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Stop Cultural Exclusions (in Chile)!: Reflections on the Principle of Multiculturalism

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STOP CULTURAL EXCLUSIONS (IN CHILE)!: REFLECTIONS ON THE PRINCIPLE OF MULTICULTURALISM

Hugo Rojas[*]

In Chile, as in other regions, long-lasting cultural ghettos segregate society. A cultural and economic minority enforces the social codes, consumer habits, modes, values, and principles that the rest of the population, implicitly or explicitly, must follow. The social thinking of this minority (un)consciously embraces: (1) moral conservatism and Catholicism, (2) neoliberalism, (3) urban separation between social classes, (4) a strong political belief in order and authority, (5) a concept of nation as a synonym for unity between equal *mestizos*—diminishing cultural

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diversity inside its territory, (6) assimilationist public policies, and (7) the control of the media, and, therefore, of public debate.

This Essay tries to explore new arguments to present the principle of multiculturalism in legal academia. This legal-political principle is a key feature in transforming the concept of the state in Chile because it is urgent to improve the legal status of the indigenous peoples, gender minorities, religious minorities, gypsies, immigrants, and other marginalized identities.

The principle of multiculturalism is an essential legal-political principle of the multicultural-state, and an orienting principle of law that: (1) values the cultural diversity of every social group that inhabits a given territory; (2) stimulates individual and collective freedom to maintain, favor, and share the patrimony and their own cultural identity; (3) encourages inter-group participation, respect, and exchange; and (4) promotes the development of the different collective identities from the moral and legal arenas, favoring mutual comprehension and the resulting inter-cultural creativity.[1]

I. INTRODUCTION

Considering the efforts of a part of the Chilean legal academia to open a space for meaningful debate on multiculturalism, the following document can be considered as a theoretical starting point for beginners and for those who are engaging this topic for the very first time: a new proposal in the conceptualization of the principle of multiculturalism.

I hope that this Essay is received as one more argumentative work aimed at producing a final modification of the political system that currently exists in Chile under the Political Constitution of 1980 imposed by Pinochet's dictatorship. More specifically, the essence of this proposal is to collaborate in the urgent transformational process that is necessary to overcome the old model of nation-state, and to establish the foundations for a transition to a multicultural-state that, in my view, will be able to guarantee human rights and to mediate tensions among the different cultural groups and peoples that co-exist in the Chilean territory.

Part I presents an overview of the *Proyecto de Investigación Multiculturalidad y Derechos de los Pueblos Indígenas en Chile* (*PIMDPI-Chile*). This Essay includes a brief description of the objectives of this

1. Two initial comments: (1) As the debate about multiculturalism is just starting in Chile, the legal academia faces a tremendous challenge and a great opportunity to learn from comparative experiences and theories without neglecting domestic realities and perspectives; (2) North American scholars could easily disagree with the use that some concepts and constitutional guarantees receive in these pages, mainly because legal reasoning is connected to personal meanings and views of the world.

project, its importance given the current structure of the Chilean legal culture, its initial hypothesis, its alternative structure, and its methodology.

The second part of this Essay presents the definition of the principle of multiculturalism as a superior and orienting criterion of the political-legal system. Each of its main elements are presented and explained: (1) cultural diversity, (2) multicultural state, (3) multicultural citizenship, (4) territory; (5) cultural human rights, and (6) minimum or fundamental rights of the principle of multiculturalism.

Third, the Essay presents the minimum rights of the principle of multiculturalism: (1) the self-determination rights, (2) the cultural identity rights, and (3) the special rights of cultural representation. It is important to mention that the legal nature of these three minimum rights corresponds to a category of collective rights which classical liberal tendencies are unwilling to recognize.

Finally, this Essay presents the more significant ideas that can be derived from the theoretical construction of the principle of multiculturalism, including some final comments relating to Chilean legal culture that warrant further study and contrast.

II. DESCRIPTION OF THE RESEARCH PROJECT "MULTICULTURALIDAD Y DERECHOS DE LOS PUEBLOS INDÍGENAS EN CHILE (PIMDPI-CHILE)"[2]

The *PIMDPI-Chile* is an attempt to answer two questions: (1) Is it possible to reconcile legally, on the one hand, the existence and protection of a project of national integration and, on the other, the recognition of the different cultural identities that co-exist in Chile?; and (2) Is our legal system prepared to mediate the growing and complex social multiculturalism of a country that is situated in an ever more globalized world order? Contrary to what I originally believed, my research has led me

2. *See generally* HUGO ROJAS, EL PRINCIPIO DE LA MULTICUTURALIDAD UNA PROPUESTA JURIDICA PARA PROMOVER Y PROTEGER NUESTRA DIVERSIDAD CULTURAL (2002). *See also* Hugo Rojas, *El Principio de la Multiculturalidad, in* DOCUMENTOS CULTURALES 67-145 (Bárbara Negrón ed. 2001); Hugo Rojas, *El Principio de la Multiculturalidad Un aporte a la protección de los derechos humanos culturales, in* 18 ANUARIO DE FILOSOFÍA JURÍDICA Y SOCIAL 451-71 (Chile) (2000).

Special thanks to: Arzobispado de Santiago, Corporación Nacional de Desarrollo Indígena, Corporación Tiempo 2000, Duke University School of Law, Fundación de Documentación y Archivo de la Vicaría de la Solidaridad, Latina/o Critical Legal Theory, Inc., Ministerio de Educación, Facultad Latinoamericana de Ciencias Sociales—Chile, Pontificia Universidad Católica de Chile, Sociedad Chilena de Filosofía Jurídica y Social, The Consortium in Latin American Studies at the University of North Carolina at Chapel Hill and Duke University, The Ford Foundation, Universidad Alberto Hurtado, Universidad Católica de Valparaíso, University of Dayton, University of Florida Fredric G. Levin College of Law, and University of Miami Center for Latin American and Caribbean Legal Studies.

to answer the two questions in the negative. Indeed, given the decades of persistent cultural domination by sectors that support essentialist, hispanic, assimilationist, and monoculturalist doctrines, it turns out to be of the highest importance to counteract these tendencies by strengthening the theoretical core of the multicultural paradigm.

The general objectives pursued in this research work are the following: (1) to deal in a comprehensive way with the meaning, importance, content, and legal establishment of the principle of multiculturalism, considering that it is one of the central platforms on which every multicultural-state should be based; (2) to specify and clarify some anthropological concepts and definitions that are highly relevant, but insufficiently addressed in legal dogmata; (3) to criticize the dominant and homogenizing cultural policies that have prevailed in Chile in the two first centuries of its existence as an independent nation-state;[3] (4) to contribute with the dynamic nature of the public law when suggesting the incorporation of a new principle that could promote the development of interculturality and that recognizes for all cultural groups and indigenous peoples the right of keeping and protecting their own cultural identity;[4] and (5) to make a comparative analysis that

3. The intellectual and symbolic construct nation-state is an association of domination of the institutional type that inside a defined territory controls the monopoly of legal production and legitimate force, regulates the monetary system, stimulates in public policies homogeneous and integrated societies according to nationalism, and even more importantly, disguises exclusionary cultural myths. We have to remember that in Latin America the nation-states seek social unity and uniformity—denying the multiethnic character of societies—using assimilationist policies and educational structures, without dissembling public efforts in the generation of nationalist collective sentiments.

4. Principles of law can be defined as abstract and superior legal criteria that reproduce the supreme cultural values that influence the law's basis in a country, and that pretend to be accepted by the citizens' collective conscience. The main dynamic functions of general principles of law are: (1) to control the power of bureaucratic authorities favoring human rights, (2) to inspire legislative work and discussion, and (3) to support legal interpretations, especially in hard cases. An interesting debate that has not been taken into account by the principles of law has to do with the interrelation that occurs when the classical principles of liberty, equality, and solidarity get in touch with the principle of multiculturalism. Those four principles do not necessarily oppose, but they rather complement one another, and that was my statement during Segundo Encuentro Nacional de Formación de Estudiantes de la Congregación de los Sagrados Corazones:

> La incorporación del Principio de la Multiculturalidad como Principio General del Derecho la realizo a partir de la Tesis de la Complementariedad entre los principios de libertad, igualdad, solidaridad y multiculturalidad. Así como sabemos que en el plano individual la libertad política no tiene sentido si no está íntimamente ligada a la libertad jurídica, en un nivel colectivo las culturas que no ven aseguradas sus libertades fundamentales (o que ven menoscabada su libertad) están en justo derecho de hacer ver los desequilibrios normativos y exigir a las autoridades la reparación del daño causado. Si todas las culturas son libres e iguales en dignidad y derechos, y si en la práctica algunas son más libres e iguales que otras, decretar la igualdad entre desiguales, sin establecer las

could show the level of recognition of multiculturalism in different legal systems.[5]

The theoretical framework of the *PIMDPI-Chile* is divided in three parts: (1) to review the bases of the Multicultural Model; (2) to emphasize the importance of multiculturalism in modern times, focusing on the nation-state's crisis, the *globalization/localization* phenomena, and the increase of migration; and (3) to analyze in comparative terms the establishment of the Principle of Multiculturalism, for example, in Latin American political constitutions, in North American legal systems, and under public international law and humanitarian law.

As in all the intellectual proposals of this sort, this one in particular seeks to deconstruct essentialist representations, combat social and cultural injustice, and transform the legal discourse/structure of subordination/ oppression into an inclusive one by attending the multiple cultural

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condiciones que compensen en parte las desventajas de hecho, a la larga lo único que logra es profundizar tal desigualdad. De modo que libertad, igualdad y multiculturalidad no se contraponen, sino que se articulan en la compleja misión de dotar a todas las culturas de ciertos derechos básicos colectivos y comunes; pero el cumplimiento de ello implica abrir espacios de debate y de diálogo intercultural en aras de una cultura jurídica respetuosa de todas las representaciones culturales e igualar las condiciones y los planos en los que han de darse tales interlocuciones. Por otro lado, la relación en la que aún falta mucho por hacer es la que debería existir entre el Principio de la Multiculturalidad y el Principio de la Solidaridad: en el evento de tener que reconocer normativamente a la multiculturalidad en calidad de principio, hay argumentos suficientes para sostener que su contenido y sus elementos deben estar indicados en concomitancia con lo que se ha estado avanzando respecto de la consagración jurídica del Principio de la Solidaridad. Esta estrecha vinculación no sólo se origina en un *ethos solidario* ni en la necesidad de armonizar los principios, sino también porque hemos visto que sólo a partir del reconocimiento de la realidad del otro como hermano-prójimo y de la comprensión sincera de los problemas que le son propios y no entendiéndolos como ajenos, es factible superar etnocentrismos, nacionalismos, chilenismos, esencialismos, etc. (presupuesto *sine qua non* para declarar que en Chile todos los grupos culturales son libres e iguales en dignidad y derechos). De lo dicho con anterioridad se colige que cualquier variación que se produzca en la consagración normativa de los principios señalados altera para bien o para mal la trama jurídica y, por ende, al Principio de la Multiculturalidad.

Hugo Rojas, Address at Segundo Encuentro Nacional de Formación de Estudiantes de la Congregación de los Sagrados Corazones, Santiago (May 2001).

5. It is appropriate to recall that some Latin American political constitutions have valued multiculturalism and have also acknowledged indigenous peoples' civil rights. Unfortunately, at that level, Chile is not one of those countries and it has forgotten the claims of more than a million indigenous that live in its territory (at least 8% of the population). About international law, let me say that I perceive some optimism on how recent international legal instruments are dealing with indigenous peoples' rights.

experiences in Chile. First, I wish to set Chile in the phenomenon of worldwide globalization (*latu sensu*) in order to achieve a multicultural citizenship—that is, one that is capable of maintaining and promoting diversity among the different and many cultural identities that co-exist in its territory. Second, the legal situation of indigenous peoples in Chile is highly problematic, especially the conflicts arising from water shortages in the North and the struggle for land and property rights in the South. Nobody can be indifferent when facing the historical violation of human rights of Latin American indigenous peoples, and in our particular case of the *aymara, mapuche, rapa nui, atacameños, quechua, colla, kawashkar and yámana o yágan* people. I agree with Rodolfo Stavenhagen when he declares that the transgression of the human rights of indigenous peoples does not only take place in material matters—that is, the well documented dispossession and exploitation they have suffered—but also in the systematic denial of the (limited) possibilities that would allow them to preserve and develop their own cultures, including their languages, customs, rules, organizations, beliefs, and different ways of social codes.[6] In Chile, *de facto* and *de jure* conditions reflect this terrible historical tendency. By absorbing all the indigenous cultures and minorities under an exclusive cultural model and by trapping these groups in cultural *ghettos*, the only thing dominant social and cultural forces have achieved has been, to paraphrase Bernardo Subercaseaux, the *mutilation of our multiculturalism*.[7] This is why the so called *conflicto mapuche* cannot be reduced to a private dispute over property rights in land, nor to a simple matter of public disorder that warrants application of the full weight of the law.

The investigative hypothesis has been: Incorporating the principle of multiculturalism in Chilean constitutionalism can be a significant and essential contribution for adapting or re-modeling the social system to pressures emerging from globalization, the discourses and movements promoting protection of cultural human rights, and new understandings of the nation-state idea reflected in Latin American panindigenous discourses. If these ideas are proven, it would follow that the "*rules of the game*" need to be examined and reformed in order to promote respect for diversity, diminish the climate of confrontation, secure greater autonomy for the different cultural groups that co-exist in the Chilean territory and, finally, declare legally and constitutionally the Chilean country as a state composed of many different cultural expressions.

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6. RODOLFO STAVENHAGEN, DERECHO INDÍGENA Y DERECHOS HUMANOS EN AMÉRICA LATINA 9 (1988).

7. *See* Bernardo Subercaseaux, *Caminos interferidos: de lo político a lo cultural: Reflexiones sobre la identidad nacional*, 73 ESTUDIOS PÚBLICOS 159-64 (1999).

Methodologically speaking, the steps designed to accomplish the proposed objectives are: (1) a comprehensive review of the Chilean press over the last three years, focusing on the ethnic conflicts; (2) planning the research work by identifying the legal problem, defining the general and specific objectives, formulating the initial hypothesis, and designing a program of work; (3) the bibliographic review of documents that have addressed the topics of multiculturalism, ethnic conflicts, human rights, indigenous rights, et cetera; (4) attendance and active participation in seminars, conferences, and debates about the *conflicto mapuche*, globalization, national reconciliation, the legal response to cultural changes, et cetera (in Chile as well as abroad); (5) interviews carried out by specialists on the topics of multiculturalism, indigenous law, and human rights; (6) writing a first draft; (7) the task of processing all the comments received;[8] (8) the synthesis and reduction of the material in the final document; and (9) the design and implementation of the action plan.

III. DEFINITION AND ELEMENTS OF THE PRINCIPLE OF MULTICULTURALISM

As far as I know, the first time that the term *multiculturalism* was used was in the *Preliminary Report of the Royal Commission on Bilingualism and Biculturalism* (produced in Canada in the mid-1960s).[9] Recently, people have tried to define, operationalize, characterize, value, criticize, question, or disparage the term. Before sitting down to read a document about multiculturalism, it is worth investigating the personal aspects of the author (*verbigratia*, the culture to which he or she belongs, the discipline to which he or she is devoted, his or her home country, geographical place, age, gender, political inclination, social class, religion, et cetera). To highlight the controversial character of this matter, it would be enough to pay attention to what Jon Stratton and Ien Ang state:

> As a discourse, multiculturalism can broadly—and without, for the moment, further specification—be understood as the

8. Comments and contributions made by Leslie Adams, Rodrigo Andreucci, José Aylwin, José Bengoa, Francesca Bignami, Rafael Blanco, José María Bulnes, Michael Byers, Guillermo Caballero, Thomas Clemens, Doriane Lambelet Coleman, Jerome Culp, Jorge Curilen, Fernando de Laire, Nancy Ehrenreich, Arturo Escobar, Rolf Foerster, Edmundo Fuenzalida, Sergio Fuenzalida, María Angélica Garrido, Paulina Gómez, Tibor Gutiérrez, Dadimos Haile, Jan Hoffman French, Elizabeth Iams, Elizabeth Iglesias, William Mace, Jennifer D'Arcy Maher, Jeff Marder, Jorge Montealegre, Bárbara Negrón, Sonia Olea, Alejandro Posadas, Maximiliano Prado, Vernellia Randall, Nelson Reyes, Hugo E. Rojas, Roberto Rosenthal, Pablo Salvat, Lars Schoultz, Andrea Seielstad, Agustín Squella, Carolina Stefoni, Francisco Valdés, Christian Viera, and Steven Wilkinson, among others, improve the project. All errors are mine.

9. *See* David BENNETT, A PRELIMINARY REPORT OF THE ROYAL COMMISSION ON BILINGUALISM (1965) (Can.).

> recognition of co-existence of a plurality of cultures within the nation. Celebrated by some and rejected by others, multiculturalism is controversial precisely because of its real and perceived (in)compatibility with national unity . . . . Viewed historically, multiculturalism could be understood as the consequence of the failure of the modern project of the nation-state, which emphasised unity and sameness—a trope of identity—over difference and diversity.[10]

Quid sit. Multiculturalism consists in a group of different social phenomena that are derived from the complex cohabitation or co-existence of people that identify themselves with diverse cultures in the same territory.[11] To be more precise, multiculturalism is the situation in which a great variety of cultural tendencies, world views, and explanations of reality cohabit within a territory—none being strong enough to dominate or eliminate the others.

The principle of multiculturalism can be understood as an orienting principle of the political-legal code that: values the cultural diversity of every social group that inhabits a given territory; stimulates individual and collective freedom to maintain, favor, and share the patrimony and their own cultural identity; encourages intergroup participation, respect, and exchange; and promotes the development of the different collective identities from the moral and legal arenas, favoring mutual comprehension and the resulting intercultural creativity.

This principle is the search for the highest coherence between cultural *diversity/plurality* and the unity of political integration.[12] It can be understood historically as a consequence of the failure of the *modernizing/homogenizing* project known as the nation-state.[13]

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10. Jon Stratton & Ien Ang, *Multicultural Imagined Communities: Cultural Difference and National Identity in the USA and Australia, in* MULTICULTURAL STATES: RETHINKING DIFFERENCE AND IDENTITY 135, 138 (David Bennett ed., 1998).

11. *See* ADELA CORTINA, CIUDADANOS DEL MUNDO: HACIA UNA TEORÍA DE LA CIUDADANÍA 178 (1997).

12. *See generally* Cynthia Hamilton, *Multiculturalism as Political Strategy, in* MAPPING MULTICULTURALISM 167-77 (Avery Gordon & Christopher Newfield eds., 1997). *See also* Bennett, *supra* note 9, at 89, 222.

13. There are many reasons to support the obsolescence and crisis of the nation-state, among them you can find: (1) the existence of a clear detachment between our reality—plural, multicultural, and multiethnic—and the historic emphasis that the nation-state has given to homogenize society; (2) the growing economic, technological, military, cultural, political, and social interdependence among the different world realities in relation to globalization; (3) the consequent answer and understandable defense by the traditional and local identities, as it happens in the Latin American re-ethnification processes, and the identities, acknowledgment, aspirations, and claims coming from excluded groups or cultures; (4) the actions of human rights movements; (5) the rapid and profound changes in the international system that occurred in the latter half of the twentieth century; (6) the necessity of a minimum global ethic; and (7) the failure

Multiculturalism is worthwhile, beneficial, interactive, and interculturally positive if, and only if, we protect the cultural human rights of all the actors and people involved, individually and collectively. When a government adopts and promotes a multicultural policy—active or interventionist—it explicitly accepts the legitimacy of cultural diversity. I will back up this idea quoting a basic book written by Claire Renzetti and Daniel Curran:

> Multiculturalism emphasizes respect for and appreciation of the cultural contributions, practices, and experiences of diverse groups. Historically, in the United States, the cultural achievements of many segments of the population . . . were downplayed or ignored, while the achievements of other groups, especially of the Anglo-Saxon heritage, were elevated . . . . Critics of multiculturalism say it promotes separatism and intergroup conflict by encouraging people to identify with their "own kind" rather than with what members of society share in common. To a large extent, however, this criticism reflects a *fundamental misunderstanding of multiculturalism*. The purpose of multiculturalism is not to diminish the accomplishments of the English or Western Europeans or to deny that our contemporary culture owes a great deal to our Anglo-Saxon and Western European heritage. Rather, multiculturalism simply emphasizes that many groups have played a significant role in the cultural development of the United States, and that the historical and contemporary contributions of the many diverse cultural groups that make up the United States today should be recognized and appreciated. Supporters of multiculturalism point out that the U.S. population is becoming more—not less—diverse, and a multicultural perspective is therefore increasingly necessary if the various subcultures are to forge a life together based on cooperation and mutual respect. Moreover, the rapid growth of international business and politics and the development of advanced communications technology mean culturally diverse societies have increased contact and are becoming more interdependent. This, too, should encourage us to adopt a multicultural perspective.[14]

It is important to strongly support the advantages of the multicultural model because the violent circumstances that have characterized the twentieth century have clearly shown that one of the most demanding collective challenges is to learn to mediate the real or potential tensions that occur when engaging cultural difference (*verbigratia*, radicalism and

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of nationalist, ethnocentrist, evolutionist, and diffusionist theories.

14. CLAIRE RENZETTI & DANIEL CURRAN, LIVING SOCIOLOGY 72-73 (1998).

unyielding bipolarities). The struggle for social inclusion is not possible if it transgresses the acknowledged aspirations of the large number of cultural groups that feel alienated, excluded, or denied. Let us not forget that when trying to fight for equality or for the recognition and enforcement of their rights, cultural "Others" often find themselves pushed into highlighting their differences—their *alteritas* in relation to other cultural groups—and on many occasions the emphasis on difference has been misunderstood or has evolved into irreversible processes of fanaticism, fundamentalism, and/or cultural ghettos.

The precaution just presented was, in some way, predicted in 1992 by Diego Iturralde when he pointed out that the Latin American Nation-States and the indigenous *nations/peoples* would face increasing tensions in their relationships, adding that this process would make it necessary to develop political and cultural methods for reorganizing society to create space for diversity and real pluralism.[15] Against this background, the voices advocating multicultural public policies in our region are entirely justified.

An sit. The ultimate foundation of multiculturalism is, above all, of an anthropological nature. Multiculturalism comes from every human being's originality and, due to our gregarious nature, it is reflected in every group of individuals that unite and identify themselves culturally. As talking about society entails different points of view and perceptions of reality, the temporal authority must respectfully value and promote, as carefully as possible, all cultures and should refrain from privileging any particular one of them. But be careful. It is not unusual to find cultures that may be unworthy of official respect because they have proven themselves to be intolerant, exclusive, exploitative, cruel, and repressive. However, even members of intolerant cultures must enjoy the freedom to express their points of view, provided their acts do not infringe the human rights of those who do not agree with them.

Living in a multicultural society is not easy. The ideal of democracy can help to some extent as a result of its practical and political structures, but it does not necessarily resolve the underlying problem.

I turn now to the aforementioned elements of the principle of multiculturalism: (1) cultural diversity, (2) multicultural state, (3) multicultural citizenship, (4) territory, (5) cultural human rights, and (6) minimum or fundamental rights of the principle of multiculturalism.

A. *Cultural Diversity*

More than being simply one element of the principle of multiculturalism, a commitment to cultural diversity is a natural and obvious imperative in

15. *See* Diego Iturralde, *Los Pueblos Indígenas y Sus Derechos en América Latina*, 15 REVISTA IIDH 12 (Costa Rica) (1992).

creating a social reality in which a plurality of cultures, totally or partially diverse, can co-exist. It is worth repeating an idea formulated by Charles Taylor, "in the current situation all societies are every day more multicultural and, at the same time, are every day more subject to multinational migration."[16] The importance of this element is addressed in a recent article by José Bengoa, in which he states succinctly that a modern indigenous policy must assume: (a) the multiculturalism of society as a principle; and (b) the acknowledgement of the different people that make up multiethnic societies.[17]

B. *Multicultural State*

The multicultural state can be understood as a kind of state that embraces the political advances achieved in and through the project of modernity—including the effects of constitutionalism—and that, moreover, incorporates the principle of multiculturalism as a pivotal and constituent pillar. In the multicultural state, three kinds of rights are integrally and systematically articulated: the subjective public rights established in domestic law, human rights (from first, second, or third category), and the different collective rights involved in the principle of multiculturalism.[18]

In other words, in a state where the principle of multiculturalism rules, constitutional rights embrace the universal rights of all individuals regardless of race, ethnicity, religion, and gender, for example, as well as a series of cultural rights belonging to minority groups. Thus,

$$MS = f(PM)$$

MS: Multicultural-State
PM: Principle of Multiculturalism

16. CHARLES TAYLOR, EL MULTICULTURALISMO Y "LA POLITICA DEL RECONOCIMIENTO" (1993).

17. *See* JOSÉ BENGOA, *Políticas públicas y comunidades mapuches: del indigenismo a la autogestión*, III 2 PERSPECTIVAS 331 (2000).

18. The transformation of the nation-state into a multicultural-state, besides the citizens' approvals, requires: (1) total protection of civil rights and constitutional guarantees, (2) positive actions that enforce international human rights in the implementation of public policies, (3) legal recognition of individual and collective rights, (4) respect of democratic and truly representative authorities/structures, and (5) a global ethic previously agreed by consensus in a social contract or *pactum* by social/political actors.

Any variation in the legal configuration of the principle of multiculturalism reflects a variation in the concept of the multicultural state (that ends ultimately in a variation in the cultural human rights framework applicable to the different cultures that co-exist in a territory).

Will Kymlicka explains two cases in which we are in the presence of a multicultural state: (1) if the members belong to different nations or peoples; and (2) if the members have emigrated from different nations, provided that this involves an important aspect of the personal identity and the political life.[19] Other authors include a third case: cultural groups, social movements, and minority voluntary associations (although this enlargement can lead us to a concept of multi-subculturalism). Without trying to avoid or close the debate, it is important to record that Multicultural States can also be made up by two or more nations (multinational states) or by diverse ethnic groups (multiethnic states).

The pluralist state must create forums and spaces in which disputes can be addressed and resolved in a climate of tolerance, where basic consensus can be reached, and where respect for cultural diversity and the multiple identities that are part of a country can be promoted. As UNESCO has maintained, finding proper ways to reconcile a new plurality with a common citizenship is an unavoidable obligation, and this objective cannot be achieved simply by building a multicultural society.[20] It requires also that the state be multiculturally formed. By this, I mean a state that recognizes plurality without diminishing its integrity.[21] The Australian example provides a good case in point:

> Multiculturalism, as government policy, has provided a new status for the state as the site where the overarching ideological principles that legitimise and vindicate the diversity of cultural practices in Australian territorial space are formulated. The state provides an ideological context for the production of the nation, but . . . the nation is not conceived as a cultural expression of the universal ideological principles represented by the state. Rather, the state acts as an institutional container of principles which are instrumental to the encouragement and management of cultural diversity . . . . In 1989, the Australian federal government launched the National Agenda for a Multicultural Australia. The very phrase 'multicultural Australia' suggests that 'multiculturality'

19. *See generally* WILL KYMLICKA, MULTICULTURAL CITIZENSHIP: A LIBERAL THEORY OF MINORITY RIGHTS (1996).

20. *See generally* UNESCO, NUESTRA DIVERSIDAD CREATIVA: INFORME DE LA COMISIÓN MUNDIAL DE CULTURA Y DESARROLLO (1996).

21. *See supra* note 19.

has now been enshrined as a recognised essence of Australian national identity, understood as an ideal unity-in-diversity.[22]

C. *Multicultural Citizenship*

When we start talking about the development of a multicultural citizenship, the premise is that the state and society facilitate the right of citizenship as a set of abilities and civic competences for the participation of a person or group in the global community to which he or she belongs. Multicultural citizenship is different from other versions of citizenship because the citizens/actors are willing in their daily lives to tolerate, respect, and incorporate the different cultures of a political community, so that no citizen is ever made to feel as a second or third class citizen. Federico Vázquez has been researching the concept of multicultural citizenship from an emancipationist model, that is to say, from the perspective of the liberation and vindication of individual and collective rights, and he defines it as:

> [E]l espacio del reconocimiento del Otro, como portador de una multiplicidad de sentidos sociales y culturales . . . . [A]sí la diferencia se concibe de forma relacional dentro de un marco de conflicto y de encuentro . . . . El acceso a la ciudadanía cultural se da a través del reconocimiento de la diversidad sociocultural en la esfera pública, movilizada culturalmente, y donde es posible reivindicar derechos colectivos (protecciones externas), sin el desmedro de la libertad individual (restricciones internas).[23]

This model, inspired by the development of intercultural ethics, is the absolute opposite of models underlying *apartheid* regimes (physical separation of the different cultural groups) or the assimilation of minority cultures, as happens in "*melting pot*" countries. In fact, in modern

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22. Stratton & Ang, *supra* note 10, at 155-56.

23. FEDERICO VÁZQUEZ, UN CONCEPTO DE MUTACIÓN: AVENTURAS Y DESVENTURAS DE LA CIUDADANÍA SOCIAL Y MULTICULTURAL EN AMÉRICA LATINA 209 (2000)

> The space for the recognition of the Other, as a bearer of a wide variety of social and cultural meanings . . . . So then the difference is conceived in a relational perspective inside an area of conflict and encounter . . . . The access to the cultural citizenship it is given through the acknowledgement of the social-cultural diversity in the public sphere, culturally moved, and where it is possible to vindicate collective rights (external protections), without diminishing the individual freedom (internal restrictions).

See id. (author's translation).

democratic theory, the notion of citizenship entails a series of rights and obligations that inform its meaning (status) and whose active exercise (roles) is encouraged as much as possible in order to promote the inclusion of discriminated or dispossessed social groups as members of the citizenry. Elizabeth Jelin presents some examples of such opening reactions that might help us to distinguish between collective status and collective roles in a historical perspective:

> [L]a lucha contra la 'solución final' del nazismo, el movimiento de derechos civiles en los Estados Unidos en la década de los sesenta, las luchas contra el Apartheid en Africa del Sur en el presente, las reivindicaciones del feminismo de acabar con todas las formas de discriminación de las mujeres, los reclamos de ciudadanía de grupos étnicos minoritarios, son las manifestaciones internacionalmente más visibles y conocidas de estas luchas sociales por la inclusión, la eliminación de privilegios y la igualdad.[24]

Interludio. In many situations, I have detected that some authors cast United States citizenship as an example of a multicultural citizenship model. The truth is that, after researching what happens in the United States, I have concluded that at best it would be considered an example of a *stagnant multicultural citizenship*.

We have to remember that the topic of multiculturalism has been methodically studied in the United States since the seventies, and it has been conceived as a possible alternative to the White supremacy that historically has dominated and assimilated other cultures (*e.g.*, Native-Americans, African-Americans, Hispanic-Americans, Pacific Islanders-Americans, Asian-Americans, Biracial and Multiracial Americans, etc.). That explains why Jamin Raskin stressed in *The Eighth Annual Federalist Society Lawyers Convention, Harvard Journal of Law and Public Policy*

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24. Elizabeth Jelin, *¿Cómo construir ciudadanía? Una Visión Desde ABAJO*, 55 EUR. REV. LATIN AM. & CARIBBEAN STUD. 21, 24 (1993).

> The struggle against the Nazism final solution, the Civil Rights Movement in the United States in the sixties, the fights against the *apartheid* in South Africa in the present, the feminist vindications to end with all forms of discrimination against women, the citizenship petition of minority ethnic groups, are the most visible and known international signs of these social struggles for the inclusion, expressions of the privilege elimination and equality.

See id. (author's translation). When I use the expressions "collective status" and "collective roles," there is a peculiar connection to Ralph Linton's anthropological theory in THE STUDY OF MAN 113-31 (Prentice Hall, 1964).

in 1996, the struggles and the complex gestation of the multicultural model and the subsequent legal reforms:

> The real glory of the American polity . . . is that we define ourselves not by exclusion, but rather by the struggle against exclusion, by the never-ending demand on the part of oppressed groups for freedom, respect, and equal ability to participate in society. These struggles for inclusion produced the Thirteenth, Fourteenth, Fifteenth, and Nineteenth Amendments. These gains were achieved at the price of much blood and sacrifice . . . . The civilizing struggles of the 1960s and 1970s, the civil rights movement, the women's movement, the gay and lesbian movement, and the youth movement, have made this country a richer, freer, and more democratic nation than it was thirty-five years ago. And yet, our nation today is in the throes of a blacklash against "multiculturalism," the progressive and, to my mind, inescapable cultural changes unleashed by the anti-authoritarian movement of the last several decades.[25]

In articulating the thesis of the *U.S. multicultural stagnation*, an outsider like me would have to take into account at least some of the following concerns: (1) the long-lasting assimilationist and integrationist policies that are institutionalized in the heart of White supremacy have neutralized, through a phenomenon called *Americanization*, the limited, though real, possibilities for cultural negotiations; (2) the population's majority identification with the utilitarianism and individualistic line of thinking has not even allowed the debate over the possibility of protecting collective rights—in other words, individualism is one of the untouchable dogmas on which the American legal net is built; (3) the ironic historical-legal-political distancing between the always protected right of religious freedom and the cultural rights of the different social groups that live in the territory; (4) the stress on federalism and the constitutional democracy as the only supposedly favorable alternatives to assure cultural diversity; (5) the insistence on limiting the public debate over multiculturalism to linguistic or educative matters (probably because of the centripetal forces of the concept of the American Nation); (6) the objective or the mission of the U.S. public education continues to be, more or less, assimilationist and ethnocentrist: form good citizens, English-speaking, who share a common commitment to the Western values on which the nation is purportedly founded, ready to defend patriotically the country's interests (right or wrong); and (7) the color blindness thesis in the public administration

25. Jamin B. Raskin, *From "Colorblind" White Supremacy to American Multiculturalism*, 19 HARV. J.L. & PUB. POL'Y 743, 744-45 (1996) (footnotes omitted).

performances is hardly compatible with the practice of the affirmative action thesis.

One of the interesting points debated in the United States was emphasized by Tom Tyler in the 2000 Symposium *Law, Democracy, and Society*:[26] when we want to prevent the potential problems that might arise in future relationships among diverse ethnicities, we have to consider that the traditional assimilationist theory that all immigrants faced when they arrived in the United States is no longer shared by all cultural groups:

> However, not all members of minority groups are interested [now] in assimilating. Instead, they argue for a multicultural model, such as that found in Canada. Such pressures have intensified, since many immigrants from Asian societies and many immigrants from the Spanish-speaking world have strong cultures that they resist abandoning. They support a model of society that accommodates to the moral and cultural values of diverse groups, recognizing their validity and incorporating them into overall societal values . . . . This potential change in American government and social structure has provoked widespread concern about the presumed destructive consequences of moving from a society based on identification with a single set of superordinate values and institutions to a society composed of citizens with strong identifications with their ethnic and racial subgroups—a multicultural or "mosaic" society. Concerns about the transformation of America into a "preservative of diverse alien identities," that is, a society of "groups more or less ineradicable in their ethnic character" have been expressed by social commentators (Schlesinger, 1992). Underlying these concerns is the question of whether democratic institutions and values diminish among minorities who place greater importance on their . . . affiliation with their own ethnic subgroups than the larger society.[27]

The previous ideas presented lead me to predict that the social and legal stagnation of American multicultural citizenship can only be overcome if Americans start recognizing in their public policies that creating one common political culture for all citizens does not require that the different cultural groups assimilate to the ways and mores of the dominant culture, a recognition that is *per se* quite risky to those who benefit from the existing structure of cultural domination under White supremacy. If the demographic and geopolitical reality of multiculturalism is a human struggle

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26. Tom R. Tyler, *Multiculturalism and the Willingness of Citizens to Defer to Law and to Legal Authorities*, 25 LAW & SOC. INQUIRY 983 (2000).

27. *Id.* at 987-88.

for recognition, then a society can be considered multicultural only if the social outsiders, silenced or dominated groups perceive themselves as included in public spaces, and participate and are heard in the building process of public policies, curricula, for example.

D. *Territory*

A territory is a physical space where people with different cultural knowledge must cohabit and which is recognized as belonging to one or more states. It is sometimes debated whether this territory must always be physical or whether it can exist symbolically as well.

E. *Recognition of Cultural Human Rights*

According to Patrice Meyer-Bisch, in this category we must locate the following rights: respect for the cultural identity, information, education, formation, participation in cultural life, and access to patrimony, including the common patrimony of humanity.[28] Luis Polo mentions that cultural rights refer to different aspects of the rights related to knowledge transmission such as: (1) the right to participate in cultural activities, (2) the right of information, and (3) the right of communication and the use of the media. This last of the three is one of the more important rights for disseminating the cultural expressions of different peoples and the recognition of their cultural expressions.[29]

F. *Minimum Rights of the Principle of Multiculturalism*

The difficulties of introducing these rights in the Chilean Constitution convinced me to dedicate a complete and final section to this issue.

IV. MINIMUM RIGHTS OF THE PRINCIPLE OF MULTICULTURALISM

The principle of multiculturalism can remain confined in the Chilean academic halls as a minority desire or aspiration, or it can be recognized, implicitly or explicitly, by statutory law. Although the content of these rights are applicable to all cultures (essential aspect) and vary from one place to another (territorial aspect), there is enough literature and empirical evidence to demonstrate that talking about multiculturalism, in different Latin American countries, loses its meaning if the following minimum rights are not recognized in introducing the principle of multiculturalism into

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28. Patrice Meyer-Bisch, *De una sucesión de generaciones a un sistema de los derechos humanos*, XIV 1 REVISTA PERSONA Y SOCIEDAD 123-31 (Chile) (2000).

29. Luis Felipe Polo Gálvez, *Prospectiva de los Derechos Humanos Desde el Punto de Vista de los Derechos Culturales*, XIV 1 REVISTA PERSONA Y SOCIEDAD 115 (Chile) (2000).

constitutional hierarchy: (1) the right of self-determination of indigenous peoples, (2) the right of cultural identity, and (3) the right of proper representation, according to cultural parameters.

These rights are clearly of a collective nature, because they are situated in a different dimension from individual rights: a constellation of cultural community that is aware of itself. The lack of certainty as well as the lack of cultural and political referents about the future of the social order lead me to conclude that we cannot be satisfied with a regime that focuses exclusively on individual rights and the rights of participation and decision. According to Stavenhagen, there are some situations in which individual rights cannot be completely fulfilled if collective rights are not recognized, or in another words:

> [D]onde el pleno ejercicio de los derechos individuales pasa necesariamente por el reconocimiento de los derechos colectivos. Así lo entendieron de hecho los redactores de los dos pactos internacionales de derechos humanos ya que el artículo primero de ambos pactos es idéntico y reza así: "Todos los pueblos tienen el derecho de libre determinación".
>
> . . . .
>
> La situación de las diversas minorías étnicas y de los pueblos indígenas en el marco de los Estados nacionales o multinacionales representa otra instancia en la que el pleno ejercicio de los derechos individuales pasa por los derechos colectivos. La 'igualdad de derechos' de los individuos no es más que una ilusión si esta igualdad es negada por diversas circunstancias a las colectividades a las que estos individuos pertenecen. Y por el contrario, la igualdad de derechos de las colectividades étnicas resulta entonces condición necesaria (pero tal vez no suficiente) para el ejercicio de las libertades y los derechos individuales.[30]

But, is it valid to talk about collective rights? What do liberals say about it? Opinions vary on this question. In fact, it has caused prestigious liberals to step back in the global *forum* when trying to answer whether protecting individual rights (*latu sensu*) is sufficient or, on the contrary, whether it is necessary to include communities as subjects of law. A diverse group of thinkers, whose work cannot be regarded an alternative to Liberalism, but

30. Rodolfo Stavenhagen, *Los Derechos Indígenas: Algunos Problemas Conceptuales, in* CONSTRUIR LA DEMOCRACIA: DERECHOS HUMANOS, CIUDADANÍA Y SOCIEDAD EN AMÉRICA LATINA 151, at 162-63 (Elizabeth Jelin & Eric Hershberg eds., 1996) [hereinafter CONSTRUR LA DEMOCRACIA]. *Compare* Elizabeth M. Iglesias, *International Law, Human Rights and LatCrit Theory*, 28 U. MIAMI INTER-AM. L. REV. 177, 207-13 (1997).

only a criticism of some of its major flaws (e.g., Alasdair MacIntyre, Michael Sandel, Charles Taylor, and Michael Walzer), favors a state that is committed with the security that a society needs for its daily working and development. Liberal versions after the publication of *A Theory of Justice*[31] sustained the concept of State neutrality in the face of possible cultural perspectives, defining its function strictly in terms of guaranteeing the exercise of individual rights. Some authors can be found halfway between the positions explained. They do not accept the concept of collective rights as an element of a liberal theory, but they urge the importance of recognizing essential rights for the benefit of minority groups so that they can carry on with their lives (e.g., Habermas, Kymlicka).[32]

On the other hand, if we accept the human rights classification made by Meyer-Bisch in: (a) civil and political rights; (b) social and economic rights; (c) cultural rights; (d) structural rights (about the structural regrouping when applying the principle of indivisibility); and (e) rights of the people in vulnerable conditions;[33] there cannot be the slightest doubt that the three rights of the Principle of Multiculturalism are both collective and cultural, though this does not mean they cannot be supported in a complimentary manner by other categories of human rights (e.g., the right to be free of racial, ethnic or gender-based discrimination).

A. *The Right of Self-Determination*

Although the right of self-determination of *peoples/nations/communities* is not the ultimate objective of this research, it is nevertheless a crucial factor in understanding the principle of multiculturalism. This is easily understood if we sociologically envision the peoples' self-determination rights as a process or complex net of legal and political relations between one *nation/people* (or *nations/peoples*) and one State in which they are situated, whose main objective is to facilitate the attainment of certain levels of autonomy that consist of giving the *people/nation* the means to keep their own identity without depending on central authorities all the time.

Now, the self-determination right does not correspond to all minority groups, but to peoples (including indigenous peoples) and to nations that inhabit a historically recognized territory. It does not necessarily entail secession or political independence. On the contrary, it is possible to reach political agreements that would enable a people and nation to be part of a

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31. JOHN RAWLS, A THEORY OF JUSTICE (1971).

32. This is not the moment to criticize the liberal doctrine of individual rights. An excellent illustration has been given by Pablo Salvat, *La Justicia entre Liberales y Comunitaristas (breve esbozo y comentario en torno al Caso Pinochet)*, XIII 3 REVISTA PERSONA Y SOCIEDAD 165 (Chile) (1999). *See also* Robert Justin Lipkin, *Can Liberalism Justify Multiculturalism?*, 45 BUFF. L. REV. 1 (1997).

33. Meyer-Bisch, *supra* note 28, at 130-31.

sovereign state in return for the recognition of some autonomy in matters of a political-cultural nature, thus allowing the specific group to dictate their own rules on previously agreed subject matters.

The objective of the autonomy system is to permit determined groups, with a common tradition and shared social-cultural characteristics, to develop freely their ways of life and heritage, exercise their rights, and be in charge of their own business. This is achieved through the establishment of a special governance regime for certain member communities who choose their own authorities from within the community and exercise the jurisdictional authority legally accorded to them to decide internal community affairs.[34] Examples of this are Panama and Nicaragua, but it could possibility be applied in other countries:

> En Panamá existe una región indígena autónoma. En Nicaragua se solucionó un difícil conflicto al firmar un estatuto de autonomía con los pueblos indígenas de la Costa Atlántica. En ninguno de estos casos autonomía implicó secesión del Estado. De parecida manera, las autonomías indígenas en México o en Perú, si se dan, tendrán que estar pactadas con el gobierno federal y ser promulgadas en la Constitución de la República y en las constituciones de cada estado federal.[35]

Through the application of autonomy rights, indigenous peoples can peacefully engage in activities that enable them to satisfy different matters/subjects. For example, they can (1) set their own cultural objectives, (2) choose their priorities and preferences, (3) define the rules of inter-group behavior, (4) select the appropriate media, (5) determine the contents of education (multilingual, bilingual or not bilingual), (6) solve internal conflicts, (7) celebrate their own rituals and festivities without interference, and (8) produce and reproduce internal laws.

Equality of the human rights and the self-determination of the peoples are part of the group of human and fundamental rights whose recognition is related to the human dignity of the peoples and the principle of liberty. As there is a strong relationship between equality rights, basic human rights, and the right of self-determination, it is clear that the right of self-determination is not only essential for the communities but it is one of the most important rights of human rights theory.

It has often been stated that there is a contradiction between the rights of peoples and individual rights. Authors like Stavenhagen and Villoro

34. HÉCTOR DÍAZ POLANCO, AUTONOMÍA REGIONAL: LA AUTODETERMINACIÓN DE LOS PUEBLOS INDIOS 151 (1991).

35. LUIS VILLORO, ESTADO PLURAL, PLURALIDAD DE CULTURAS 95 (1998).

openly disagree with this doctrine.[36] In this vein, and in supporting a vision of the correct and appropriate complementary nature of these rights, it has been said that:

> Si el derecho de los pueblos se considera un derecho humano fundamental, en el mismo plano que los derechos individuales [, entonces] no puede [ni debe] haber contradicción entre ellos. Los derechos humanos básicos no fundan su legitimidad en su promulgación por el Estado, se justifican en el reconocimiento de necesidades y valores previos a la constitución de cualquier asociación política. Si el "derecho de los pueblos" ha de entenderse como un derecho humano básico, tiene que fundarse en necesidades y valores supuestos en cualquier asociación política y que no deriven de ella.[37]

As modern anthropological legal theories have warned, it is impossible to realize individual rights without cultural collective rights. The difficult aspect is to reach peaceful agreement in the elaboration of alternatives that will reduce inter-ethnic tensions (internal and international). For this reason, the plurality of national satisfaction increasingly has been valued, especially if national harmony depends on recognizing the collective interests of social-cultural communities. If, on the one hand, you want to avoid the dangerous fragmentation of the states and, on the other, political negotiation between the parties is paralyzed, it is not always easy to reach this consensus, and the participation of an impartial third party has turned out to be a necessary strategy of recourse (in a few cases this third party has been the United Nations).[38]

Luis Villoro, who maintains that the indigenous problem can only be solved by legally recognizing the peoples' autonomy, is in favor of giving self-determination rights only to those minority communities that exactly fulfill the characteristics of "a people."[39] This self-determination can be exercised in two ways by "a people": (1) claiming for itself the right to make final decisions about its future without accepting any higher legal authority other than itself—in this case the exercise of the self-determination leads to a sovereignty statute (this, for example, is the position taken by nation-states and some nations that aspire to the sovereignty of statehood); and (2) agreeing to be part of a sovereign state,

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36. *See* Stavenhagen, *supra* note 30; Villoro, *supra* note 35.

37. VILLORO, *supra* note 35, at 88.

38. Remember that the Charter of the Organization of American States (OAS) proclaims that all peoples are subjects of inter-American law and subjects of collective rights, such law and right being the principal the self-determination. *See* Charter of the Organization of American States, Dec. 13, 1951, 119 U.N.T.S. 3 (as amended).

39. VILLORO, *supra* note 35.

with delimited faculties, competences, and fields in which the autonomy rights could be exercised (this would be the case of indigenous autonomous regions in countries like Canada, Panama, and Nicaragua).[40] Stavenhagen calls this kind of self-determination internal (political and economical organization *ad intra* of a people, without affecting the external relations already stated).[41] The assumption is the existence of a superior *pactum* between the peoples and the sovereign state in which are specified the conditions of the survival and maintenance of the identity (e.g., ways of life protections and cultural reproduction in a territory), development, and education of ethnic groups' self-government in a multicultural state, for example, the San Andrés Larraínzar Agreement between Ejército Zapatista de Liberación Nacional and the Mexican government. In sum, there are several options for effectuating the second category of self-determination rights, such as federalism, relative or partial independence, political and administrative decentralization, and others.

This issue is very complex, and several politicians have failed to satisfy public opinion when trying to suggest alternatives that will promote peaceful solutions for the resolution of inter-ethnic conflicts. At the same time, the legal academy has been alert to the strategic manipulations through which the doctrine of the right of self-determination of peoples has been interpreted. For example, Elizabeth Iglesias has argued that the demise of the interstate system of sovereign nations is a potentially progressive development for the struggle against subordination, and maybe Latin American scholars should explore the implications of her remarks in connection with the *Latina/o Critical Legal Theory Third Annual Conference*, Miami Beach:

> Rather than investing further in a bankrupt system of nation-states, LatCrit theory might chart a new agenda to imagine and articulate the kinds of institutional arrangements and rights regimes that can promote the right of self-determination, both at the international and sub-national levels where the neoliberal project is, even now, reconfiguring and consolidating new regimes of freedom and compulsion. At an international level, this agenda might take up the pending project of promoting the full recognition of individuals as subjects of international law, for example, through the incorporation of international human rights into the institutional structures, substantive norms, and decisional procedures currently regulated by international economic law. At a subnational level, this agenda might begin by rejecting the neoliberal paradigm that confines democracy to the political

40. *Id.* at 94.

41. Stavenhagen, *supra* note 30, at 168.

> realm, and pursue the institutionalization of democratic governance structures throughout the inter/national economy as well. Both trajectories provide a meaningful way out of "the stateness problem," even as they expand the parameters and meaning of democracy in ways that more readily cohere with the anti-essentialist, anti-subordination commitments that are the heart of the LatCrit movement.[42]

If we assume a realistic point of view of the law, trying to be careful with the meaning of social events, then we will have to reintroduce Villoro's argument directly in relation to the situation currently confronting a majority of Latin American countries:

> Los pueblos indígenas no han gozado de iguales oportunidades para ejercer sus derechos ciudadanos. Aunque se los declare iguales en derechos, en realidad no lo son. Carecen de las mismas oportunidades que los demás para decidir respecto de sus formas de vida, personales y sociales, y ejercerlas siguiendo su propia cultura, sin interferencias ajenas. La autonomía que reclaman es justamente la facultad de realizar, con la libertad que les confiere su derecho de ciudadanos, sus propias formas de vida. Para ello necesitan que se estatuya ese derecho en la Constitución. Esa garantía no estaría en oposición a los derechos iguales a todo ciudadano, sino, por el contrario, sería la manera de garantizar su ejercicio para los ciudadanos que no han tenido hasta ahora la posibilidad real de disfrutarlos. La autonomía, lejos de propugnar derechos opuestos a la igualdad ciudadana, pretende garantizar su ejercicio efectivo para todos los pueblos que componen la nación y no sólo para el mayoritario. Para asegurar la igualdad, es necesario reconocer jurídicamente la autonomía allí donde se impide u obstaculiza su ejercicio.[43]

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42. Elizabeth Iglesias, *Foreword: Identity, Democracy, Communicative Power, Inter/National Labor Rights and the Evolution of LatCrit Theory and Community*, 53 U. MIAMI L. REV. 575, 646 (1999) (footnotes omitted). Following this line of thought and after reading some of the LatCrit documents, I firmly believe that it is possible to put in contact the progressive sectors of the Chilean Legal Culture with the pivotal objectives and main postulates of the LatCrit Theory. It is probable that the potential encounters between them may require a lot of previous explanations if there really is a strong desire to take advantage of each other. I suggest, as a very convenient step, we spread the LatCrit Theory all over Latin America, break the ice in some (conservative) circles, and stop the (human rights violations) amnesia in others.

43. VILLORO, *supra* note 35, at 102-03.

B. *The Right of Cultural Identity*

The most conservative position in the Chilean jurisprudence conceives cultural identity as a set of, more or less, fixed, essential and unchanging features, that were made up in the distant past. Others, by contrast, view the national identity as a mutable historical process that is constantly under construction. One also hears skepticism concerning the idea of national identity (e.g., post-modernist theories), suggesting the idea is vague or without content and that it is used for either imaginative or discursive purposes, or both but in the end has no scientific meaning. Nevertheless, for Subercaseaux the richness of the debate that has been held in the last years, at least in Chile, has not been in vain because "*it points at the deconstruction of the concept* [of national identity], *from the field of its historicity and also from the post-modern cultural theory.*"[44]

Leaving aside these interesting controversies, the preliminary results of the *PIMDPI-Chile* has led me to ratify that the identity of a people is not something inherited or given, but rather an image constructed and projected at all times (past, present, and future). The destruction of a peoples' identity begins with the denial of its capacity to construct its own self-image, the consequent lack of recognition with, and the cultural expressions aborted or manipulated.

In his work, *Estado Plural, Pluralidad de Culturas,* Villoro explains the essence of a peoples' identity, confirming the different opinions presented in connection to the vitality and humanity of cultural relativism:

> Por identidad de un pueblo podemos entender lo que un sujeto se representa cuando se reconoce o reconoce a otra persona como miembro de ese pueblo. Se trata, pues, de una representación intersubjetiva, compartida por una mayoría de los miembros de un pueblo, que constituiría un "sí mismo" colectivo.
> El "sí mismo" colectivo no es una identidad metafísica, ni siquiera metafórica. Es una realidad con la que se encuentran sociólogos y antropólogos. Los individuos están inmersos en una realidad social, su desarrollo personal no puede disociarse del intercambio con ella, su personalidad se va forjando en su participación en las creencias, actitudes, comportamientos de los grupos a los que pertenece. Se puede hablar así de una realidad intersubjetiva compartida por los individuos de una misma colectividad. Está constituida por un sistema de creencias, actitudes y comportamientos que le son comunicados a cada miembro del grupo por su pertenencia a él. Esa realidad colectiva no consiste, por ende, en un cuerpo,

44. BERNARDO SUBERCASEAUX, CHILE O UNA LOCA HISTORIA 47 (1999) (emphasis added).

> ni en un sujeto de conciencia, sino en un modo de sentir, comprender y actuar en el mundo y en formas de vida compartidas, que se expresan en instituciones, comportamientos regulados, artefactos, objetos artísticos, saberes transmitidos; en suma, en lo que entendemos por una "cultura". El problema de la identidad de los pueblos remite a su cultura.[45]

It is not enough to give autonomy to groups that do not share the values nor the beliefs of the dominant national majority. It is necessary to recognize the collective identity of the group through a combination of factors that enable its cultural reproduction. Some of these factors include: the validity of common law, an education that would answer the wishes of the community, religious practices, linguistic expressions, family codes, rules for social behavior, and physical spaces. The right to maintain a cultural identity is not limited to the right to maintain peoples' distinctive cultural features, but rather to maintain its capacity for autonomous decisions that influence the cultural meanings and heritage with which the members of a culture can identify themselves. According to Jorge Larraín, the more significant the role of collective identity in the self-construction of personal identities, the more important become the symbolic meanings and historical narratives through which individuals are called to construct their identities.[46]

Does the right of cultural identity have limits? Of course, to begin, there are basic rights of all members of society (constitutional and internationally recognized or both), subjective or collective; in addition, the legislature has neither the constitutional nor legal power to define the rules that either will expand the scope of minority group autonomy or restrict the autonomy rights of sub-cultures.[47] Finally, in those difficult or complex cases, it is the court's responsibility to solve the conflict of interest between two or more views of the world or cultures.

The ones that accept, negotiate, and implement the details of the cultural rights of Latin American ethnic groups will have to be the states' representatives and indigenous peoples' representatives. But it is not enough to identify the particular elements and give expression to them in legislation. According to Enrique Mayer, it is fundamentally important to go beyond the specific contents that can be included or excluded in the

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45. VILLORO, *supra* note 35, at 65-66.

46. Jorge Larraín, *Elementos teóricos para el análisis de la identidad nacional frente a la globalización, in* ¿HAY PATRIA QUE DEFENDER? LA IDENTIDAD NACIONAL FRENTE A LA GLOBALIZACIÓN 75 (2000).

47. *See* AMITAI ETZIONI, LA NUEVA REGLA DE ORO: COMUNIDAD Y MORALIDAD EN UNA SOCIEDAD DEMOCRÁTICA 237 (1999).

declaration of these rights.[48] It is also necessary—along with the declaration of these rights—to create the mechanisms of implementation, dispute resolution, and sanction.[49]

Two important breakthroughs in the comprehension of the right to a cultural identity are first, Article 7, Convention 169, adopted at the General Conference of the International Labor Organization in Geneva, 1989;[50] and second the design of the Canadian Multicultural policy in the Canadian Charter of Rights and Freedoms and the Canadian Multiculturalism Act.[51]

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48. Enrique Mayer, *Reflexiones sobre los derechos individuales y colectivos: los derechos étnicos, in* CONSTRUIR LA DEMOCRACIA, *supra* note 30, at 171.

49. *Id.*

50. International Labor Convention (No. 169). Concerning Indigeneus and Tribal Peoples in Independent Countries, June 27, 1989, art. 7, *at* http://iolex.ilo.ch.1567/cgi_lex/conude.pl?c169.

51. The Government of Canada: (a) recognizes and promotes the understanding that multiculturalism reflects the cultural and racial diversity of Canadian society and acknowledges the freedom of all members of Canadian society to preserve, enhance, and share their cultural heritage; (b) recognizes and promotes the understanding that multiculturalism is a fundamental characteristic of the Canadian heritage and identity and that it provides an invaluable resource in the shaping of Canada's future; (c) promotes the full and equitable participation of individuals and communities of all origins in the continuing evolution and shaping of Canadian society and assist them in the elimination of any barrier to such participation; (d) recognizes the existence of communities whose members share a common origin and their historic contribution to Canadian society, and enhance its development; (e) ensures that all individuals receive equal treatment and equal protection under the law, while respecting and valuing their diversity; (f) encourages and assists the social, cultural, economic, and political institutions of Canada to be both respectful and inclusive of Canada's multicultural character; (g) promotes the understanding and creativity that arise from the interaction between individuals and communities of different origins; (h) fosters the recognition and appreciation of the diverse cultures of Canadian society and promotes the reflection and the evolving expressions of those cultures; (i) preserves and enhances the use of languages other than English and French, while strengthening the status and use of the official languages of Canada; and (j) advances multiculturalism throughout Canada in harmony with the national commitment to the official languages of Canada. All Canadian federal institutions shall: (a) ensure that Canadians of all origins have an equal opportunity to obtain employment and advancement in those institutions; (b) promote policies, programs, and practices that enhance the ability of individuals and communities of all origins to contribute to the continuing evolution of Canada; (c) promote policies, programs, and practices that enhance the understanding of, and respect for, the diversity of the members of Canadian society; (d) collect statistical data in order to enable the development of policies, programs, and practices that are sensitive and responsive to the multicultural reality of Canada; (e) make use, as appropriate, of the language skills and cultural understanding of individuals of all origins; and (f) generally, carry on their activities in a manner that is sensitive and responsive to the multicultural reality of Canada. *See generally* CAN. CONST. (Constitution Act, 1982) pt. I (Canadian Charter of Rights and Freedoms); Canadian Multiculturalism Act (1988). *Cf.* J.W. BERRY & J.A. LAPONCE, ETHNICITY AND CULTURE IN CANADA (1994).

C. *Special Rights of Representation*

The election system is a set of rules or social-political relations that structure the designation process of authorities based on the preferences expressed by the citizens of a given political community.[52] This process *per se* is oriented to the designation of representatives in whom the voters have entrusted the defense of their interests and the orientation on public matters. Additionally, the process itself is a very important element in the institutional architecture of modern states and the functioning of representative democracies.

The election system in a democratic culture must be a framework where all later results in the elections (sample) can be as representative as possible of the total citizenry (population). Paraphrasing Josep Vallès and Agustí Bosch, we have to consider the idea of representation-sample in the sense that the group elected can be a representative selection of the voters, or at least of some of their main characteristics,[53] having a strong bearing on the social legitimacy of democratic mechanisms.

If the design of the election is *uninominal* (first-past-the-post) or *binominal*, we take the risk that the positions of minority groups would be ignored and that it would affect their *modus vivendi* as the country in general. If we have to take sides for one of these positions, it would be recommended that the candidates' elections could be connected with proportional or distributive criteria. In this vein, there are several representative dimensions of a group of voters, including (1) place of residence, (2) political or ideological orientation, (3) gender, (4) social class, (5) profession or activity, and (6) ethnic or cultural group.

The big difference between the positions that have adopted a first-past-the-post system and the ones that recommend a distributive electoral process design is the different value that they give to representation. Proponents of the first approach reinforce the parliamentary positions of the blocs or the merger of the biggest political parties, whereas proponents of distributive formulas are those who recognize the need to achieve a fair distribution of seats among all the participants.[54] Empirical and quantitative analysis of the election results in different countries using these different processes in the last fifty years reveal that the first-past-the-post and the *binominal* alternatives show bigger signs of disparity than the distributive system.[55] Even experts have mentioned a standard deviation higher than

52. JOSEP VALLÈS & AGUSTÍ BOSCH, SISTEMAS ELECTORALES Y GOBIERNO REPRESENTATIVO 33 (1997).

53. *See id.* at 12.

54. *See id.* at 133.

55. *See generally* ARENO LIJPHARD, ELECTORAL SYSTEMS AND PARTY SYSTEMS: A STUDY OF TWENTY-SEVEN DEMOCRACIES 1945-90 (1994).

two hundred percent (200%) from the one that used the distributive or proportional approach.[56] From a historic point of view, the proportional system has been used as a result of the achievements of minority group movements tired of the postponements and their marginalization in elections that do not allow them to elect representatives under systems of a *uninominal* disposition.

To solve the problems of underprivileged groups in known election processes, Kymlicka has tried to demonstrate that the rights of self-determination that could guarantee the correct representation of those groups appeal ultimately to the very basis of a representative democracy.[57] The consecration of these rights would be neither undemocratic nor liberal, but it would be:

> una ampliación plausible de nuestras tradiciones democráticas existentes y en determinadas circunstancias es la mejor manera de asegurar que las minorías puedan expresar adecuadamente sus intereses y sus aspiraciones. Habida cuenta de que resulta vital que las minorías dispongan de procedimientos justos para que se escuche su voz en el proceso político, parece obvio que las propuestas orientadas a lograr la representación de grupo les proporcionan tales procedimientos.[58]

Diminishing the systematic exclusion of minority groups in the electoral processes during the (unfinished) Transition stage to democracy in Chile requires the complete transformation of the election system that currently is in use. It is significant to add that the designated senators (*senadores designados*) and life member senators (*senadores vitalicios*) increase the rates of deviation, undermine the legitimacy of the political system, and distort the concept of democracy. Indeed, the high indexes of deviation in Chile invite efforts to make a high level qualitative turn and establish a temporary system of quotas for the representation of minority groups (defined in the widest sense) for as long as necessary to remedy the lack of minority representation.

V. CONCLUSIONS AND COMMENTS

Our journey has tried to elaborate the structural and theoretical bases of a new legal-political principle of a higher order that allow or contribute to the process, within the democratic system, the challenges, risks, and benefits that will carry out cultural diversity in a context of growing globalization. The detailed study of the principle of multiculturalism is

56. *Id.*
57. *See* KYMLICKA, *supra* note 19, at 207.
58. *Id.*

timely because there are voices of worry and skepticism considering the event of having to reconcile national identity (if there is one) with the different cultural expressions that co-exist in a territory.

If multiculturalism consists of a group of social phenomena that comes from the complex co-existence of people that identify themselves with different cultures living in a same territory, then we can understand the principle of multiculturalism to be an essential legal-political principle of the multicultural state—an orienting principle of law that: (1) values the cultural diversity of every social group that inhabits a given territory; (2) stimulates individual and collective freedom to maintain, favor, and share the patrimony and the group's own cultural identity; (3) encourages inter-group participation, respect, and exchange; and (4) promotes the development of the different collective identities from the moral and legal arenas, favoring mutual comprehension and the resulting inter-cultural creativity.

When we incorporate the principle of multiculturalism at a constitutional level, we are contributing in part to: (1) better attention to cultural human rights; (2) a modern citizenship with informed and tolerant citizens, who are able to participate in the market's opportunities and to participate in all public spaces; (3) the possibility of improving pacific systems for conflict resolution, starting with the implementation of multicultural educational projects; (4) the modernization in which social, economic, and cultural inclusion are pursued; (5) the end of the negation-exclusion dialectics of the Other by the elites; and (6) positively assuming within our region the trans- and inter-cultural fabric of our condition.

When I mentioned each element of the principle of multiculturalism, I paid special attention to the meaning of: (A) cultural diversity, (B) multicultural-state, (C) multicultural citizenship, (D) territory, (E) recognition of cultural human rights, and (F) recognition of the minimum or fundamental rights of the principle of multiculturalism.

In relation to the minimum rights of the Principle of Multiculturalism, the peoples' rights of self-determination that are recognized in international law need not be understood as a right to political separation, but rather as a complex net of legal-political relations between a certain people and the state authorities. Its objective is to ensure the right of peoples to the necessary level of autonomy that would guarantee the support of their own cultural identity, the establishment of priorities by the community's internal decision-making processes, and the management of collective matters by themselves. However, the right to maintain a cultural identity is not limited to the right to maintain peoples' distinctive cultural features, but rather to maintain its capacity for autonomous decisions (something *risky,*

contingent, doubly contingent, and diachronic).[59] If we are talking about special rights of cultural representation, I do not disagree with the idea of temporary quotas to ensure representation in the political institutions, but I would suggest the distributive-proportional election system as a good remedy to the high deviations that the *uninominal* and *binominal* systems produce. In all other respects, it is our duty that all cultures have access to fair procedures that allow them to take meaningful part in the political process.

You may have noticed that in this research work, several criticisms have been brought against: (1) the nation-state; (2) the strong roots of the dominant and exclusive legal discourse; (3) the genocidal, assimilationist, or integrationist theories, whose effects are still part of some rules and legal doctrine sectors; and (4) the legal delay in the protection of minority groups' and indigenous peoples' rights in Chile. The purpose of these criticisms have been none other than to find the legal-political arguments to support the validity and the advisability of: (1) proposing to the country the incorporation of the principle of multiculturalism in our constitution; (2) promoting cultural human rights and cultural diversity through the construction of a multicultural state in Chile; (3) the contributions that global minimum ethics have been producing in these kinds of subject matters;[60] (4) our theory of the complementary relationship among the principles of liberty, equality, solidarity, and multiculturalism; (5) the thesis that the principle of multiculturalism is in harmony with international law, its potential consecration in formal sources, and the importance of recent debates about indigenous peoples in the international community; and (6) the processes of ethno-genesis related to the American pan-indigenous discourses.

VI. FINAL COMMENTS

Chileans have the fortune of living together and sharing in the bowels of a plural society that is not only multicultural, but also, multiethnic. Although we can agree at a discursive level with this statement, boasting of this or simply saying it is not enough. The background and the implications of this statement are honestly immeasurable. When it refers to the legal system's actors, it comes to be an essential part in the conscious understanding of the legal evolution that we have had in the republican past. It is unacceptable to deny the following declaration: our statutory law

59. *See generally* NIKLAS LUHMANN SOCIEDAD Y SISTEMA: LA AMBICIÓN DE LA TEORÍA (1997); NIKLAS LUHMANN, SISTEMAS SOCIALES: LINEAMIENTOS PARA UNA TEORÍA GENERAL (1991).

60. *See* Adela Cortina, *Multiculturalismo y Universalismo*, XIV 1 REVISTA PERSONA Y SOCIEDAD 133 (Chile) (2000).

has not been able either to avoid or to diminish the huge cultural isolation, nor to alleviate the serious structural imbalances.

There is a lot to do to stop the legal structures of domination in Chile. First, scholars (and the media) should concentrate their work against the historical euro-centric, anti-indigenous, and anti-Latina/o discourse. Second, scholars should try to explore and find out more alternatives to reduce political tensions between civil society, the government, and the military, so courts and judges can maintain independence in their mission of finding the truth about human rights violations during Pinochet's dictatorship. Third, scholars must build an inclusive legal framework that overcomes the inflexible-traditional-essentialist one that is centered on concepts as Nation-State, *Chilenidad*, patriotism, etc.

There is no doubt that, for different reasons, such as the ethnocentrism and the patriotism or passionate nationalism, Chileans have not taken advantage of all the magnificence and shine of the wealth of the community or communities or union of social unions that live in the Chilean territory. Even more, there persists in an important sector of citizenry, especially in the dominant elites, a legal debt to the native peoples that fight: (a) to be socially and constitutionally recognized; (b) to recover a big part of their ancient territories; and (c) to have a better level of political autonomy with the purpose of reproducing their cultures and maintaining their traditions and heritages.

The importance of legally recognizing our cultural plurality through the incorporation of this new principle (the one that tends to alter, in a crucial way, the spirit and the organic structure of existing public law) is not only justified for reasons of the preventive order. In fact, given the likely eventuality of consecutive turmoil and inter-cultural conflicts, a system essentially democratic, multicultural, participative, inclusive, and representative is the best means for processing the interests of the ones involved in a context of respect of human rights (and also to pacify fundamentalism). But a second argument comes up with force: considering the new challenges that emerge from the world or the globalization phenomena–for example the rapid rhythms of migratory population movements (permanent, seasonal, or temporary), the force of the media, international investments, and stock market transactions—all make me believe that, as days go by, our society has to be alert to the complex ups and downs in this upward direction to multiculturalism, happening with different intensities, but that reaches all the world.

If we want to live together, we will have to incorporate changes in the political system, because if we leave unchanged the current pseudo-democratic structures that offer little participation, our future inevitably will be unstable (or not too encouraging). I hope that the solidarity *ethos* is a top priority when trying to guarantee cultural diversity, plurality of interests, opinions, and values through a participative construction of the

multicultural state (until now the only one capable of enabling the existence of the different cultural identities and, if internally agreed on by the members of these cultural groups, the only one capable of contacting these cultural groups to establish mutual recognition).

Even though we have awoken to a multicultural country, this multiculturalism remains mutilated in the legal and social areas. As our current legal code is not prepared to process efficiently the growing and irreversible social multiculturalism, it is of the highest importance to debate the proposals directed to assume the compatibility among the unitarian political project and the multiple projects that come from the different cultures. One of those prospective proposals that, I am convinced, will favor the recognition (and tolerant and reciprocal understanding) of the different cultures of Chilean society, is the one that I have presented under the name of the principle of multiculturalism.

VII. RESUMEN EN ESPAÑOL (SUMMARY IN SPANISH)

No quisiera desaprovechar la oportunidad que Florida Law Review me ha dado, al publicar estas reflexiones sobre el Principio de la Multiculturalidad, para agradecer la hospitalidad de la Escuela de Derecho de la Universidad de Florida y para felicitar al Comité Organizador de la Sexta Conferencia Anual de LatCrit (Gainesville, abril de 2001). Además, me parece del todo apropiado resumir algunas de las ideas que han sido planteadas en este artículo para facilitar o motivar investigaciones similares de académicos de habla hispana.[61]

Es común apreciar dentro de la historiografía conservadora y esencialista un cierto culto hacia el mito de la *Chilenidad*, como queriendo destacar que la gran mayoría de los habitantes de la República serían mestizos, hispano parlantes, monógamos, heterosexuales, católicos, sedentarios, occidentales. Sin embargo, la realidad es distinta y las minorías han demostrado ser mucho menos flexibles de lo que superficialmente se piensa o contempla: por una parte sabemos que existe un porcentaje importante de inmigrantes provenientes de las más diversas latitudes, también estamos ciertos que más de un millón de personas se identifica con alguno de los pueblos indígenas y que se están generando procesos de etnogénesis, no olvidemos el nomadismo del pueblo gitano, tampoco que

61. No haber incorporado esta sección al final del ensayo hubiera sido una clara señal de contradicción con lo que he estado sosteniendo. El multiculturalismo no sólo puede ser visto desde la perspectiva macro-sociológica, sino también en nuestros quehaceres y cotidianeidad, incluyendo nuestras actividades laborales y académicas. Es cierto que el inglés se ha estado transformando en un idioma globalizado que permite a las personas de diferentes culturas utilizarlo como un mínimo denominador comunicacional, pero si se escribe pensando en las dificultades de las latinas y los latinos, anhelando mayores índices de justicia social, lo que a todas luces corresponde es fortalecer y mantener el bilingüismo en las revistas especializadas.

las estadísticas muestran cómo en las últimas décadas ha ido descendiendo el porcentaje de católicos en la población y, en contrapartida, ha aumentado el número de fieles de otros credos religiosos.

Destinar esfuerzos para demostrar algo tan notorio como nuestra diversidad cultural no sólo sería algo inoficioso sino reiterativo, pues diversas encuestas e investigaciones ya lo han logrado con notable éxito y rigurosidad científica. Por el contrario, el aporte verdadero que se puede realizar desde la academia es ofrecer los marcos teóricos que puedan utilizar los actores sociales y políticos para lograr que el sistema político sea más inclusivo y menos excluyente. Por eso he intentado explicar los nódulos teóricos del Estado-Multicultural de una manera diferente a lo que a la fecha ocurre en las aulas, esto es, identificando a lo que en puridad denomino Principio de la Multiculturalidad. En otras palabras, y tal como fuera señalado en la primera parte de la *Introducción,* en apoyo de los incipientes esfuerzos que se pueden detectar en parte de la doctrina chilena por abrir un debate profundo sobre multiculturalidad, en este documento se sugiere un punto de partida teórico y que puede ser útil tanto para iniciados como para quienes se acercan por vez primera al tema: una propuesta diferente de conceptualización del novísimo principio de la multiculturalidad.

En la primera parte del documento se ofrece una visión panorámica del *Proyecto de Investigación Multiculturalidad y Derechos de los Pueblos Indígenas en Chile* (PIMDPI-Chile). Se mencionan sumariamente sus objetivos, las sospechas que justifican su importancia (o al menos que debieran llamar la atención de la cultura jurídica chilena), la hipótesis inicial, la estructura y la metodología. A continuación se da a conocer la definición del PM, en cuanto principio superior y orientador del sistema jurídico-político, y se presta atención a cada uno de sus elementos principales: (1) diversidad cultural; (2) Estado-Multicultural; (3) ciudadanía multicultural; (4) territorio; (5) derechos humanos culturales; y (6) derechos mínimos o fundamentales del Principio de la Multiculturalidad: (A) el derecho a la libre determinación de los pueblos; (B) el derecho a la identidad cultural; y (C) los derechos especiales de representación. Por último, como corresponde a todo trabajo de esta naturaleza, se transcriben las *Conclusiones* más importantes sobre la construcción teórica del PM y se formulan algunos comentarios finales que requieren posteriores estudios y contrastes.

En apretada síntesis, el recorrido efectuado ha pretendido acotar en parte las bases estructurales y normativas de un nuevo principio jurídico-político de rango superior que permite o contribuye a procesar al interior del sistema democrático los desafíos, riesgos y beneficios que conlleva la diversidad cultural y la heterogeneidad social, en un contexto ascendente de globalización. El estudio pormenorizado del Principio de la Multiculturalidad es oportuno puesto que suenan voces de inquietud e incredulidad ante la eventualidad de tener que compatibilizar toda la

temática de la identidad nacional (si es que la hay) con las diversas expresiones culturales que coexisten dentro del territorio.

Si la multiculturalidad consiste en un conjunto variado de fenómenos sociales que derivan de la convivencia y/o coexistencia compleja de personas que se identifican con culturas diversas en un mismo territorio; es factible entender al Principio de la Multiculturalidad, en cuanto principio jurídico-político esencial del Estado-Multicultural, como aquel valor orientador que: (1°) valora la diversidad cultural de cada uno de los componentes de la sociedad; (2°) promueve la libertad individual y colectiva para mantener y compartir los múltiples patrimonios e identidades culturales propios; (3°) fomenta la participación, el respeto y el intercambio intergrupal; y (4°) promociona el desarrollo de las distintas identidades colectivas desde los ámbitos moral y jurídico, favoreciendo la comprensión mutua y la creatividad resultante.

Al pretender consagrar el Principio de la Multiculturalidad en el nivel constitucional se está contribuyendo en parte a: (1) una mejor atención de los derechos humanos culturales, (2) una ciudadanía moderna dotada de ciudadanos informados y tolerantes capaces de intervenir en las oportunidades de los mercados y de participar en todos los espacios públicos, (3) la posibilidad de mejorar los sistemas pacíficos resolutorios de conflictos, partiendo por la implementación de proyectos pedagógicos multiculturales, (4) una modernización en la que se persigue la inclusión social, económica y cultural, (5) la terminación de la dialéctica de la negación-exclusión del otro por parte de las élites, y (6) asumir positivamente en la región nuestra condición de tejido trans e intercultural.

En cuanto a los derechos mínimos del Principio de la Multiculturalidad, la autonomía de los pueblos reconocida en el derecho internacional no debe interpretarse como un derecho a la separación política sino más bien como una compleja red de relaciones jurídico-políticas entre un pueblo determinado y la autoridad estatal, cuyo objetivo es alcanzar ciertos márgenes o niveles de libertad que aseguren la mantención de la propia identidad cultural, la fijación de las prioridades de la colectividad y el manejo de los asuntos colectivos por sí mismos. Por otro lado, el derecho a la mantención de la identidad cultural no conduce a la preservación de los rasgos distintivos, sino al mantenimiento irrestricto y sin cuestionamientos de capacidad autónoma de decisión y de cambio desde la retroalimentación de los integrantes de una cultura, produciendo en los individuos los significados e historias con las cuales se puedan identificar (lo que puede cambiar contingente y diacrónicamente). Si de los derechos especiales de representación se trata, los sistemas de cuotas y los sistemas electorales proporcionales son buenos paliativos a las altísimas desviaciones de los modelos mayoritaristas. Por lo demás, es un deber que todas las culturas dispongan de procedimientos justos para que se escuche sus voces en el proceso político.

Se podrá haber apreciado que en este documento se han esbozado críticas contra: (1) el Estado-Nación; (2) las hercúleas raíces del paradigma jurídico monocultural; (3) las teorías genocidas, asimilacionistas o integracionistas, cuyos resabios aún permanecen en algunas normas y sectores doctrinarios; (4) el atraso jurídico en la protección de los derechos de las minorías y de los pueblos indígenas en Chile. El sentido de tales detracciones no ha sido otro que buscar los argumentos jurídico-políticos para sostener la validez y la conveniencia de: (1) proponer al país la introducción del Principio de la Multiculturalidad en nuestro ordenamiento constitucional; (2) promover los derechos humanos culturales y la diversidad cultural por medio de la construcción del Estado-Multicultural en Chile; (3) los aportes que la ética universal de mínimos ha estado haciendo en este tipo de materias; (4) nuestra teoría de la complementariedad entre los principios de libertad, igualdad, solidaridad y multiculturalidad; (5) la tesis que el Principio de la Multiculturalidad está en armonía con el derecho internacional, su potencial consagración en las fuentes formales y la trascendencia de los últimos debates en Naciones Unidas sobre los derechos de los pueblos indígenas; y (6) los procesos de etnogénesis vinculados con los discursos panindigenistas americanos.[62]

Por último, los chilenos tenemos la dicha de convivir y compartir en el seno de una sociedad plural, que no sólo es multicultural sino que, además, es multiétnica. El trasfondo y las implicancias a las que conduce tal afirmación son francamente inconmensurables, y en lo que respecta a los actores del sistema jurídico, resulta una pieza esencial en la comprensión conciente de la evolución normativa que hemos tenido en el pasado republicano, pues resulta inaceptable todo intento que anhele reprimir la siguiente autocrítica: nuestro derecho positivo no ha sido capaz a lo largo de los siglos XIX y XX de disminuir (y menos de evitar) las grandes exclusiones culturales ni los serios desequilibrios estructurales que acusan quienes se han sentido discriminados en este orden de materias, incluso a veces la soberbia del legislador ha llevado a actitudes de indiferencia frente a las aspiraciones de las minorías, lo que puede resultar mucho más doloroso de lo que se piensa en la construcción dialógica de las autoimágenes e identidades grupales. Qué duda cabe, por razones de diversa categoría, tales como el etnocentrismo y el patriotismo o nacionalismo pasional, los chilenos no hemos aprovechado en todo su esplendor y brillo la riqueza de los crisoles y mosaicos que aglutinan la comunidad de comunidades (o unión de uniones sociales) que habita el territorio chileno. Es más, persiste en un sector importante de la ciudadanía, sobre todo en las élites dominantes, una deuda jurídica pendiente con los

62. RODOLFO STAVENHAGEN, DERECHO INDÍGENA Y DERECHOS HUMANOS EN AMÉRICA LATINA (Mexico) (1988).

pueblos originarios que luchan por: (a) ser reconocidos social y constitucionalmente; (b) recuperar gran parte de sus tierras ancestrales; y (c) gozar mayores grados de autonomía política con la finalidad de reproducir sus culturas y resguardar sus tradiciones. A pesar que pestañeamos desvelados en un país multicultural, esa multiculturalidad persiste 'mutilada' en los planos jurídico y social. Como nuestro ordenamiento vigente no se encuentra preparado para procesar eficientemente la creciente e irreversible multiculturalidad social, es de la mayor conveniencia debatir propuestas encaminadas a asumir la compatibilidad entre el proyecto político unitario con los múltiples proyectos emanados de las diversas culturas. Una de esas propuestas prospectivas que, estamos convencidos, permitirá favorecer el reconocimiento (y la comprensión tolerante y recíproca) de las diversas culturas de la sociedad chilena es la que acá se ha dado a conocer bajo el nombre de Principio de la Multiculturalidad.