for me. Has this expansion in my normative repertoire been a result of intellectual exposure to these debates? Has it been the result of a personal and affective commitment to what I have come to see as Chile's foundational injustice? I do not know if I can answer that question at this point, but I do know from personal experience that navigating shifting and multiple normative universes is a possibility. When I found myself in this state of awareness, I actually realized that this was not the first time I

have inhabited other *nomos*, even if only partially. As an immigrant living in Canada for the past decade, for instance, I have started living according to some normative precepts emerging from collective lived experiences other than the one where my legal consciousness (to borrow Hunt's term again) brewed. Sometimes people might inhabit normative orders that are not their own because they naturally encounter them or find themselves navigating them; sometimes because they are imposed on people – such as in Chile's settler colonial context. In either case, the brief examples just described indicate that it is possible to do it.

In fact, Hunt goes even further when she suggests that "Indigenous law relies on a network of individuals who are oriented toward the local fires of culturally grounded spatial relations, and the potential exists for everyone to be brought into these networks" (2014, p. 200). The key for engaging in such legally plural relationships is for non-Indigenous peoples "to reorient themselves as agents of Indigenous law, recognizing the teaching, stories, norms, and values through enacting their obligations as members of these networks" (Hunt, 2014, p. 200). Can planners in settler contexts become agents of Indigenous law? What if instead of theorizing legal pluralism planning practitioners just immerse and let themselves go? Perhaps the small embodied experiences of legal pluralism presented here might begin to provide answers and offer new ways of thinking about how the tensions of planning in the contact zone can be transformed. To paraphrase Cover (1983, p. 68) one last time, perhaps planning ought to stop circumscribing the *nomos*; perhaps it ought to invite new worlds.

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Appendix A – List and profiles of interviewees

The table below lists the 49 research participants I interviewed for this study. All of them were interviewed, and their narratives transcribed and analyzed. However, not all of them were quoted directly in the text of the dissertation, as explained in Chapter 1.

As I also explained in Chapter 1, all interviewees were offered anonymity as a way to protect their identity given the current and sensitive nature of some of the topics that came up during the conversations. However, some of them explicitly requested to be identified. For stylistic consistency I used codes throughout the text of the dissertation, but the table below shows the names of those individuals who requested their names to be made available.

The Role/Profile column offers a brief description of the position or kind of connection of the interviewee to the Consultation. The purpose is to allow readers to appreciate the full spectrum of knowledges and perspectives brought into the analysis, as well as to contextualize the verbatim quotes. However, in keeping with the spirit of anonymity for those participants who so requested, the descriptions are very high level and not detailed in order to prevent the quotes from being attributed to specific individuals.

Code	Name (if asked to be identified)	Role/Profile
Indigenous representatives		
Indigenous Leader 1		Indigenous leader who participated in the Consultation and sat at the Consensus Table until the end
Indigenous Leader 2	Francisco Vera Millaquen	Mapuche leader who withdrew from the Consultation
Indigenous Leader 3	Mirna Cortés	Colla leader who participated in the Consultation and sat at the Consensus Table until the end
Indigenous Leader 4	Sandra Huentemilla	Mapuche leader who withdrew from the Consultation
Indigenous Leader 5		Indigenous leader who participated in the Consultation and sat at the Consensus Table until the end
Indigenous Leader 6	Eliana Monardez	Colla leader who participated in the Consultation and sat at the Consensus Table until the end
Indigenous Leader 7	Juana Cheuquepan	Mapuche leader who participated in the Consultation and sat at the Consensus Table until the end
Indigenous Leader 8	Wilfredo Bacian	Quechua leader who withdrew from the Consultation
Indigenous Leader 9	Miguel Melin	Mapuche leader who never participated the Consultation
Indigenous Leader 10	Aurora Nahuelan	Mapuche leader who participated in the Consultation and sat at the Consensus Table until the end

Indigenous Leader 11	Sonia Linco Lebtun	Mapuche leader who participated in the Consultation and sat at the Consensus Table until the end
Indigenous Leader 12	Yessica Sobarzo	Mapuche leader who participated in the Consultation and sat at the Consensus Table until the end
Indigenous Leader 13	Gino Grunewald	Aymara leader who withdrew from the Consultation
Indigenous Leader 14	Juan Valeria Quilapan	Mapuche leader who opposed the Consultation
Indigenous Leader 15	Julio Huanca	Aymara leader who withdrew from the Consultation
Indigenous Leader 16		Indigenous leader who withdrew from the Consultation
Indigenous Leader 17		Likanantay leader who withdrew from the Consultation
Indigenous Leader 18	Hugo Alcamán	Mapuche leader who withdrew from the Consultation
CONADI Indigenous Councilor 1	Iván Carilao Ñanco	Mapuche CONADI Councilor who withdrew from the Consultation
CONADI Indigenous Councilor 2	Rafael Tuki	Rapa Nui CONADI Councilor who withdrew from the Consultation
CONADI Indigenous Councilor 3	Andrés Matta Cuminao	Mapuche CONADI Councilor who withdrew from the Consultation
CONADI Indigenous Councilor 4		Indigenous CONADI Councilor who withdrew from the Consultation
CONADI Indigenous Councilor 5	Wilson Reyes	Likanantay CONADI Councilor who withdrew from the Consultation
CONADI Indigenous Councilor 6		CONADI Indigenous Councilor appointed by the President of Chile who participated in the Consultation until he was asked to step down due to being non-elected
CONADI Indigenous Councilor 7		CONADI Indigenous Councilor appointed by the President of Chile who participated in the Consultation until he was asked to step down due to being non-elected
Government officials		
Senior Official 1		High level government official who played a key role at the beginning of the Consultation
Senior Official 2		High level former government official very familiar with the ratification of C169
Minister 1	Felipe Kast	Minister of Social Development during part of the Consultation
Minister 2		Minister of Social Development during part of the Consultation
Minister 3		Minister of Interior and Public Safety during part of the Consultation
UCAI Planner 2		UCAI planner deeply involved in the design and implementation of the Consultation
UCAI Planner 3		UCAI planner deeply involved in the design and implementation of the Consultation

UCAI Planner 4		UCAI planner deeply involved in the design and implementation of the Consultation
UCAI Planner 5		UCAI planner deeply involved in the design and implementation of the Consultation
CONADI Officer 1		CONADI officer who provided support to the Consultation
Government Lawyer 1	Iván Cheuquelaf	Government lawyer deeply involved in the drafting of DS66
Government Lawyer 2		Government lawyer deeply involved in the drafting of DS66
SEIA Officer 1		Government officer familiar with the development of environmental legislation
SEIA Officer 2		Government officer familiar with environmental legislation and with the development of consultations in previous governments
Ministry of Education Officer 1		Government officer involved in the application of DS66 once it was enacted
International organization representatives / Consultants / Scholars		
Consultation External Observer 1		Representative from Human Rights government agency who attended the Consultation as external observer
Consultation External Observer 2		Representative from international organization who attended the Consultation as external observer
Consultation External Consultant		Lawyer who provided legal services to Indigenous leaders negotiating at the Consensus Table
Indigenous Rights 'Expert' 1		Lawyer and former government officer familiar with Indigenous rights and policy
Indigenous Rights 'Expert' 2	Salvador Millaleo	Mapuche lawyer and scholar familiar with Indigenous rights
Indigenous Rights 'Expert' 3		Lawyer and scholar familiar with Indigenous rights
Religious Authority 1		Religious authority familiar with the reality of the Mapuche nation and who has acted as mediator between the state and Mapuche communities in the past

Appendix B – List of interview questions

Below is the list of questions I used to guide the interviews with the 49 research participants described in Appendix A. All interviews were semi-structured and open-ended. The interview questions were specific to each interviewee's role and experience, but the following broad questions were used as a guideline:

a) Please outline what you know about the Consultation on Indigenous Institutions led by the Government of Chile between 2011 and 2014.

b) Please tell me about your participation/involvement in the Consultation, whether direct or indirect. Why did you get involved in the Consultation? What was (were) your role(s) or what task(s) you had to perform in relation to the Consultation? Please outline in some detail how you went about your task(s) and/or what your participation looked like.

c) In which ways the work you performed in the context of the Consultation is similar to the work you usually do? In which ways was your work different?

d) In general terms, what is your opinion about the Consultation? How would you assess the conceptualization, planning, development, and implementation of the Consultation? In your opinion, what are the main strengths and weaknesses of the process? What were the main challenges and which challenges you foresee for the future?

e) From a historical perspective, how would you read the Consultation on Indigenous Institutions in the context of the relationships between the Chilean state and Indigenous peoples in the country?