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Tel. 02 28 / 8 83 – 80 57, Fax 02 28 / 8 83 – 92 09
E-Mail: afs@fes.de

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Manuel Bastias Saavedra

Weltgesellschaft, Functional Differentiation, and the Legal System

Modernisation of Law in the Chilean Frontier (1790–1850)*

In an article written in the year 2000, Dieter Grimm reflected on where the law was to be found in Hans-Ulrich Wehler's *Gesellschaftsgeschichte*. Grimm stated that, at first sight, law does not seem to have any role but that, on closer examination, it actually appears in each of the constitutive dimensions of *Gesellschaft*. Grimm argues that though law is ubiquitous and therefore influences almost every aspect of social life, it should be understood within the dimension of *Herrschaft*, »weil Recht heute überwiegend politisch erzeugt wird, und der Politik als Herrschaftsinstrument dient«.[1] This, however, is a concession made by Grimm to Wehler's concept of *Gesellschaft*, because the law would constitute a »vergessene Grunddimension« and therefore is actually »unzureichend erfasst«.[2] The analytical problem of the law is not only a problem of Wehler's concept of *Gesellschaft* but constitutes a broader problem for social historians. Traditionally, social historians treat law as the codification of specific power relations[3] or as an instrument for asserting political or economic control.[4] This way of looking at the problem, however, reduces law to an outcome of political processes and, as Nijhuis has pointed out, neglects questions regarding »the autonomy of law as well as developments within law and jurisdiction«.[5] But perhaps a more important reason for this is that the ubiquity of law makes it difficult to define units of analysis: how can the social historian isolate legal phenomena in a meaningful manner without reducing it to an element of political or economic power?

This article suggests approaching the problem of law in a way that can be productive for social historical research by recourse to the idea of *Weltgesellschaft*. The concept is used here to provoke rethinking of the concept of society in a double sense. The first intention is to rethink the centrality of the concept of society in social history. I will argue

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1 *Dieter Grimm*, Die Bedeutung des Rechts in der Gesellschaftsgeschichte. Eine Anfrage, in: *Paul Nolte/Manfred Hettling/Frank-Michael Kuhlemann et al.* (eds.), Perspektiven der Gesellschaftsgeschichte, München 2000, pp. 52f.

2 Ibid., pp. 56 and 55.

3 *Ton Nijhuis*, Problems and Opportunities of the German *Gesellschaftsgeschichte*. Some Reflections on its Methodological Foundations and its Future Agenda, in: AfS 36, 1996, pp. 529–535, here: p. 535.

4 *Cf. Wolfgang J. Mommsen*, Introduction, in: *id./Jaap de Moor* (eds.), European Expansion and Law. The Encounter of European and Indigenous Law in 19th- and 20th-Century Africa and Asia, Oxford/New York 1992, pp. 1–14, here: p. 2. See also *Jörg Fisch*, Law as a Means and as an End. Some Remarks on the Function of European and Non-European Law in the Process of European Expansion, in: *Mommsen/Moor*, European Expansion and Law, pp. 15–38.

5 *Nijhuis*, Problems and Opportunities of the German *Gesellschaftsgeschichte*, p. 535.

that ever since Wehler originally formulated his three-dimensional concept of *Herrschaft*, *Wirtschaft*, and *Kultur*, the notion of society has fallen out of favour in historical debates and has not been critically reassessed.[6] Second, Niklas Luhmann's concept of *Weltgesellschaft* is also a way of rethinking modernisation: *Gesellschaft* is the overarching social system, the *Gesamtsystem*, which in modern society can only be described as a *Weltgesellschaft*. It is the hypothesis of the existence of one – and only one – global system of society. Luhmann's characterisation of modernity as the fragmentation of society into diverse autonomous communicative systems allows thinking of modernisation not as the improvement of social structures but as the substitution of forms of differentiation. Modern society is thus characterised by multiple processes of differentiation of functional systems, where each system handles a task which is relevant for the whole of society in a monopolising manner. In this framework, law acquires a specific analytical role as a system among others. *Weltgesellschaft* is a consequence of functional differentiation because the operations of functional systems can no longer be bound to a specific territory or social group.

Following this characterisation of modern society, this article seeks to exemplify how modern forms can appear in unexpected places, and in a rather understated manner, by looking into property transfers in the Chilean frontier between 1790 and 1850. The space historically known as the Chilean frontier was one of very few places in the Americas where resistance against Spanish invasion and colonisation succeeded.[7] The military feats of the disparate groups of Che[8] that inhabited the regions to the south of the Kingdom of Chile created a zone of independent indigenous territories, which were ratified in the Quilín treaty of 1641. Chilean social-historical research has divided this zone into three distinct »frontiers«: a cattle herding frontier, a military frontier, and an Andean frontier, characterised as areas which sheltered extensive internal migration due to the freedoms provided by less State control and less repressive labour regimes.[9] In a recent article, María Angélica Illanes proposed the existence of a »fourth frontier«, characterised by a process of colonisation through private property. The colonial enclave of Valdivia, located in the »country of Indians«[10] and bound by the sea with the territories of the Spanish crown, produced a distinct kind of encounter between the Spanish and the local Huilliche population, based on the recognition of original indigenous »property« with a discrete and piecemeal process of occupation through the purchase of indigenous land.[11] Looking for manifestations of mod-

6 There has been some recent interest in the historical use of the concept of *Weltgesellschaft* according to two conferences held in October and November 2016: the conference »Dimensionen und Perspektiven einer Weltgesellschaft?« held by the »Institut für Geschichte« of the University of Hildesheim and the symposium »Sociology and History of World Society: Interdisciplinary Perspectives on Globalization« at the »Forum Internationale Wissenschaft« at the University of Bonn.

7 *James Lockhart/Stuart Schwartz*, Early Latin America. A History of Colonial Spanish America and Brazil, Cambridge/New York etc. 1999 (first published in 1983), pp. 287ff.

8 »Che« is the self-identification of the people that inhabited southern Chile until the 19th century, they are the fore-bearers of today's Mapuche. The specific group studied in this paper is known as Huilliche or Williche, which translates from the native language Mapudungun as »people of the south«. *Mónika Contreras Saiz*, En nombre de la seguridad. Procesos de segurización en el Gulumapu y la Frontera de Chile. 1760–1885, Stuttgart 2016, pp. 44f.; *Guillaume Boccara*, Etnogénesis mapuche. Resistencia y restructuración entre los indígenas del centro-sur de Chile (siglos XVI–XVIII), in: The Hispanic American Historical Review 79, 1999, pp. 425–461, here: pp. 426f.

9 *Mario Góngora*, Vagabundaje y sociedad fronteriza en Chile (siglos XVII a XIX), in: Cuadernos del Centro de Estudios Socioeconómicos 3, 1966, no. 2, pp. 1–41; *Sergio Villalobos*, Vida fronteriza en la Araucanía. El mito de la Guerra de Arauco, Santiago 1995.

10 *Juan Ignacio Molina*, Compendio de la historia geográfica, natural y civil del Reyno de Chile, vol. 1, Madrid 1788, p. 9.

11 *María Angélica Illanes*, La cuarta frontera. El caso del territorio valdiviano (Chile, XVII–XIX), in: Atenea, 2014, no. 509, pp. 227–243.

ern society in this fourth frontier is highly counter-intuitive, especially if one takes into account characterisations of this territory in the 1840s as being »almost one hundred years in the past« compared to the Chilean regions in the north.[12] These ideas, however, can be contrasted with the profound changes in the representations of ownership, which occurred in the Valdivia territory by way of property formation and private law.

In the following, (I) I will discuss how, except for the German program of *Gesellschaftsgeschichte*, social history has often undertheorised the concept of society. While the problems of providing a strict definition have become evident in the critique against *Gesellschaftsgeschichte* in recent decades, the program of a history of society is only meaningful if social historians confront the complexity of the notion of society itself. In this sense, I suggest that recourse to Luhmann's concept of *Gesellschaft* and his characterisation of modern society as a *Weltgesellschaft* may allow the resumption of a history of society after the critiques of postmodernism, postcolonialism, and methodological nationalism. In this sense, (II) this article proposes a case study for analysing the modernisation of law from a systems-theoretical perspective. Looking into the different regimes which structured transfers of indigenous land between 1790 and 1850, I will argue that the de-localisation of the law and the reliance on legal instruments after 1830 were a reflection of the broader process of functional differentiation of the legal system. The modernisation of law was highly disruptive to local forms of life in the Valdivia territory, which by the 1850s could be seen in the shifts in land ownership – from indigenous to white populations – and in the consequent ecological transformations in the region's landscape, in which the vast and »impenetrable« forests were slowly but steadily replaced by rural estates.

I. The Problem of Society: from *Gesellschaft* to *Weltgesellschaft*

Since the 1930s, most social historians have taken Lucien Febvre's cue and treated the question of the »social« in social history as an open-ended issue.[13] This made sense because it allowed the inclusion of many themes that had been neglected by 19th-century historians without imposing an a priori exclusion of others. By the 1970s, social history was increasingly understood as the history of society. Albert Soboul, for example, stated that »[s]ocial history appears linked to the study of society and the groups that compose it«.[14] Eric J. Hobsbawm suggested that social history was moving towards a history of society[15], while Chilean social historian Sergio Grez Toso also argued that »in the end what we try to write is a history of society in its totality«.[16] In this shift towards a history of society, however, the actual meaning of *society* remained obscure. In his essay, Hobsbawn abstained from providing a definition, aware of the difficulties such a task implies: »How do we de-

12 *Cesar Maas*, Viaje a través de las provincias australes de la República de Chile, desde enero hasta junio de 1847, Santiago 1950 (first published in 1847), p. 35.

13 »When Marc Bloch and I chose those two traditional words [›économique et sociale‹] for the cover of the *Annales*, we knew perfectly well that ›social‹, in particular, was one of those adjectives that has had so many meanings over the course of time that, in the end, it did not mean anything. But we chose it precisely for that reason.« *Lucien Febvre*, Combates por la Historia, Madrid 1993 (first published in French 1953), p. 39. All translations by the author.

14 *Albert Soboul*, Description et mesure en histoire sociale, in: *id.*, L'histoire sociale. Sources et méthodes, Paris 1967, pp. 9–33, here: p. 11.

15 *Eric J. Hobsbawm*, From Social History to the History of Society, in: Daedalus 100, 1971, no. 1, pp. 20–45.

16 *Sergio Grez Toso*, Debates en torno a la historia social, una aproximación desde los historiadores, Primera Jornada de Historia Social, Santiago 2004, URL: <http://repositorio.uchile.cl/handle/2250/122852> [13.9.2016].

fine these units [societies]? It is far from easy to say, though most of us solve – or evade – the problem by choosing some outside criterion: territorial, ethnic, political, or the like. But this is not always satisfactory.«[17] Yet the problem of defining society was not restricted to historians, as noted by Robert Deilège in 2001: »While the concept of society is to be found in most sociological writings, it remains ambiguous and relatively ill-defined. Like most of the scientific concepts that are also used in common speech, that of society seems to need no introduction and to reflect reality in a rather straightforward, transparent way.«[18]

Arguably the most systematic attempt to move social history towards a history of society was the Bielefeld School's program of *Gesellschaftsgeschichte*. Having identified that social history had positioned itself as an area of historical research in its own right, *Gesellschaftsgeschichte* was an attempt to provide an »übergreifende, ›gesamtgeschichtliche[]‹ Interpretation« required to synthesise the results produced by social history and other historical subdisciplines, as well as assess the interactions between, and the relative importance of, different dimensions in a historical process.[19] The manner in which German historians understood social history – as a subdiscipline within a broader historical discipline – was important in framing the necessity of constructing a precise theory for the history of society. Unlike other approaches to the history of society, German historians needed to construct a more encompassing idea that could make social history equivalent to total history.[20] This was the function of the concept of *Gesellschaft*, understood as the *Gesamtsystem* composed by every *Teilsystem*, as a way of making *Gesellschaftsgeschichte* the historical discipline which encompassed every other historical subdiscipline. The history of society was thus an attempt to reconcile social, political, and, later, cultural history under a common, overarching research paradigm.[21]

To this end, Hans-Ulrich Wehler defined society as *Gesellschaftsgeschichte*'s specific object of study and divided it into three dimensions: *Herrschaft*, *Wirtschaft*, and *Kultur*. These dimensions, and the interactions between them, were considered to have exhausted the basic processes that determined »die historische Entwicklung eines gewöhnlich innerhalb staatlich-politischer Grenzen liegenden Großsystems«.[22] While the idea of *Gesellschaft* as a synonym for *Gesamtsystem* was taken from the Marxist tradition[23], Wehler emphasised the »Gleichrangigkeit und Gleichberechtigung« of the economic, political, and cultural dimensions, which was taken from his particular reading of Max Weber.[24] According to

17 *Hobsbawm*, From Social History to the History of Society, p. 30.

18 *Robert Deliège*, Societies, Types of, in: *Neil Smelser/Paul B. Bates* (eds.), International Encyclopedia of the Social & Behavioral Sciences, vol. 21, Amsterdam 2001, p. 14530.

19 *Jürgen Kocka*, Sozialgeschichte – Strukturgeschichte – Gesellschaftsgeschichte, in: AfS 15, 1975, pp. 1–42, here: p. 34.

20 »Die Zielvorstellung einer solchen […] Gesellschaftsgeschichte gleicht dann in der Tat dem, was die französische Geschichtswissenschaft seit einiger Zeit ›Totalgeschichte‹ nennt«, *Hans-Ulrich Wehler*, Deutsche Gesellschaftsgeschichte, vol. 1: Vom Feudalismus des alten Reiches bis zur defensiven Modernisierung der Reformära. 1700–1815, München 2008, p. 7. Also Kocka: »Gesucht wird also eine […] sozialgeschichtlich orientierte Interpretation der allgemeinen Geschichte, die häufig auch als ›Sozialgeschichte‹ bezeichnet wird, für die hier aber der Begriff der ›Gesellschaftsgeschichte‹ vorgeschlagen wird.« *Kocka*, Sozialgeschichte – Strukturgeschichte – Gesellschaftsgeschichte, p. 36.

21 Ibid., pp. 41f.; *Wehler*, Deutsche Gesellschaftsgeschichte, p. 21.

22 Ibid., p. 6.

23 *Kocka*, Sozialgeschichte – Strukturgeschichte – Gesellschaftsgeschichte, p. 35.

24 It may be worth noting that Weber avoided using the concept of society altogether, preferring instead the idea of *Vergesellschaftung* as a way to highlight the dynamic and functional character of social action. *Klaus Lichtblau*, Von der »Gesellschaft« zur »Vergesellschaftung«. Zur deutschen Tradition des Gesellschaftsbegriffs, in: Zeitschrift für Soziologie 33, 2005, Sonderheft »Weltgesellschaft«, pp. 68–88, here: p. 80. It is also important to note that *Gesellschaftsgeschichte*

Wehler, this three-dimensional structure was more empirically adequate than the Marxist-Hegelian deterministic emphasis on the economy, since the aprioristic assumption that the economy determines all other spheres was not adequate for historical research. On the contrary, the three-dimensional characterisation of society avoided starting with preconceptions from the point of departure, which did not mean, however, that eventually a historian could fixate on culture, politics, or the economy as the determinant of societal development, but this could only come about as a result of historical research.[25] Wehler also included »the system of social inequality« as a fourth, transversal, dimension to act as a selection and organisation criterion for the historian.[26]

The limitations of *Gesellschaftsgeschichte* so defined were extensively discussed in the decades that followed its first formulation. Following this discussion, drawing from post-modern and postcolonial theories, and taking into account diverse methodological and analytical inspirations, the critique of *Gesellschaftsgeschichte* focused on the fact that, despite its intentions of providing a comprehensive paradigm for understanding historical reality, its practise and area of research had become too narrow. On the one hand, it was too narrow in analytical scope. In the 1980s, the criticism by German historians of everyday life centred on the exclusion of experiential and meaningful dimensions of historical actors. This critique was followed by the inclusion of gender as a central dimension of social inequality, which led to a broader critique of the manner in which the history of society handled culture more generally.[27] Cultural historians criticised the fact that by reducing the agency of collective actors to instrumental or strategic actions, the subjective, meaningful experiences were reduced to objective interests. And since actions that conformed to the system were treated as normal cases that did not need explanation, cultural meaning systems did not have an autonomous and systematic place in history of society. Chris Lorenz observed that Wehler's addition of *Kultur* alongside politics and the economy as a third dimension of society could not solve the theoretical problem of the opposition of structure and culture since this solution involved understanding culture as a separate sphere and not as a subjective dimension present in every social action.[28]

On the other hand, the concept of society was too narrow in its spatial representation: *Gesellschaft* meant the whole »nation« and was thus bound to the borders of the nation-state. On a global scale, this implied the co-existence of many societies that could be compared with each other according to their paths of modernisation. The German *Sonderweg* thesis was perhaps the most salient expression of the influence these premises carried. The problems of this approach, however, have been extensively noted by the critique of modernisation theory and methodological nationalism. The emphasis on modernisation implied not only a theoretical but also a normative standpoint through which western modernisation could be represented as the model or standard on which historical comparison could be grounded.[29]

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did not allow an unproblematic conciliation with Weber's Handlungstheorie. *Chris Lorenz*, Wozu noch Theorie der Geschichte? Über das ambivalente Verhältnis zwischen Gesellschaftsgeschichte und Modernisierungstheorie, in: *Volker Depkat/Matthias Müller/Andreas Urs Sommer* (eds.), Wozu Geschichte(n)? Geschichtswissenschaft und Geschichtsphilosophie im Widerstreit, Stuttgart 2004, p. 134.

25 *Wehler*, Deutsche Gesellschaftsgeschichte, p. 8.

26 Ibid., p. 9.

27 *Jürgen Kocka*, Historische Sozialwissenschaft heute, in *Nolte/Hettling/Kuhlemann* et al., Perspektiven der Gesellschaftsgeschichte, pp. 5–24.

28 *Lorenz*, Wozu noch Theorie der Geschichte?, pp. 136ff.

29 Ibid., pp. 127f.; *Thomas Welskopp*, Westbindung auf dem »Sonderweg«. Die deutsche Sozialgeschichte vom Appendix der Wirtschaftsgeschichte zur historischen Sozialwissenschaft, in: *Wolfgang Küttler/Jörn Rüsen/Ernst Schulin* (eds.), Geschichtsdiskurs, vol. 5: Globale Konflikte, Erinnerungsarbeit und Neuorientierungen seit 1945, Frankfurt am Main 1999, pp. 210f.

Ideal types were thus constructed as a means for assessing correspondence or divergence from development paths considered to be »normal«. Additionally, *Gesellschaftsgeschichte* was criticised for becoming simply another way of writing German national history.[30] The calls for a transnational perspective[31] and the broader critique of methodological nationalism of more recent global historical approaches[32] have moved *Gesellschaftsgeschichte* to reassess the importance of the »globalen Zusammenhänge«.[33]

As the tradition of *Gesellschaftsgeschichte* reacted to these debates with the selective »Erweiterung« of its themes and its geographic scope[34], what happened regarding the concept of society? The problems of its theoretical construction became evident with the extension of its spatial scope: could other societies be understood in the same sense as German society? Could the concept expand beyond Germany or Europe?[35] While Wehler seemed to exclude this possibility altogether, Jürgen Osterhammel struggled to reconcile the idea of *Gesellschaft* and a global historical perspective when laying the ground for a »transnationale Gesellschaftsgeschichte«. Osterhammel proposed distinguishing between two forms of writing the history of society, the first kind (type I) was the Bielefeld School's synthesis-oriented, »gesamtgesellschaftliche« kind of national history writing, and the second form, a *Gesellschaftsgeschichte* type II, understood as a »Geschichte des Sozialen in seinen weltweit realisierten Erscheinungsformen unter Einschluss transnationaler Wirkungen und Wechselwirkungen«.[36] However, despite this openness towards global interdependencies, Osterhammel's *Gesellschaftsgeschichte* in the latter sense continued to ascribe to a nationally restricted concept of society when he argued that the »Nationalgesellschaft« was still, »gerade auch außerhalb Europas, der umfassendste lebensweltliche Bezugsrahmen der meisten Menschen«.[37] In this sense, though advocating the expansion of the study of history towards a global perspective, Osterhammel denied the possibility of conceiving a »Weltgesellschaft« as a »soziologischen Tatbestand«. Therefore a »transnationale Gesellschaftsgeschichte« »muß sich […] vom Konzept der ›Gesamtgesellschaft‹ lösen«.[38]

Society as Weltgesellschaft

While the critique of *Gesellschaftsgeschichte* was justified, the abandonment of the concept of society has led to an evident fragmentation of social historical research.[39] The prob-

30 *Nijhuis*, Problems and Opportunities of the German *Gesellschaftsgeschichte*, p. 533; *Lutz Raphael*, Nationalzentrierte Sozialgeschichte in programmatischer Absicht. Die Zeitschrift »Geschichte und Gesellschaft. Zeitschrift für Historische Sozialwissenschaft« in den ersten 25 Jahren ihres Bestehens, in: GG 26, 2000, pp. 5–37.

31 *Jürgen Osterhammel*, Transnationale Gesellschaftsgeschichte: Erweiterung oder Alternative?, in: GG 27, 2001, pp. 464–479; *Albert Wirz*, Für eine transnationale Gesellschaftsgeschichte, in: GG 27, 2001, pp. 489–498.

32 *Sebastian Conrad/Andreas Eckert*, Globalgeschichte, Globalisierung, multiple Modernen: Zur Geschichtsschreibung der modernen Welt, in: *id./Ulrike Freitag* (eds.), Globalgeschichte. Theorien, Ansätze, Themen, Frankfurt am Main/New York 2007, pp. 7–47.

33 *Kocka*, Historische Sozialwissenschaft heute, p. 21.

34 *Osterhammel*, Transnationale Gesellschaftsgeschichte.

35 This question was also raised in *id.*, Gesellschaftsgeschichtliche Parameter chinesischer Modernität, in: GG 28, 2002, pp. 71–108; and *Ulrike Freitag*, Gibt es eine arabische Gesellschaftsgeschichte?, in: GG 32, 2006, Sonderheft 22, pp. 161–177.

36 *Jürgen Osterhammel*, Gesellschaftsgeschichte und Historische Soziologie, in: GG 32, 2006, Sonderheft 22, pp. 81–102, here: p. 83.

37 *Id.*, Transnationale Gesellschaftsgeschichte, p. 475.

38 Ibid.

39 *Jürgen Kocka*, Losses, Gains and Opportunities: Social History Today, in: Journal of Social History 37, 2003, Sonderheft, pp. 21–28.

lem of selection and organisation of potentially infinite information existent in historical reality, which the Bielefeld historians recognised as the main issue in constructing their theoretical program, was a question about how the complexity of the social world could be described in a meaningful and interrelated manner.[40] In a sense, this was the main question that Luhmann identified when proposing his social theory: if there are no unitary and encompassing ways of describing social reality in modern society, then how is social order (still) possible?[41] Therefore, he constructed his theory as one for observing the complexity of the social world, while at the same time excluding the possibility of providing a unifying and definitive description of society.[42]

Luhmann's theory is consequently highly complex and abstract, one of the reasons for its slow reception among historians and in the social sciences more generally.[43] The Bielefeld historians did not warm to the abstruse language of Luhmann's theory, and more recently Osterhammel referred to »Die Gesellschaft der Gesellschaft« to highlight the unsatisfactory character of nation-bound concepts of society but stopped short of endorsing the idea of a *Weltgesellschaft*. Even some good commentators of Luhmann's work have correctly observed that strict adherence to basic systems-theoretical concepts would reduce the theory of society to a pure analytical category precluding the possibility of historical discussion.[44] If theories always pose difficulties for historians, Luhmann's conceptual constructions create a high entry barrier for more empirically oriented analysis; not least because his theory does not study individuals or even groups of individuals but communicative (i.e. social) *systems*. Despite these reservations, there are some good reasons to suggest familiarising oneself with the language of systems theory may be worth the effort. Stated briefly, it includes the »umfassende« and social-scientific orientation of early *Gesellschaftsgeschichte*; the constructivist, discursive, and meaning-oriented elements of the post-modern and culturalist critique[45]; and it presupposes an openness to global perspectives demanded by contemporary historical research.

The concept of society plays a central role in Luhmann's social theory and therefore has been defined in a very precise manner. Luhmann analyses the path of generalisation followed by Aristotle in which many communities *(koinoniai)* were encompassed in the overarching concept of *koinonía politiké*. One among many of these communities, the *koinonía politiké*, is, at the same time, the community which represents the whole. Stichweh recognises this paradoxical formulation as the starting point of Luhmanns idea of society: »Gesellschaft ist eine unter vielen Gemeinschaften, aber sie ist zugleich die Gemeinschaft, die alle anderen Gemeinschaften in sich schließt.«[46] However, since Luhmann's theory is a theory of social systems, it is more accurate to define society as the social system that encompasses every other social system. Through its own operations, a system draws its own

40 *Kocka*, Sozialgeschichte – Strukturgeschichte – Gesellschaftsgeschichte, p. 37. Also more recently *id*., Historische Sozialwissenschaft heute, p. 21.

41 *João Paulo Bachur*, Kapitalismus und funktionale Differenzierung. Eine kritische Rekonstruktion, Baden-Baden 2013, pp. 13f.

42 *Niklas Luhmann*, Die Gesellschaft der Gesellschaft, Frankfurt am Main 1998, p. 64.

43 *Benjamin Ziemann*, The Theory of Functional Differentiation and the History of Modern Society. Reflections on the Reception of Systems Theory in Recent Historiography, in: Soziale Systeme 13, 2007, pp. 220–229.

44 *Bachur*, Kapitalismus und funktionale Differenzierung, p. 92.

45 *Petra Gehring*, Entflochtene Moderne. Zur Begriffsgeschichte Luhmanns, in: *Ute Schneider/Lutz Raphael* (eds.), Dimensionen der Moderne. Festschrift für Christof Dipper, Frankfurt am Main/Berlin etc. 2008, pp. 31–41.

46 *Rudolf Stichweh*, Zum Gesellschaftsbegriff der Systemtheorie: Parsons und Luhmann und die Hypothese der Weltgesellschaft, in: Zeitschrift für Soziologie 33, 2005, Sonderheft »Weltgesellschaft«, pp. 174–185, here: p. 180.

boundaries, which differentiates it from its environment and allows it to increase and organise its own complexity. In this regard, social systems are a special kind of self-referential system defined by a specific boundary-drawing operation: communication.[47] Insofar, as they communicate, all social systems (e.g. families, cities, and the economic system) are the same.[48] What distinguishes social systems from each other is *how* they historically reproduce the system/environment difference, thus constituting their own identity, and *how* they organise their internal structures *(autopoiesis)*. Each system presupposes, and *autopoiesis* could not occur without an environment. From the perspective of the system, which draws distinctions, the environment is constituted by the lack of specification. It is for this reason that systems are always less complex than their environment: system autonomy entails the reduction of complexity. The environment of social systems, however, is also composed by other social systems, which means that social systems can alternate between internal and external communications. Society, as the overarching social system, is particular in the sense that it includes all possible meaningful communication and makes communication between other social systems possible. However, no meaningful communication is possible outside of society; there is no social system in the environment of society.[49]

This definition of society would seem to preclude the co-existence of multiple societies. This is, however, an empirical and not a theoretical issue. Luhmann's concept of society highlights the communicative closure of the system, which would seem to resume the Aristotelic idea of autarchy in an operative sense.[50] Thus, the concept of society allows the empirical co-existence of various societies which structure their internal differentiation and generate meaning for their interdependent social systems but »ohne kommunikative Verbindung dieser Gesellschaften, oder so, daß, von den Einzelgesellschaften aus gesehen, eine Kommunikation mit den anderen unmöglich ist, oder ohne Konsequenzen bleibt«.[51] Luhmann speaks, in this sense, of historical societies, in which trade relations, technological diffusion, and reports of other societies had little reciprocal communicative effect. Societies, as systems, however, have the potential to extend their operative boundaries. Since no system can realise operations (communications) outside of the boundaries of the system, whenever a system includes new operations, the boundaries of the system have to expand accordingly.[52] Thus the distinction drawn between society and its environment »has no *fundamentum in re* but varies its meaning according to changing historical circumstances«.[53] This was the case of empires, which attempted to control expansive territories, and more recently the case of the modern *Weltgesellschaft*. As such, *Weltgesellschaft* is the hypothesis of the existence of one global system of society, which includes all previous societal systems. In this sense, contemporary *Weltgesellschaft* constitutes a historical singularity.[54]

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47 *Niklas Luhmann*, The World Society as a Social System, in: International Journal of General Systems 8, 1982, pp. 131–138, here: p. 131.

48 *Luhmann*, Die Gesellschaft der Gesellschaft, p. 90.

49 »Gesellschaft ist daher ein vollständiges und ausschließlich durch sich selbst bestimmtes System«, ibid., p. 95.

50 *Stichweh*, Zum Gesellschaftsbegriff der Systemtheorie, p. 182.

51 *Luhmann*, Die Gesellschaft der Gesellschaft, p. 145.

52 *Id*., Das Erkenntnisprogramm des Konstruktivismus und die unbekannt bleibende Realität, in: *id*., Soziologische Aufklärung, vol. 5: Konstruktivistische Perspektiven, Wiesbaden 1990, p. 38.

53 *Id*., Globalization or World Society: How to Conceive of Modern Society?, in: International Review of Sociology 7, 1997, pp. 67–79, here: p. 72.

54 *Rudolf Stichweh*, Interkulturelle Kommunikation in der Weltgesellschaft. Zur politischen Soziologie der Integration und Assimilation, in: *id*., Der Fremde. Studien zur Soziologie und Sozialgeschichte, Berlin 2010, pp. 195–205.

The idea of *Weltgesellschaft* is Luhmann's response to theories that restrict the concept of society to territorial references (e.g. nation-states) and to those that reduce the global system to a particular subsystem (e.g. the economy). Since the historical emergence of modern *Weltgesellschaft* is »the unavoidable consequence of functional differentiation«[55], neither of these representations is satisfactory. Societies cannot be defined by their identification to particular social systems but are rather defined by their primary form of internal differentiation.[56] The form of differentiation determines the unity of society and, at the same time, limits the autonomy of the respective partial systems. Throughout history, there have only been a limited number of primary forms of internal differentiation: segmentary differentiation, in which society is structured mainly through partial systems that stand in horizontal relation to each other (families, lineages, villages); centre/periphery differentiation, which results from the development of a centre that determines new forms of division of labour (cities, empires); stratified differentiation, which designates a society primarily structured in a hierarchical social order (aristocracy, nobility, bureaucracies); and a society structured around the primacy of functional differentiation (economy, law, politics, art, and so on).[57] Characterised by the primacy of functional differentiation, modern society is thus not determined by progress or specific social descriptions but by a replacement of the primary forms of societal integration. This does not mean that other forms of differentiation cease to exist but rather that modern *Weltgesellschaft* is defined by the *primacy* of functional differentiation[58], by which each functional system determines, for itself, which issues it considers relevant, under what rules it communicates, and what roles it provides persons (consumer, citizen, plaintiff, patient, student, and so on) under these conditions.[59]

Functional Differentiation and the Legal System

Functional differentiation means that partial systems acquire their identity through specific functions they fulfil for the *Gesamtsystem*; they act unilaterally and in a monopolistic sense, conditioning possibilities in such a manner that the horizons of possibility of each partial system are highly expansive but also become highly incompatible to each other. The hypothesis of the primacy of functional differentiation implies at least three complementary ideas: (i) functional specialisation leads to a functionally differentiated society in which there is no hierarchical ordering of social systems; (ii) all social functions are equally important insofar as they cannot be replaced by any other; and, finally (iii) the primacy of functional differentiation means that there is no partial system that can represent the whole of society.[60] The hypothesis of the primacy of functional differentiation thus resembles Wehler's appeal to the *Gleichrangigkeit* of societal dimensions, but here the theoretical consequences come to their logical conclusion: no subsystem has privileged access to the observation of society in its entirety, and this holds true for social evolution as well as for historical reconstruction. The fracture in observation produced by functional differentiation means that the reconstruction of causal relations can no longer be assumed to arise from an objective point of view: »They differ, depending upon observing systems, that attribute effects to causes and causes to effects, and this destroys the ontological and

55 *Luhmann*, The World Society as a Social System, p. 132.
56 *Id.*, Globalization or World Society, p. 70.
57 *Id.*, Die Gesellschaft der Gesellschaft, esp. chap. 4.
58 *Id.*, Die Weltgesellschaft, in: Archiv für Rechts- und Sozialphilosophie 57, 1971, pp. 1–35, here: p. 27.
59 *Id.*, Die Gesellschaft der Gesellschaft, pp. 738f.
60 *Bachur*, Kapitalismus und funktionale Differenzierung, p. 90.

logical assumptions of central guidance.«[61] Understood in this manner, the concept of *Weltgesellschaft* forces the social historian to assume a constructivist perspective. If systems theory is not occupied with objects that exist in an independent reality but with distinctions – i.e. how systems make distinctions –, then it must be held that no historical moment can be described in a unitary manner.

Thinking of law as a system highlights the fact that law provides society with a specialised form of observation which reconstructs reality according to its own specific, self-referential meanings. For our case, the most important difference is the basic distinction made by the legal system between norms and facts, which allows it to distinguish between self-reference and external reference. This basic distinction allows the legal system to sustain its function of reproducing normative expectations in spite of factual disappointments. For this, the legal system operates using a rule of attribution and connection, the system's binary code: legal/illegal. »If the question arises whether something is legal or illegal, the communication belongs to the legal system, and if not then not.«[62] The code allows the autopoietic closure of the legal system and structures its identity, but the code itself is not a norm. While the code structures the operative closure of the system, legal norms are the way in which the legal system takes information from its environment to make possible the application of the code legal/illegal. Legal norms are thus internally generated rules that allow the system to assign positive or negative value for the internal processes of the system. Understanding law as a system means thinking of law as becoming an open-ended concern structurally occupied with assigning legality/illegality.

The differentiation of the legal system entails a strict adherence to the binary code and requires that decisions be increasingly made deductively from legal norms. Before operating as a differentiated system, one could say that the law functioned as a program without a code.[63] Part of a broader »jurisdictional culture«[64], this codeless program was based on the doctrinal corpus of the *ius commune* which »was not a common core of universal norms, but rather the rational and elegant disposition of the seemingly disparate diversity of legal norms«.[65] As such, laws and norms could not be »applied« but rather served as normative sources that the judge had to consider for providing just decisions based on the consideration of the particularities and the facts of each case. As such, the local context determined

61 *Luhmann*, Globalization or World Society, p. 75. Bachur provides a neat example of how this should be thought: »Freilich ist die Kontingenz des Beobachters historisch und institutionell saturiert bzw. stabilisiert: Es ist nicht im Voraus zu entscheiden, ob eine Finanzkrise z.B. wesentlich zum Wirtschafts- oder zum politischen System gehört; das Vorhandensein der Krise besteht nur aus einer Sukzession von flüchtigen und ephemeren kommunikativen Ereignissen, die in ihrer Überkomplexität nicht fassbar sind. Sie kann deshalb von der Wirtschaft, von der Politik, von den Familien, vom Rechtssystem, vom Erziehungssystem usw. unterschiedlich beobachtet werden, ohne dass eine vereinheitlichende Beobachtungsinstanz vorausgesetzt werden muss. Die im klassischen Sinne des Marxismus verstandene Totalität findet keinen Platz mehr in der Systemtheorie, denn Totalität ist immer und paradoxerweise eine ›partielle Totalität‹, d.h. die konstruierte Totalität eines beobachtenden Systems.« *Bachur*, Kapitalismus und funktionale Differenzierung, pp. 36f.

62 *Niklas Luhmann*, Operational Closure and Structural Coupling: The Differentiation of the Legal System, in: Cardozo Law Review 13, 1992, pp. 1419–1441, here: p. 1428.

63 I am indebted to Samuel Barbosa for this observation.

64 *Alejandro Agüero*, Las categorías básicas de la cultura jurisdiccional, in: *Marta Lorente Sariñena* (ed.), De justicia de jueces a justicia de leyes: hacia la España de 1870, Madrid 2007, pp. 19–58, p. 24f. Also *Paolo Grossi*, L'ordine giuridico medievale, Bari 2011 (first published in 1995).

65 *António Manuel Hespanha*, Uncommon Laws. Law in the Extreme Peripheries of an Early Modern Empire, in: Zeitschrift für Rechtsgeschichte. Germanistische Abteilung 130, 2013, pp. 180–204, p. 183.

which norms had to be applied to each case.[66] The application of the binary code required, therefore, a reversion in how law handled the relation between facts and norms. Luhmann understands the programmes of the legal system as *Konditionalprogramme*, i.e. as rules that allow the deductive use of facts (»if … then«). In this manner, the facts that are relevant to the legal system do not necessarily correspond to facts in other social systems. »In other words, knowledge has different ›credibility profiles‹ inside and outside the legal system. Legal facts are made to fit the legal framework; they have to facilitate the deductive use of legal norms.«[67] Therefore a differentiated legal system requires »große Entscheidungsmengen vorzuentscheiden unter selektiver Vernachlässigung fast aller Details«.[68] The transformation of indigenous land into private property is precisely a way to observe how these shifts in meaning occurred. In the following, I will concentrate on how indigenous land sales that took place between 1790 and 1850 were handled by the legal system and argue that the passage from tradition to consent as ways of transferring ownership rights of indigenous land was a reflection of the broader process of functional differentiation of the legal system.

II. Of Tradition and Consent: The Legal System in the Valdivia Territory

Since indigenous ownership of land was recognised by the colonial and, as of 1820, the Chilean government, land sales became a central institution in accessing indigenous land and, therefore, in the historical structuring of this territory. In the following, I will argue that the territory of Valdivia underwent a distinct form of modernisation concomitant to increasingly abstract representations of ownership related to the importance of legal definitions in the structuring of land transfers. In other words, the intent is to show how the definition of land ownership was monopolised by legal observations, particularly through the introduction of specialised instruments in handling the conveyance of indigenous property. Based on an analysis of notary archives of the Province of Valdivia between 1790 and 1850, the following discussion is an explicit attempt to reconstruct the first-order observations that are being used to structure the transfer of indigenous property, i.e. I focus on the conditions that make the transfer of land ownership legal. The analysis reveals two periods with marked contrasts in how sales of indigenous land were handled, which differ mainly in how the distinction indigenous/non-indigenous was applied to the procedures necessary to transfer ownership.

Transfer of Land Ownership, 1790–1829

Between 1790 and 1829, conveyance of land ownership differed according to whether it involved indigenous or Spanish/Chilean sellers. In both cases, according to the *Siete Partidas*, the main source of private law in Spanish America, the sale was not possible simply through contracts of purchase but involved the legal act of tradition, which meant that legal ownership was only transferred once the object of the sale had been handed over from seller to buyer.[69] In land sales involving Spanish/Chilean sellers, this act of transfer

66 *Víctor Tau Anzoátegui*, Casuismo y sistema: Indagación histórica sobre el espíritu del Derecho Indiano, Buenos Aires 1992.

67 *Niklas Luhmann*, Operational Closure and Structural Coupling, p. 1430.

68 *Niklas Luhmann*, Ausdifferenzierung des Rechts. Beiträge zur Rechtssoziologie und Rechtstheorie, Frankfurt am Main 1999, p. 46.

69 *José María Álvarez*, Instituciones del Derecho Real de Castilla y de Indias, New Mexico 1842 (first published in 1818), pp. 49f.

was symbolic and done through the creation or transfer of a deed of ownership before the public scribe.[70] Land sales involving indigenous sellers, probably related to the lack of written deeds within the territory, sustained the medieval act of physical possession that signalled tradition. Transfers of ownership of indigenous land consequently occurred on the tracts and paddocks subject to sale; they intertwined *written* legal documents with *physical* legal acts. This is relevant since, as we will see, not only were transfers of indigenous land conditioned by political considerations, but many important prerequisites for the legal transfer of ownership could only be ascertained by recurring to shared local knowledge.

The process of buying and selling indigenous land occurred in six different steps: (i) First, buyer and seller agreed on the tract of land and the price to be paid, and the payments were settled in one or more instalments. (ii) Once this had been agreed upon, the buyer had to submit a written supplication to the Governor asking him to send the *Comisario de Naciones*[71] or some other agent with the power to »verify the purchase«[72] and give the lands »in possession«.[73] (iii) The Governor then issued a decree instructing the agent to assess the propriety of the transaction and, if that was the case, give possession to the buyer. (iv) The agent would travel to the designated location to meet buyer and seller, summon local *caciques*[74], neighbours, and witnesses (often local *Capitanes de Amigos*) and proceed to execute the verification of the land sale. (v) Following a last act of physical possession, conveyance was considered complete, and (vi) a written deed served as the legal instrument of ownership. As can be seen, the process of buying indigenous land involves numerous interactions and institutions beyond the strictly legal and economic.

The second and third steps of this process are the stage in which the political authority directly intervenes in the purchase of land. The governor's decrees, for example, on occasion introduce additional criteria beyond the strictly private legal conditions for the sale. In one case, in 1798, the sale is conditioned to »the precise obligation to make home [poblar casa] in the village«[75]; and in two cases the sale could only be authorised if »enough land

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70 *Abelardo Levaggi*, Historia del Derecho de las Obligaciones, Contratos y Cosas, Buenos Aires 1982, p. 92.

71 The system of indigenous land transfers in Valdivia during this period was structured around a group of colonial institutions particular to southern Chile, collectively known as the »oficiales de indios« (officers of Indians), created to negotiate the relations of the Chilean colonial government with the diverse Che nations. The first was the »Lengua General« (General Interpreter), an outgrowth of the diverse indigenous translators that accompanied the Spanish conquest of Chile. The second institution was that of the »Capitanes de Amigos« (Captains of Friends), Spaniards or mestizos who usually lived among the indigenous population and carried out diverse functions according to their place of habitation. Finally, the »Comisarios de Naciones«, created in the 17th century, were charged with sustaining relations with the caciques, maintaining the peace among Ches and avoiding abuses by Spanish soldiers. As the »Lengua General«, there was one »Comisario de Naciones« for the Kingdom of Chile and one for Valdivia. *Sergio Villalobos*, Tipos fronterizos en el Ejército de Arauco, in: *id./Carlos Aldunate/Horacio Zapater et al.* (eds.), Relaciones fronterizas en la Araucanía, Santiago 1982, pp. 175–221. Also: *Contreras Saiz*, En nombre de la seguridad, pp. 137–144; *María Ximena Urbina Carrasco*, La Frontera de arriba en Chile Colonial. Interacción hispano-indígena en el territorio entre Valdivia y Chiloé e imaginario de sus bordes geográficos, 1600–1800, Valparaíso 2009, pp. 207–212; *Jorge Iván Vergara*, La herencia colonial del Leviatán. El Estado y los mapuche-huilliches (1750–1881), Iquique 2005, pp. 89–107.

72 Land sale from cacique Calfuquir and others to Ventura Carvallo, 1791, Archivo Notarial de Valdivia (ANV), vol. 2, fol. 5ff.

73 Land sale from cacique Queipul to Antonio Solis, 1792, ANV, vol. 2, fol. 23ff.

74 »Cacique«, the Spanish word for »lonko«, translated literally as »head«, was the leader of each Che group. I use the Spanish word because it often appears in the quoted documents.

75 Land sale in Quelaco from Juan Queipul to Dionisio Delgado, 1826, ANV, vol. 2, fol. 126ff.

remains in possession of the sellers for their sustenance and of their families«.[76] These conditions were introduced to sustain the population of the territory: on the one hand, authorities wish to inhabit the region with Spanish families; on the other hand, they seek to retain converted Huilliches within the jurisdiction.[77] It was not uncommon that having sold their land, indigenous families would move *tierra adentro* (inland) to the territory of the independent, »faithless« Ches[78], and thus it seems plausible that these conditions sought to stem the emigration of Huilliches to the north or towards the Andes. The decrees, however, are primarily intended to ascertain that certain legal prerequisites have been fulfilled. In the documents, the agreement of the sale is only informed in the supplication submitted by the buyer, and therefore every step up until the production of the deed of purchase was intended to ascertain that the purchase, as described by the buyer, corresponds with what has actually taken place. The governor's decrees are thus filled with exhortations to »verify« *(verificar)*; »find out« *(averiguar)*; »have knowledge« *(tener conocimiento)*; be »well informed of the certainty« *(bien informado de la certidumbre)*; »have proof« *(constando)*; »with greatest precision« *(con la mayor exactitud)*. The responsibility for the »legality of the instrument«[79] and avoiding complaints was therefore placed on the agent instructed with verifying the purchase, which was often – though not always – the *Comisario de Naciones*.

The most important part of the transfer of ownership, the acts of verification and possession, were highly localised affairs, taking place on the farms, tracts, and paddocks subject to sale. Here, the facts of the sale at hand were discussed among the various actors: is the seller the legitimate owner? Has the price been agreed upon and has it, in fact, been paid? Is the tract subject to purchase correctly delimited? Does the seller indeed wish to sell? Are third parties (successors, neighbours) harmed by the sale? The answer to these questions guaranteed the legality of the sale, and if any of the facts were contested the sale could not take place. This manner of physical tradition thus served the very specific purpose of giving the political authority a high degree of oversight over land transfers in a territory where central forms of delimitation were lacking and intended to avoid unnecessary litigation and disputes. But how were these issues resolved? How were ownership and the other requisites for the sale determined?

One decree is particularly insightful into how verification had to take place. Governor Alejandro Eagar in 1808 instructed that the *Comisario de Naciones*, Francisco Aburto,

> »shall summon the casiques [sic] and interested parties to the lands of Pichihue and in presence of everyone and of the respective capitanes de amigos and two witnesses will find out the legitimate owner or owners of the land and will ask if it is their own free will to sell them: In how many payments, and the time in which they may be satisfied, and done this he will give possession to the buyer, with the summoning of immediate neighbours for the signalling of the limits. All of this with greatest precision to avoid the continuous complaints that these cases cause this Government, of

76 Posession. Pablo González against J. Cotrén, 1816, Archivo Judicial de Valdivia (AJV), 05/01. The second case, from 1827, conditions the sale to finding out if »said seller has other lands on which to live to sustain his family, because on the contrary he shall not be permitted to sell all of them«. Land sale from Lebitun Antiguir to José Antonio Agüero, 1827, ANV, vol. 2, fol. 158ff.

77 This was part of the broader rationale of Spanish occupation under Bourbon reformism, which had no use for uninhabited spaces. See *Vergara*, La herencia colonial del Leviatán, p. 106.

78 This concern was raised by the »Comisario de Naciones«, Francisco Aburto, in a case of a failed land sale. He stated that rather than having problems with the Spaniards, the ›Huilliche‹, Mateo Catalan, would prefer to sell all his lands and move to »live among the Pehuenches, where he also has lands; but this has the great inconvenient [for the government of Valdivia] that five or six Christian families will go on to live among the unfaithful, very *tierra adentro*«. Lands of Pablo Caniu, 1801, AJV, 19/01.

79 Land sale from H. Llancal and others to Julián Pinuer, 1800, ANV, vol. 2, fol. 36ff.; *Lands of Pablo Caniu, 1801, AJV, 19/01*.

which he will be responsible providing the account of everything and returning it to this Government.«[80]

Though not all decrees contain such detailed instructions, the acts of verification and possession are conducted more or less in this manner. These acts are therefore, first and foremost, public and must be conducted »in presence«[81] of interested parties or »being everyone gathered«.[82] On these occasions this would include sellers, buyers, *caciques*, along with »capitanejos, Guilmenes, and mocetones«[83], *Capitanes de Amigos*, witnesses of both parties, and neighbours. On occasion, these gatherings would be larger, involving neighbouring Huilliche families, or »several Spaniards«.[84] The gatherings for the sale fulfilled two purposes: first, they made the act of transfer known to the inhabitants of the surrounding area; second, and more important for our discussion, they had the function of determining the legal prerequisites of the sale, of which I will concentrate on three: consent, legitimate ownership, and demarcation.

Consent, according to the aforementioned decree, had to be ascertained by an explicit question. In some documents, we find rather formal statements whereby sellers indicate that they sell »of their spontaneous wills not preceded by force or deception«.[85] This very formal expression of consent, however, was probably obtained by an explicit question and answer. In a case from 1795, for example, the *Comisario de Naciones* having gathered »casique Dn. Colin, his brothers Hilmenen, Redeyuqueo, Lancuqueo, Pocollafan, and Huayquipan, asked them if it was their will to sell those lands of ›el Rozal‹ […] to which they said […] that of their will they sell them and guarantee them«.[86] In 1828, a local judge in company of the scribe, the *Comisario de Naciones*, and others asked two Huilliche sellers »in clear and intelligible voice if of their spontaneous will they wished to sell« to which they answered that »they were very willing« *(eran muy gustozos)*.[87]

Consent was an important prerequisite for the authorisation of the sale because it fulfilled the contractual condition for the transfer of ownership; sales were prohibited without the explicit consent of both parties: willingness to sell and willingness to acquire. Indigenous land sales in the period did fail because this clause was not duly agreed upon in the initial agreement (or Huilliche sellers changed their minds between the agreement and the verification). In one verification in 1807, we find a case in which one Huilliche seller does not consent. The Spanish buyer had declared that he had agreed with four sellers to purchase lands »which were inherited from their fathers«. Asked by the local judge, with assistance of the *Comisario de Naciones*, »the first three said it was their will to give in

80 Tract sale in Pichihue from Juan Llancamán to Antonio Leuvu, 1808, ANV, vol. 2, fol. 74ff.

81 Santiago Ancaguirre regarding possession in Cudico, 1806, AJV, 01/02.

82 Land sale by Manuel Lefian, 1828, ANV, vol. 2, fol. 168ff.

83 These denominations are social ranks attributed by the Spaniards to the Che, though they are not always straightforward. »Guilemenes« or »ulmenes« were apparently equivalent to »lonkos« or »caciques«, and »capitanejos« and »mocetones« were warriors subordinate to the »lonko«, known as »cona« in Mapundungun. See *Contreras Saiz*, En nombre de la seguridad, pp. 358 and 362. According to Alcamán, in documents, »cacique« is used to designate »lonkos« who had a broader jurisdiction, commanding over several lineages led by their respective »guilmenes«. *Eugenio Alcamán*, Los mapuche-huilliche del Futahuillimapu septentrional: expansión colonial, guerras internas y alianzas políticas (1750–1792), in: Revista de Historia Indígena 2, 1997, pp. 29–75, here: p. 33.

84 Land sale from Agustín Pilun to Felipe Bastidas, 1824, ANV, vol. 2, fol. 97ff.

85 Land Sale in Rio Bueno from Felipe Guenchumilla to Francisco Javier Carrasco, 1795, ANV, vol. 1, fol. 116ff.; Dionisio Delgado claims possession of lands in Rio Bueno, 1814, AJV, 02/06; Severino Catalan against N. Antilef and others for right to lands, 1826, AJV, 09/04.

86 Cacique Colin and others sell land to Gregorio Ulloa, 1795, ANV, vol. 2, fol. 10ff.

87 Land sale by Manuel Lefian, 1828, ANV, vol. 2, fol. 168ff.

Royal sale the lands called Nales […]. The fourth heir Ñancucheo, said in presence of everyone that he for his part did not agree to such sale«.[88] In this case, ownership could not be transferred to the buyer.

Ownership was perhaps the most important of the prerequisites. Though many accounts of the acts of verification indicate simply that the Huilliche sellers are »owners«[89], »legitimate owners«[90], or that the lands are »owned by said Indians«[91], this was not simply a statement of fact. Unlike the consent clause, this was something that could not be simply verified by asking the seller but rather had to be ratified by the local inhabitants gathered at the site of the sale; it had to be »found out«. It seems that discussions among those gathered were common, and Huilliches often resolved issues of ownership in their »own debates according to their customs and style«.[92] There is one case from 1800 that is particularly illustrative of this:

> »I [the Commander of the Fort of Alcudia, accompanied by the Lengua General] summoned to the site contained in this petition, the Indians, sellers, Cacique Calfunir, Llancal, and other neighbours of the Indians of the area of Chanchan with the others, their relatives being the head of the latter the cacique Epuyan and having everyone gathered were told of the sale of this piece of land that the Indian Llancal was selling Dn. Julian Pinuer and after several reasons that each presented in attention to the relations of kinship that connects them with each other, unanimously said: That the sale made by Llancal was legitimate as true owner with which they were satisfied stating that in the adjacent lands in the area of Pilmaiquen said Llancal could from now on not claim access nor right.«[93]

Llancal's claim to the land was therefore valid only as it corresponded with the shared knowledge of both family groups. The fact that the verification of ownership was only possible with recourse to local knowledge is well exemplified in a case in which a land sale failed when cacique Josef Sunil claimed that the seller Pablo Caniu was not »owner to dispose of said lands«. Caniu claimed recourse from the Governor, arguing that he had inherited the lands from his father and that the cacique had only disputed his claim because he was not included to benefit from the sale. He claimed that the »ancient possession I have is known to many living old Indians«. The *Comisario de Naciones*, with presence of the *Lengua General* and *Capitanes de Amigos*, visited the area and interviewed different witnesses. Tomás Huaytu, whom Caniu had cited as a witness, expressed that when he was a young boy those lands had in fact belonged to Caniu's father, but this was no longer the case, because Caniu had »sold all of the lands that were of his deceased father Chanacul«. As Caniu was not unable to produce another witness, the *Comisario* summoned don Lucas Aricales »a man in his eighties or nineties« who »confirmed that Caniu did not have lands of his own to sell«.[94]

The importance of shared local knowledge is also visible in the demarcation of the lands subjected to sale. The »recognition« or »indication« *(señalamiento)* of the boundaries *(lindes)* of the tracts, farms, or paddocks required that »everyone together« walk through the land in order to settle the correct limits. Though most documents simply indicate the demarcations (»the limits of which are«), others are more explicit in showing that this in itself constituted a physical act. In one sale from 1824, we find the following: »The bounda-

88 Manuel Delgado against Manuel Quepul and others for the delivery of a tract (Rio Bueno), 1807, AJV, 01/06.
89 Possession of Julian Pinuer of a paddock in Chanchan, 1802, ANV, vol. 2, fol. 46ff.
90 Land sale from Bernardo Calfunir to Dionisio Delgado, 1797, ANV, vol. 2, fol. 16ff.
91 Land sale from cacique Juan Queipul and others to Julian Pinuer, 1792, ANV, vol. 2, fol. 25ff.
92 Manuel Delgado against Manuel Quepul and others for the delivery of a tract (Rio Bueno), 1807, AJV, 01/06.
93 Land sale from H. Llancal and others to Julián Pinuer, 1800, ANV, vol. 2, fol. 36ff.
94 Lands of Pablo Caniu, 1801, AJV, 19/01.

ries explained were signalled materially by the very Indian sellers in my presence and that of my Lieutenant Comisario, Captain of the Reduccion, Casiques, Guilmenes, and mozetones and several Spaniards publicly at three in the afternoon.«[95] The boundaries could also be set by creating landmarks. In one case the boundary was indicated »in an old fence and by chopping a Pellín [tree] for firewood«[96]; in another »a dead tree was marked«; finally, in a vast plain »several trees were marked all along the plot of land, serving as boundaries *[linderos]* until they reach the stream«.[97] These kinds of landmarks could only make sense to those who had a good knowledge of the terrain and shared common understandings of the area. In one sale the boundary was indicated as »to the south on a broad marked tree on the top of a knoll«[98]; another sale established a boundary »on a large apple tree located on a depression on the public road«; and another »at the gully *[quevrada]* that makes a corner with the place where the head of a criminal had been placed on a stake as an example of justice«.[99] This latter example is interesting because it refers to a landmark which was no longer present at the place but was probably very well known to local inhabitants.

The act of verification was thus important because, before possession could be given, those gathered (and not only seller and buyer) had to come to the point of »having nothing to contradict«, of no one »placing obstruction nor contradiction«, or »having come to agreement« *(quedando acordes y llanos)*.[100] This was followed by the physical act of possession, which signalled tradition, i.e. it was the condition by which ownership was transferred from seller to buyer. One such possession from 1792 can be provided as an example:

> »and not having anything to contradict on the part of Antonio Solis nor of the casique, having come to agreement I gave mentioned Antonio Solis integral possession of the mentioned lands of Lligco throwing stones as well as pulling weeds, in sign of possession and true tradition and saying three verses in loud and clear voices possession, possession, possession, in which he was left absolute owner«.[101]

These ceremonies of possession can be traced back to medieval Spain[102] and were commonly used by colonists since the very beginning of European expansion to claim rights over the American territories.[103] In the territory of Valdivia, they can be found dating up until the late 1820s, and though some documents do not always have the detailed description of the physical act of possession, they do include the observation that possession is given on the spot »in accordance to law«[104], »in due form«[105], or »practicing the remaining ceremonies they are accustomed to« *(que acostumbran)*.[106]

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95 Land sale from Agustín Pilun to Felipe Bastidas, 1824, ANV, vol. 2, fol. 97ff.
96 Santiago Ancaguirre regarding possession in Cudico, 1806, AJV, 01/02.
97 Land sale in Quelaco from Juan Queipul to Dionisio Delgado, 1826, ANV, vol. 2, fol. 126ff.
98 Land sale from Lebitun Antiguir to José Antonio Agüero, 1827, ANV, vol. 2, fol. 158ff.
99 Land sale from Agustín Pilun to Felipe Bastidas, 1824, ANV, vol. 2, fol. 97ff.
100 Land sale from Agustín Pilun to Felipe Bastidas, 1824, ANV, vol. 2, fol. 97ff.
101 Land sale from cacique Queipul to Antonio Solis, 1792, ANV, vol. 2, fol. 23ff.
102 *Levaggi*, Historia del Derecho de las Obligaciones, Contratos y Cosas, pp. 91f.
103 On symbolic acts of sovereignty, see: *Arthur Keller/Oliver Lissitzyn/Frederick Mann*, Creation of Rights of Sovereignty through Symbolic Acts, 1400–1800, New York 1967; *Patricia Seed*, Ceremonies of Possession in Europe's Conquest of the New World, 1492–1640, Cambridge/New York 1995. Silvio Zavala has shown that these ceremonies of possession were related to sales of indigenous land in Mexico in the 16th century. *Silvio Zavala*, De encomiendas y propiedad territorial en algunas regiones de la América española, México 1940, p. 46. More recently, *Brian P. Owensby*, Empire of Law and Indian Justice in Colonial Mexico, Stanford 2008, chap. 4.
104 Land sale in Rio Bueno from Felipe Guenchumilla to Francisco Javier Carrasco, 1795, ANV, vol. 1, fol. 116ff.
105 Tract sale in Pichihue from Juan Llancamán to Antonio Leuvu, 1808, ANV, vol. 2, fol. 74ff.
106 Santiago Ancaguirre regarding possession in Cudico, 1806, AJV, 01/02.

The importance of the acts of verification and possession was that, in their absence, property rights could not be conveyed. However, beyond their specific legal function, the ceremonies of possession during the early republican period also reveal that the attribution of relevant facts is not yet exclusively managed by legal institutions. First, the distinction between indigenous and non-indigenous, and thus the difference by which land sales were to be handled, was introduced by local political authorities. Though the republic, as of 1820, had dissolved the legal differences between Spaniards and indigenous populations, legal claims by Ches continued to follow colonial custom, consequently placing the decision on political, not judicial, authorities. Intendant Ramón Picarte observed that this occurred mainly because the Ches, »according to long-standing custom«, continued to seek justice through the *Comisario de Naciones* or the local political authority.[107] Second, the ceremonies of possession established a direct relation between facts and their legal meaning. The publicity of the act meant that at any point those present could call the sanction of the legal act into question: the claims to ownership, the limits of the tract, and consent could be disputed by any of those gathered, thus invalidating the purchase. This indicates that the acts of possession were not a mere formality associated with sales of indigenous land but were intrinsic to ascertaining the validity of the contracts of purchase. The legally relevant facts were thus analogue to the shared knowledge of those living on the spot; no instrument could in and of itself determine the legality of its contents.

Transfer of Land Ownership, 1830–1850

Beginning in the 1830s, the distinction between indigenous and non-indigenous, which had been so important in the previous period, no longer carried any consequence for the legal system. This meant that indigenous populations no longer transferred ownership of land under a different regime: they came to be conducted solely through written legal instruments; intendants and *Comisarios de Naciones* lost their legal functions, and the approval of the cacique was no longer required. Instead, legal functions were handled by different magistrates according to the territorial unit: subdelegates, *alcaldes*, and judges *(jueces de letras)*. The latter, and the public scribe, were seated in the provincial capital, Valdivia, and were the only persons authorised to produce public instruments.[108] Thus land sales were de-localised, being exclusively sanctioned in the city of Valdivia. This shift is certainly related to the increasing consolidation of republican institutions and reflects very clearly a process of state centralisation. But it is, at the same time, a reflection of increasing functional differentiation: legal decisions are handled by legal authorities, and claims to legal ownership are handled exclusively by the legal system. In the remainder of this section, I will focus on three important private legal instruments that became prevalent in sales of indigenous land from 1830 until the enactment of the Civil Code in 1855: deeds of purchase, powers of attorney, and contracts of sale. All of these instruments introduced a displacement in how the legal system handled the question of legitimate ownership.

Though having been the sole legal instrument for sales among Spaniards, the deeds given in public sale *(venta pública)* became important instruments in the purchase of indigenous land after 1830. This displacement of the instrument introduced a series of changes. The first and arguably most important shift is the already mentioned de-localisation of the legal act: from the tracts and paddocks to the city. Thus the sanction of sales always occurs in the city of Valdivia »before this court of first instance«[109] or »before me the scribe and

107 Quoted in *Villalobos*, Tipos fronterizos en el Ejército de Arauco, p. 199.

108 *Juan Bautista Alberdi*, De la majistratura y sus atribuciones en Chile. O sea de la organización de los tribunales y juzgados según las leyes que reglan al presente la administración de justicia, Valparaíso 1846.

109 Land sale from Pedro Manquenir to Antonio Carrillo, 1830, ANV, vol. 8, fol. 8f.

witnesses«.[110] Second, this entailed that tradition no longer required a physical act, replaced instead by a symbolic one contained in the instrument by which the seller gave the buyer »the power to judicially or extrajudicially take and acquire the possession and tenancy of the land«.[111] Third, this removed the subset of colonial institutions – including the customary gatherings – that had until then structured indigenous land sales from the legal act. Finally, it displaced the responsibility for the identity of the instrument from the agent charged with its creation to the seller. Sellers were thus obligated by the deed to remove anyone living on the tract and handle any claims that contested the validity of the sale.

This shift expedited the process of buying and selling land by solely requiring that the agreement of sale be ratified through the creation of the public deed. For our purpose, however, these changes in the instrument separated the verification of the facts of the sale from the transfer of ownership. Though land sales still required tradition for the transfer of ownership, the elimination of a specific regime for indigenous sellers removed the political and social mechanisms of control over the territory. Ownership, consent, and the demarcation of the tracts were hence contained in the creation of the instrument. Legitimate ownership, for example, was often declared by the seller as »inheritance from their fore-bearers«[112], i.e. in reference to ancestral rights, or occasionally certified by a written deed.[113] Consent was the statement, as we have already seen, that the seller is selling »of his own spontaneous will«. Finally, the demarcation of the tracts was either provided by the creation of the deed or, before this, was done by the subdelegate, a local legal authority, in the presence of a witness named by the seller.[114] Since the responsibility of the instrument was placed on the seller, the act of verification was no longer used and the facts of the sale were simply presumed to be true by virtue of the deed of purchase.[115]

By placing the responsibility of the instrument on the seller, contested claims were treated in a very different manner than in the previous regime. On the one hand, it displaced the moment for the introduction of contending claims. The gatherings on the tracts that served to find out the facts of the sale *before* property was transferred were intended to reduce complaints directed at the political authority. Complaints that arose after the fact were considered the result of negligence or malice on the part of the agent charged with the creation of the instrument and thus required a repetition of the act of verification or the annulment of the transfer of ownership.[116] After 1830, as a matter of course, contending claims had to be dealt with *after* the fact. Lawsuits involving indigenous parties multiplied and these disputes were handled in lengthy trials, which occasionally ended with appeals before the Supreme Court. This shift in responsibility, on the other hand, increased the importance of specifically legal institutions in handling indigenous land sales and the conflicts that arose: scribes and judges became the sole handlers of property claims.

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110 Land sale in Pichoy, 1843, ANV, vol. 2, fol. 208f.

111 Land sale from Josefa Cariman and Maria Luisa Raitrai to Maria Josefa Zuli and Tomasa Samudio, 1844, ANV, vol. 7, fol. 48.

112 Ibid.

113 Public sale of farm from Esteban Curitripai to Ramon Flandes, 1836, ANV, vol. 9, fol. 84.

114 Land sale from Juan Collilef to Francisco Bezerra, 1837, ANV, vol. 9, fol. 102.

115 In a legal doctrinal sense this was the equivalent of understanding tradition independently from the contractual aspects of the exchange. This idea informs most civil codes that have sustained conveyance on the *traditio* side of Roman law and in Germany was developed in Savingy's »Theorie der abstrakten dinglichen Verträge« which informs the doctrine of the »Bürgerliches Gesetzbuch«. See *Helmut Coing*, Europäisches Privatrecht, vol. 2: 19. Jahrhundert. Überblick über die Entwicklung des Privatrechts in den ehemals gemeinrechtlichen Ländern, München 1989, pp. 393f.

116 Bernardo Calfuquir against Lucas Molina concerning borders of tract, 1803, AJV, 01/04.

It may be worth briefly noting that the tension between oral and written legal acts, though relevant, should not be overemphasised.[117] Both in this period and the previous one, the transfer of property connects oral interactions with written procedures. While between 1790 and 1830 the agreement of the sale and the verification are mostly oral interactions, after 1830 the contents of the deed are the result of oral interactions before the scribe.[118] In both cases, the most important outcome is the production of the written deed. The more relevant question, however, is which communications are legally relevant in each period, and not through which media these communications are conveyed. As we saw in the previous section, land sales were not structured only around buyers and sellers before the respective authorities but also involved numerous other actors who could state their claims during the procedure. The gatherings on the tracts were not only intended to let the community know of the sale but were an instance where the community could also be heard: this is the meaning of the publicity of the act of transfer. The displacement of the act of transfer to the city and before the scribe separated this ›social‹ component from the land sales. By removing the act of verification from the transfer of indigenous land, the communications of the community and neighbours were rendered irrelevant for the legal procedure of property transfer and could only be introduced retroactively through lawsuits.

As a consequence of the changes made for land sales, powers of attorney acquired importance for Huilliche sellers. Since sales and lawsuits took place in the city, and appeals had to be delivered to the Supreme Court in Santiago, powers of attorney were mostly used for two reasons: because illness or occupation impeded the seller from travelling to Valdivia to complete a sale, or because lawsuits, being lengthy affairs, required time and reiterated travel. In 1831, for example, before departing to Calle-Calle »to tend to his farming obligations«, *cacique* Francisco Caillumanqui, who was in Valdivia, extended a power in favour of Javier Castelblanco to handle the sale of a tract of land and other matters.[119] In a case from 1836, to sort out a dispute with Santiago Sapí over a tract of land, *cacique* Francisco Colimanque »not being able due to his ailments and advanced age to travel to this city [Valdivia] to clear before the justices the right he has to said land« gave a power in favour of Miguel Arbuco to settle the matter before the court.[120] Powers of attorney were, however, particularly useful in the case of appeals before the Supreme Court in Santiago. This spared a lengthy trip by sea to Valparaiso and a 100-kilometre trip from there to Santiago over mountainous terrain. In 1837, Antonio Vio, who was representing Huilliche sellers in a land dispute, transferred his power to José María Navarro and José Manuel Valverde so they could handle »the lodged appeal until obtaining a favourable ruling in the matter«.[121] In 1846, Antonio Asenjo transferred a power granted by Tomás Tranquil to his brother Domingo Asenjo »resident in the city of Santiago« so that he could »do and determine in all degrees and instances on the appeal lodged before the Honourable Court«.[122]

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117 Cf. *Jack Goody*, The Logic of Writing and the Organization of Society, Cambridge/New York etc. 1996 (first published in 1986).

118 This has been argued by *António Manuel Hespanha*, »The Everlasting Return of Orality«. Paper presented to Readings of Past Legal Texts. International Symposium in Legal History in Tromso, Norway, 13–14 June 2002, URL: <https://sites.google.com/site/antoniomanuelhespanha/home/textos-selecionados> [9.8.2017].

119 Power of attorney from Francisco Caillumanqui to Javier Castelblanco, 1831, ANV, vol. 8, fol. 56.

120 Power of attorney granted by Francsico Colimanque 1836, ANV, vol. 9, fol. 44.

121 Power of attorney granted by the heirs of Alapan to Maria Calfunado and others, 1835, ANV, vol. 9, fol. 21ff.

122 Power from Anonio Asenjo (Valdivia) to Domingo Asenjo (Santiago) for land dispute involving Tomás Tranquil, 1846, ANV, vol. 7, fol. 117.

Powers of attorney consequently became important instruments for bridging space and time.

Powers of attorney, however, perhaps best symbolise the displacement of reality introduced by legal observation. The power granted through this instrument is given to »represent the person of the granter«[123] and act »in everything as if [the granter] were present«.[124] Thus, the powers of attorney are strictly counterfactual: they create a fiction that carries legal effect. One case is particularly illustrative. In 1835, in the locality of Arique, located roughly 40 kilometres from Valdivia bordering the Calle-Calle River, nineteen Hulliche individuals gave powers of attorney to two of their relatives, María Calfunado and Manuela Raynao, to travel to Valdivia to settle a land dispute. The latter transferred the power, in turn, to Antonio Vio to oversee the lawsuit before the judge in Valdivia. Two years later, as seen above, Vio transferred the power to a representative in Santiago to oversee the appeals before the Supreme Court.[125] The separation of individual and legal person is here clearly represented: for the legal system, the grantee and the granters of the power have equal legal capacity within the limits provided by the instrument. The displacement of the legal acts from the farms to the city and the increasing mediation by legal representatives[126] highlight the subtle coercive power of the procedural shifts.

The final and possibly most consequential instrument used in this period was the contract of sale. Its form is a personal statement from the owner declaring the intention to sell or the completion of the sale. This was probably the written form of the agreement of sale that occurred before seller and buyer legalised the transfer of property. Unlike the deeds of purchase and the powers of attorney, the legal status of the contract of sale is unclear because it was not always emitted by authorised public servants. Some of these contracts were signed by »inspectors«, minor local magistrates, who were not authorised to emit public instruments other than powers of attorney and wills. It is therefore unclear to which degree such contracts were enforceable should one of the parties fail to keep their end of the agreement. Further, these documents fell under the rules of obligations and contracts, meaning that though they could be binding for the contracting parties, they did not bind third parties. Although they created a contractual obligation between the parties, according to existing law, these documents lacked legal power to transfer property.

Yet the contracts of sale began to be used for transferring ownership of land since at least the late 1830s, though due to their informal nature they are only sparsely found in archives. Two documents from 1839 and 1846 are good examples of these contracts.[127] The first, celebrated in Calle-Calle on 10 September 1839, states: »I Patricio Castro say, that I

123 Power of attorney granted by Francsico Colimanque 1836, ANV, vol. 9, fol. 44.

124 Power of attorney from Francisco Caillumanqui to Javier Castelblanco, 1831, ANV, vol. 8, fol. 56.

125 Power of attorney granted by the heirs of Alapan to Maria Calfunado and others, 1835, ANV, vol. 9, fol. 21ff.

126 It is unclear how these representatives were selected, but they apparently did not have legal training according to a list published in 1865 which shows lawyers authorised before the Appeals Courts in Chile since 1812. The list is incomplete but provides some insight into the national distribution of attorneys. According to the author, in 1865 there was only one trained lawyer in Valdivia, probably the local magistrate. Cf. Abogados chilenos. Ensayo estadístico de los que actualmente existen, recibidos en nuestras Cortes de Apelaciones desde el 10 de octubre de 1812 hasta el 1° de diciembre de 1864, segun la Matrícula recien publicada en el número 1183 del periódico oficial Gaceta de los Tribunales, i segun varios datos tomados de la última entrega del Anuario estadístico de la República, in: Anales de la Universidad de Chile 27, 1865, pp. 3–13.

127 In the volume's index they are both incorrectly marked as »compraventa« (purchase), the same way in which deeds of purchase are catalogued.

sell Don Pascual Mayorga the lands that belong to me through inheritance«.[128] The document, a simple piece of paper, does not indicate the precise location, or limits, and is signed for both parties by Miguel Arbuco and by the witness, Patricio Ochoa. The second document, signed in Molpun on 14 April 1846, follows a similar format: »I Ignacio Antipan say, that I have sold Don Pascual Mayorga a block of land of my belonging.« It includes sparse information on the boundaries of the tract and neighbours. It also says that Antipan gives (»entrego«) Pascual Mayorga a second tract, apparently a donation.[129] Like the document above, it also lacks most of the formalities associated with the deeds of purchase produced by the public scribe: the official seal, the cost and year of the paper, and the formal legal statements usually provided by the scribe.

These contracts acquired widespread use as of the mid-1840s. In the preparations for the colonisation of the territory, an 1849 brief instructed the fiscal agent to abstain from taking possession of public lands if individuals were in possession of the land or disposed of »reliable titles« *(títulos atendibles)* to it. Among the latter, the government listed prolonged possession, transmission of the lands over three generations, having worked the field, or having enclosed the tract. Among the reliable titles was also having conducted »three successive contracts of sale on the same lands«.[130] This seems to indicate that land transfers had been taking place through the more informal contracts before this time. By the time the agent travelled to Valdivia to take possession of the public lands in 1851, however, he was confronted by the fact that the state had »but very few properties« in the territory and that titles of property that were used by those who claimed fiscal land as private property were »perverse and monstrously informal«. The titles described by the agent in a communication to the Ministry of Interior fit the description of the documents mentioned above:

> »the writings mentioned are merely strips of paper, without seals, without certifying dates, nor any formality of mention in them; I gave, exchanged, or sold so-and-so [Fulano], the piece of land (such and such) without knowing with which title it was given, exchanged or sold; and without this being acknowledged in archives, nor through the payment of alcabala [sales tax], nor appearing in them the signatures of two credible witnesses«.[131]

These documents thus served to lay property claims to land. Crucially, however, in the lawsuits filed by the state against holders of titles of this kind, these claims were upheld by the courts, thus recognising contracts as legitimate instruments for transferring ownership rights. In the most famous case of the period, filed by the treasury against the German immigrant Francisco Kindermann, who through an intermediary had bought large expanses of land for speculation, the courts ruled – in first and second instance – in favour of Kindermann. Both rulings were ratified by the Supreme Court, which argued that by virtue of the »contracts of sale« *(escrituras de compras corrientes)* Kindermann was »in possession of the lands claimed by the fiscal agent«.[132] As such, Kindermann should be left »in quiet and pacific possession of the lands bought from the natives [naturales] mentioned in the said contracts [escrituras]«.[133]

The widespread use of contracts indicated that transfers of land ownership between 1830 and 1850 had in practice moved from tradition to consent. If the exclusive handling of land sales by the scribe had removed the Governor and the gatherings, among other institutions,

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128 Land sale from Patricio Castro to Pascual Mayorga, 1839, ANV, vol. 2, fol. 213.
129 Land sale from Ignacio Antipan to P. Mayorga, 1846, ANV, vol. 2, fol. 212.
130 *Ricardo Donoso/Fanor Velasco*, Historia de la constitución de la propiedad austral, Santiago 1928, p. 98.
131 Ibid., p. 107.
132 *Agustín Torrealba*, La propiedad rural en la zona austral de Chile, vol. 1, Santiago 1917, p. 188.
133 Ibid., p. 189.

from the legal process of conveyance, the transition to consensual mechanisms removed the remaining administrative procedures from the buying and selling of land: scribes, and the payment of sales and paper taxes. The purchase of land was thus liberated from every kind of institutional constraint to which it was hitherto bound, functioning purely as a transaction between private individuals. This manner of property transfer had been institutionalised in the French »Code Civil« of 1804 which in its article 1138 correspondingly stated that »La propriété se transfère par simple consentement«[134], grounding the transferral of ownership solely on a contractual basis. The consensual mechanism for transferring the ownership of land was, however, short-lived in Chile. By 1855, the Chilean Civil Code reintroduced the idea of tradition through the registration of property.[135] While sales could still be contractually agreed upon, conveyance of ownership only occurred once the estate had been registered before the Real Estate Register *(Conservador de Bienes Raíces)*.[136]

The manner in which property was transferred during this period was a reflection of broader shifts in legal doctrinal discussions that characterised the codification processes of the 19th century. Whether property transfers were understood in the direction of tradition or in the direction of consent, the practical consequence was the same: the removal of political and social mechanisms of control.[137] Luhmann argues that the changes in the doctrine of contracts, which were henceforth only determined by the will of the parties, completed the modern structural coupling between law and the economy. As such, the transformation of the concepts of property and contract during the 19th century had tremendous consequences.[138] The consequences of this process, however, were not the same across different territories. In our case, the introduction of specialised legal instruments in the transfer of indigenous property detached the legal fact of property from the social knowledge of legitimate possession and created a fluidity of ownership that became impossible to submit to political control. This generated problems both for the indigenous communities which were continuously dispossessed of their lands by land speculators and European immigrants[139] as well as the state insofar as it could not contain the loss of public lands in the region. The decree-laws enacted by the Chilean state throughout the 19th century to stem these problems – which submitted sales of indigenous land to the supervision of the intendants (1853, 1855, and 1856), restricted the conditions under which indigenous people could grant powers of attorney (1856, 1857), and finally prohibited all sales of indigenous land (1874, 1883, 1893) – were to a large extent ineffective.[140]

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134 *Coing*, Europäisches Privatrecht, p. 396.

135 *Javier Barrientos Grandon*, De la ›tradición‹ y su definición en el Código Civil chileno. A propósito del artículo 670, in: Revista Chilena de Derecho Privado 1, 2003, pp. 11–108; *Alejandro Guzmán Brito*, La tradición como modo de adquirir el dominio en el derecho romano, en el común y en el iusnaturalismo y su destino en los derechos patrios de la América española, in: Revista Chilena de Derecho 42, 2015, pp. 329–344.

136 *Manuel Montt*, Mensaje del Ejecutivo al Congreso proponiendo la aprobación del Código Civil, in: Código Civil de la República de Chile, Santiago 1877, p. vi.

137 See *Dieter Grimm*, Recht und Staat der bürgerlichen Gesellschaft, Frankfurt am Main 1987, pp. 165–191.

138 *Cf. Luhmann*, Die Gesellschaft der Gesellschaft, chap. 10, esp. pp. 463–467.

139 *Eugenio Alcamán*, Memoriales Mapuche-Williches. Territorios indígenas y propiedad particular (1793–1936), Osorno 2010; *Jorge I. Vergara*, La matanza de forrahue y la ocupación de las tierras huilliche, Valdivia 1991; id., La herencia colonial del Leviatán.

140 *Álvaro Jara*, Legislación indigenista de Chile, México 1956; *Ismael Errázuriz Ovalle*, Títulos de propiedad en el territorio indíjena, Santiago 1914.

III. Conclusions

The modernisation of law has been described by legal historians in diverse ways. Helmut Coing argued that the 19th century was the moment in which the unitary transnational law of the *ius commune* was dissolved and replaced by modern national law through codification.[141] For Victor Tau Anzoátegui, the most important transformation of this period was in how law was practiced. Until the 19th century, though grounded on norms, law was realised only in its application on a case-to-case basis. Thereafter, law was predominantly conceived as a rationally constructed and internally connected structure of legal norms meant to provide appropriate solutions to every problem of everyday life.[142] While both are correct characterisations of the transformations occurring in law, the ways in which these transformations were interrelated and how they affected social life more generally were left in the background.

This article has attempted to take a social historical approach to the study of law by recourse to Luhmann's idea of *Weltgesellschaft*. In Luhmann's idea of an operatively closed legal system both the shift in sources as well as the changes in the application of law go hand-in-hand with a society that organises itself globally according to the primacy of functional differentiation. A functionally differentiated legal system requires a reorganisation of legal communications in two interrelated directions. First, the legal system sacrifices normative unity in favour of operative unity. This means general norms that were applied differently across local contexts are replaced by nationally heterogeneous norms, which are applied in the same way everywhere, using the code legal/illegal as a rule of attribution and connection for all legal communications. Second, the legal system has to construct rules that allow the application of the system's binary code. These rules are conditional rules, creating »if … then« relations that subordinate the facts of the case to the deductive application of the norm. In a modern legal system, the application of legal rules becomes more important than the social nuances of the case at hand and reaching decisions based on socially shared understandings of justice.

The case analysed in this article exemplifies how this process occurred in the territory of Valdivia between 1790 and 1850. Fundamentally, the legal interactions that surrounded the conveyance of indigenous land went from politically and socially negotiated transactions, highly reliant on local memory and knowledge, to become increasingly specialised affairs organised around rules provided by the legal system itself. The detachment of the legal from social representations, exemplified by this article, suggests that discrete manifestations of societal change were interrelated with the manner in which legal communications were structured. This process, of course, was not restricted to law nor to the territory of our case study.[143] Inscribing the case studied in this article in a theory of *Weltgesellschaft* sought to highlight the contradictory outcomes that are produced by modernisation. Within the framework of *Weltgesellschaft*, modern society does not necessarily lead to social improvement or to an increasing homogenisation of social structures. Rather it produces and increases heterogeneity, because the general detachment of socially bound mechanisms of regulation generates disruptions and problems that can no longer be perceived unilateral-

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141 *Helmut Coing*, Europäische Grundlagen des modernen Privatrechts. Nationale Gesetzgebung und europäische Rechtsdiskussion im 19. Jahrhundert, Opladen 1986.

142 *Tau Anzoátegui*, Casuismo y sistema, pp. 30f.

143 Similar observations on the way law was detached from physical acts and local communities have been provided for 19th-century rural England and southern India. Cf. *Alain Pottage*, The Measure of Land, in: The Modern Law Review 57, 1994, pp. 361–384; *David Washbrook*, Sovereignty, Property, Land and Labour in Colonial South India, in: *Huri Islamoğlu* (ed.), Constituting Modernity. Private Property in the East and West, London 2004, pp. 69–99.

ly.[144] The case of indigenous property transfer in southern Chile is an example of this process of introduction of modern forms of communication – with devastating consequences. Property transfers in the Valdivia territory suffered important changes by detaching the legality of land transfers from social and political mechanisms of regulation.

Finally, rethinking the concept of society is a way of suggesting that it may be fruitful to recover the programmatic aspiration of the first German *Gesellschaftsgeschichte*. The concept of *Weltgesellschaft* is an effort to construct a comprehensive category that accounts for the social construction of meaning and, as such, traces the contours of the *Gesamtsystem*. However, it is also a category that is self-aware of its limitations and through its theory of observation precludes complete and unitary descriptions of society. As such, the concept of *Weltgesellschaft* may be interesting in light of the cultural, linguistic, and global-turns of social history. The case analysed in this article, more than following through on a programmatic proposal, has attempted to exemplify the potential this theory may have for a social historical study of law. A systems-theoretical approach to the study of law has the analytical advantage of taking the legal experience seriously as an area of study in its own right. Instead of focusing on the codes and laws created by central decision-making instances, such a perspective opens the possibility of studying the vague ubiquity of law from the lived everyday experiences of actors and their relation to the broader normative context.

144 On the heterogeneity of »Weltgesellschaft« and its problematic nature see *Luhmann*, The World Society as a Social System; *Stichweh*, Interkulturelle Kommunikation in der Weltgesellschaft.