

## The Coca Leaf in Chile: A Review of the Legal Status

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This article reviews the legal status of the coca leaf in Chile, considering current legislation, specifically Law 20.000, or the anti-trafficking law, and its corresponding by-law, norms protecting indigenous peoples that reference coca, and presentation of two cases involving the arrest and imprisonment of indigenous people for possessing and transporting coca leaves. The coca leaf, in strictly legal terms, is considered an illicit drug in Chile, but its use has been tolerated to a certain extent for cultural reasons, leading to special legal treatment compared to the rest of prohibited drugs in the country. The article distinguishes between indigenous and non-indigenous people who use coca, looking at the legal consequences for both groups and demonstrating a differentiated system in application of the law.

### ***Introduction***

Although coca (*Erythroxylum coca*) is prohibited in Chile, it is common to see small-scale, informal sale of coca leaves in the country, particularly in the north. *Pijchar*<sup>1</sup> coca is the most commonly known use for the leaf, but it also has medicinal purposes and is used in religious celebrations, including as symbolic offering. The religious syncretism between indigenous cultures and the Chilean population has extended the use of the coca leaf to the non-indigenous population, leading to a process of acculturation and the custom of *pijchando* coca spreading throughout the country.

The state's tolerance of coca, despite its prohibition, is not only the result of the strong and deeply rooted custom of indigenous people in Chile who use coca, but also through diverse legal norms in the country, which will be presented in this article, which guarantee the free development of indigenous peoples and their customs. Coca, however, does not grow in Chile because of geographical conditions. Coca grows in subtropical climates, not the arid desert of the Chilean Altiplano, which is why coca has to be brought into the country from Bolivia and Peru. Coca is required for cultural reasons (Aymara, Quechua or other), including rituals, religious feasts, offerings or medicinal uses, and this means trade in coca leaves. While small-scale coca leaf vendors in markets are generally free from legal hassles, the same is not true for those who transport the leaves. They are often detained and accused of drug trafficking if they

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<sup>1</sup> The indigenous words *pijchar*, *chacchar*, *acullicar* and *coquear* refer to chewing coca leaves, but these terms mean something more complicated than chewing. They refer to the practice of inserting a small quantity of dry coca leaves into the mouth, which form a kind of ball as they get wet. It is common to add some kind of "activating" agent, often sodium bicarbonate or a mixture of vegetable ash. The mass is then left in the cheek, continuously moistened by saliva. This article uses the term *pijchar* instead of chew because it is more precise and, in addition, it is the word used by indigenous communities in northern Chile.

enter the country with large quantities of coca leaves. This continues today, despite Circular N°643/2019, issued by the Agriculture and Livestock Service (*Servicio Agrícola Ganadero*—SAG), the agency in charge of agricultural health at borders, which allows coca to enter the country. The norm does not specify a quantity of coca leaves that can be imported and, in practice, enforcement is left up to the border officer. If the border officer considers the amount of coca to be excessive, the person transporting it will be detained. Traders will also be detained if they fail to declare the coca. The SAG is limited to sanitary control, while border officers can decide whether or not to start a legal process. This has created a climate of legal insecurity and uncertainty at the border, which is replicated throughout the Chilean court system. If the amount of coca is considered high by a judge, the crime of trafficking is applied. If the amount is deemed low and the citizen involved is an indigenous person, he or she is not charged based on legislation that protects the identity and customs of indigenous people.

As a result, if the individual is not an indigenous person, the justice system applies drug trafficking legislation, not legal norms for the customary use of coca. This leads to a double standard in application of the law, depending on whether or not the subject is an indigenous citizen.

The drugs seized most often by Chilean police are cannabis, cocaine paste and cocaine, with ketamine gaining ground in recent years. There are few documented cases of coca leaves being seized, which is why there is little jurisprudence on the issue and when cases do exist they generally involve the person transporting the coca. The legal fallout from these cases depends on whether or not the person involved is an indigenous citizen.

### ***Indigenous Citizens***

On December 20, 2006, the Calama Court of Guarantees,<sup>2</sup> in Chile's northern Antofagasta region, imprisoned two Quechua-speaking indigenous women who had migrated to Calama from the Bolivian Altiplano. They were found guilty of illegal narcotics trafficking for possessing 5.44 kilos of coca. The coca was going to be used several days later during the feast of the Virgin of Rosario of Cosca, which is celebrated on December 25. The two women were held for nearly six months in one of the few registered cases involving coca leaves. They were eventually acquitted. While the Calama Trial Court<sup>3</sup> acquitted the women, it did not include the defence arguments that the arrests were made because of a “error of prohibition” (unaware that they were committing a crime or ignorance of illegality), but instead determined that:

*“...the accused, despite their reproachable conduct, did this because of they were adhering to the forms and symbolism of their culture, which means that, in accordance with their conscience and internal rules of conduct, they did not have the intention to traffic coca leaves, but deliver them to an indigenous person who, as a believer, was going to use them in a religious feast.”<sup>4</sup>*

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<sup>2</sup> Case RIT N°6240-2006, RUC N°0600900213-6 of the Calama Court of Guarantees.

<sup>3</sup> Case RIT N°66-2007, RUC N°0600900213-6 of the Calama Trial Court.

<sup>4</sup> Recital 18 in the Acquittal Sentence RIT N°66-2007, RUC N°0600900213-6 of the Calama Trial Court.

The court placed special attention on religious syncretism in northern Chile, referencing Article 1<sup>5</sup> of Law 19.253, the Indigenous Law. The court maintained that the law provides state recognition of indigenous communities and that Article 54<sup>6</sup> provides guidelines for indigenous customary law to be considered law. The court used these articles to interpret what Chile's lawmakers determined is cultural amalgamation, which recognizes indigenous communities and their traditions. The acquittal stated that:

*“... in the conscience of the accused, their conduct did not violate the law, because it is common in their ethnic group that coca leaves would be consumed and used in these kinds of feasts, which has significant importance for the Aymara people both in their cultural development and their idiosyncrasies, all the more so when it is legally recognized in norms that have been cited here. As a consequence, the accused acted by incorrectly believing that they were covered by Article 10 in the 10th Criminal Code through legitimate exercise of a right, which impeded them from understanding the illegality of their conduct. It should be understood that they are not guilty for the action that resulted in this trial, an action that is illicit, because they lacked the element of awareness of the illegality of their behaviour, which in relation to the accused, was not present and, given that there is no guilt, then there is no crime.”<sup>7</sup>*

The Public Ministry, which is in charge of criminal prosecution in Chile, appealed the sentence, arguing that the court had erroneously applied the law. The Antofagasta Court of Appeals not only rejected the appeal, but stated in its ruling<sup>8</sup> that this case produced what is known in international public law as a “self-executing treaty provision,” given that it is constitutionally appropriate to apply Article 27 of the International Covenant on Civil and Political Rights<sup>9</sup> and the analogous Article 19, Clause 2 of the Chilean Constitution and, based on these norms, “minorities have incorporated into their legal rights non-discriminatory treatment and the broadest sense to practice their cultural life, customs, rituals, and ways whatever their nationality may be.”<sup>10</sup> In Recital 8 of the ruling, the court stated that the indisputable principal of the primacy of the reality of the community in Calama and the Bolivian Altiplano was at play, which determines respect for and cultivation of the traditions of their culture and their way of loving and living daily life.

This case was novel on several fronts. First, it is one of the few cases that involved an acquittal using indigenous legislation in the context of drug trafficking. Second, the court applied the law to foreign citizens, invoking the indigenous law to acquit the accused. Third, the Court of Appeals reiterated application of the indigenous law, establishing in a direct manner the “self-executing treaty provision.” This case points to the possibility of a positive future for cases involving possession, transportation and use of coca leaves in Chile given that the sentence established that the few laws passed related to indigenous protection have direct application and it eliminated criminal responsibility because of the right of indigenous peoples to use coca leaves in the context of religious ceremonies. The court understood that the conduct of the accused

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<sup>5</sup> See Appendix.

<sup>6</sup> See Appendix.

<sup>7</sup> Recital 18 of the Acquittal Sentence RIT N°66-2007, RUC N°0600900213-6 of the Calama Trial Court.

<sup>8</sup> Case ROL N°250-2007 de la Ilustrísima Corte de Apelaciones de Antofagasta.

<sup>9</sup> See Appendix.

<sup>10</sup> Recital 7 in Case ROL N°250-2007 of the Antofagasta Court of Appeals.

was framed in the legitimate exercise of a right. However, the decision regarding this case is still not reflected in the regular practice of Chile's criminal courts.

On May 12, 2023, nearly 17 years after this ruling and at time in when more laws for indigenous protections were being approved, the Court of Guarantees in María Elena,<sup>11</sup> also in the Antofagasta region, ordered the incarceration of two Aymara men from Bolivia who were accused of drug trafficking for possessing 113.85 kilos of coca leaves in the truck they were driving. They were bringing coca to the fairgrounds in Calama to sell it to other Bolivians to *pijchar*. The two men did not have criminal records. They were incarcerated for approximately one year and five months.

Seven appeals for a more lenient treatment were made during the time they were incarcerated, with each appeal focused on a defence from the indigenous laws, arguing for the legitimate exercise of rights, the error of prohibition and the absence of a crime. The defence team presented documentation showing that the men were Aymara, that they were involved in retail distribution and that the coca leaves were going to be sold to people from their culture and Chileans who, as a result of cultural and religious syncretism, also used coca, that they were not detained with any precursor inputs for processing cocaine paste or refined cocaine and that they had no intention of producing and selling drugs. The defence argued that the right of two men to practice their customs and develop their culture was protected by a set of norms specifically passed to protect the rights of indigenous peoples, including: a) Article 27 of the International Covenant on Civil and Political Rights; b) Article 54 of Law 19.253 on protection of indigenous development; c) Article 40 on the U.N. Declaration on the Rights Indigenous Peoples;<sup>12</sup> and d) Articles 2, 5 and 8 of the International Labour Organization's Convention 169,<sup>13</sup> which came into force in September 2009.

On two occasions, motions were presented to the same Court of Appeals in Antofagasta that 17 years earlier had upheld the acquittal of the two women. In this case, however, the court decided to maintain the pretrial detention order because there were no precedents to determine that such a large amount of coca was destined for ancestral cultural use or that it was going to be sold on the local market. It is noteworthy that the first case only included the norms referred to in points a) and b) above, while in the second case they added points c) and d), which were approved in Chile after 2006 and should have reinforced the indigenous defence in these two processes. The two men, considering the possibility of losing at trial and receiving sentences ranging from five years and one day to 15 years, decided to negotiate with the Public Ministry. They accepted a sentence of three years and one day that called for close supervision of their parole, but allowed them to avoid prison. Something very similar occurred with Case RIT N°86-2023, also in the María Elena Court, in which two indigenous citizens were arrested with coca for retail distribution. They also agreed to plead guilty to receive more benign sentences.

A typical case of someone arrested for coca involves an individual transporting the dried leaves. The legal response to these cases has been diverse and based on the court involved. Case RIT N°27-2015 in the Criminal Trial Court in Arica involved 16.85 kilos of coca and was dismissed as an "error of prohibition." It was determined that the

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<sup>11</sup> RIT 97-2023, RUC N°2300517067-2 of the María Elena Court of Guarantees.

<sup>12</sup> See Appendix

<sup>13</sup> See Appendix

accused was not transporting enough coca for it to be considered a crime, so the “crime” of trafficking did not apply. The court determined that the amount of coca was small and, therefore, innocuous. It could not be considered a public health risk. In Case RIT N°190-2012, however, the same court sentenced a trader for transporting 57 kilos of coca. It did not consider the “error of prohibition” and did not consider the exercise of legitimate right, because the trader could not specify the destination of the coca.

As can be seen, indigenous citizens who can show that they belong to an indigenous community and that the coca being transported is for retail or religious use, has a chance of being acquitted if the amount of coca is small. However, if the judge considers the shipment to be large, there is the possibility that the shipment will be considered raw material for cocaine or cocaine paste production and there is a high probability of a conviction, regardless of person’s indigenous heritage. In these cases, the legislation for indigenous protection would not apply.

In Case RIT N°5440-2022, heard by the 6th Guarantee Court in Santiago, a Bolivian from the Quechua culture was held for 10 months for possessing and transporting 500 kilos of coca that was going to be sold to Bolivian farmers living in central Chile. While this represents one of the largest seizures of coca leaves in Chile, it would only cover the amount needed for *pijchado* for 500 workers for two months. The accused took a plea bargain, accepting conditional release, because he was likely to be found guilty of transporting raw material for cocaine production.

It is obvious from these cases that the amount of coca, even if no specific quantity is established, is the predominant criteria for the judiciary to distinguish between legitimate right and abuse of the law, the first resulting in acquittal, the second in conviction, in cases involving indigenous citizens.

### ***Non-Indigenous Citizens***

The more favourable and special legal treatment offered by norms for indigenous peoples is much different from the legal framework applied to non-indigenous citizens in similar cases. The coca leaf is prohibited for the non-indigenous population and it is treated like any other illicit drug in Chile. The quantity of drugs involved is the primary criterion for classifying conduct either as trafficking or small-scale trafficking or for personal use. The determination of the amounts in the criminal code, however, is not specified and is left up to the court to decide. Courts tend to rule that up to 10 grams is for personal consumption, between 10 and 100 grams is trafficking, but this might be considered micro-trafficking in one court could be considered something altogether different in another court.

With respect to the regulatory framework, the crimes referred to above are included in Law 20.000, the Illicit Narcotics Trafficking Law. Article 1, Clause 1 of the law penalizes anyone who *makes, produces, transforms, prepares or extracts substances or narcotic or psychotropic drugs that produce physical or mental dependency capable of causing serious toxic effects or considerable damage to health, without proper authorization*. Clause 2 in Article 1 penalizes people who have the same conduct but with other *drugs or substances that do not produce the same effects as indicated above*, thereby constituting a lesser crime.

Decree 867, of February 19, 2008, set out the implementing by-laws for Law 20.000. It establishes the list of illegal drugs in Chile. Article 1 lists the substances that Law 20.000 includes as causing serious effects, while Article 2 includes those that do not produce harmful effects. Coca is listed under Article 2.

Article 3 of Law 20.000 establishes that the crime of drug trafficking is applied to those individuals who do not possess proper authorization to *import, export, transport, acquire, transfer, extract, possess, supply, store or carry* these substances or raw materials. Article 4 regulates the crime of micro-trafficking, which applies to anyone who possesses, transports, stores or carries small quantities of substances or narcotic or psychotropic drugs that produce physical or mental dependency or the raw material used to obtain them, whether addressed in Clauses 1 or 2 in Article 1 unless *they are for medical treatment or for personal use or consumption in a specific period of time*. The law also penalizes whoever *acquires, transfers, supplies or facilitates* small quality of these substances, drugs or raw materials to produce them if they are consumed or used by others.

An analysis of the language used to describe the crimes of drug trafficking in Chile leads to the conclusion that personal consumption of any drug is permitted, whether for medical use or personal and exclusive consumption in the short term, while acquiring, buying or possessing them is prohibited. Consumption is also regulated in Article 50 of Law 20.000, which lists three kinds of crimes related to consumption, including: a) consumption of drugs or narcotic or psychotropic substances referred to in Article 1 *in public spaces or spaces open to the public, such as streets, roads, plazas, theatres, movie houses, hotels, cafes, restaurants, bars, stadiums, dance or music halls, or educational or training centres*; b) possession in the places referred to above for *exclusive personal use or consumption in the short term*; and c) *consumption of these drugs in private spaces or places if they have been contracted specifically for this purpose*. The norm concludes that *use, consumption or possession* of some of these substances is justified for medical treatment.

As can be seen, the only legally permitted figure for consumption of coca leaves in Chile, similar to any drug considered illegal, is “personal consumption in a private manner,” but it is not possible to buy, carry or supply a drug, even if it is for personal use or consumption in a determined period of time. They can only be consumed by someone who is alone and in a private setting.

The only legal way to acquire a prohibited drug in Chile is through cultivation, which is regulated in Article 8 of Law 20.000. Two things are required: Authorization from the Agriculture and Livestock Service and that the plants are for personal and exclusive use in a specific period of time, with criminal penalties for failing to adhere to the conditions in Article 50 and following article. The legislation has special treatment for cannabis, which can be grown for medical treatment, but a prescription is required.

## ***Conclusion***

The coca leaf is considered an illicit drug in Chile and, therefore, prohibited, with the exception of certain cases for personal consumption. However, given that its use is public and widespread in northern Chile because of the large indigenous population,

police officers do not detain people who carry, publicly consume or sell coca in small quantities.

The people criminally affected by the prohibition are traders who transport coca into the country, normally from Bolivia or Peru. Traders are important figures, because they supply small-scale retailers, thereby facilitating sale and consumption of the leaf, which for many is sacred and represents a fundamental element of the culture of people who live in Chile, where it is impossible to grow for geographical conditions.

The cases analysed demonstrate that in Chile there is a differentiated system for applying the law based on whether or not the person is an indigenous citizen. Only those who are of indigenous descent would be able to receive a favourable verdict in a criminal hearing involving trafficking of coca leaves if the quantity is not considered sufficient to be used in drug production, but for small-scale retail sale or religious purposes. While a specific quantity is not determined, the cases analysed show that around 15 kilos are considered a non-threatening quantity. In cases with amounts greater than 15 kilos, even if they involve an indigenous citizen, the trader is likely to be considered as someone transporting coca for cocaine or cocaine paste production.

While the “quantity of drugs” is the determining factor to decide whether or not the conduct falls within indigenous laws, or in the case of a non-indigenous citizens, to determine the hypothesis of consumption or trafficking, the criterion of quantity is not regulated in any legislation and is left to the discretion of the court.

Although laws have been approved in recent years to protect indigenous culture and customs, the application of these laws by the courts in cases that concern coca leaf does not bode favourably in the effort to address this conflict. It is not a priority for lawmakers and the only bill currently in the system is aimed at regulating the right, without distinguishing between citizens, to carry, use, transport, acquire, supply, possess and consume dry coca leaves without any threat of legal penalty. The bill was included in Docket 16381 in 2023. It is still in the initial constitutional stage, without much chance to become a law.

## APPENDIX

**Article 1 of Law 19.253:** The state recognizes that indigenous peoples in Chile are the descendants of human groups that have existed in national territory since pre-Columbian times and who conserve their own ethnic and cultural manifestations and for whom the earth plays a fundamental role in their existence and culture.

The state recognizes the following principal indigenous peoples or ethnic groups in Chile, including the Mapuche, Aymara, Rapa Nui or Pascuense, Atacameño, Quechua, Colla, Diaguita, Chango, Kawashkar o Alacalufe, Yámana or Yagán of the southern channels, and Selk'nam. The state values their existence, as well as their integrity and development, according to their customs and values, as an essential part of the roots of the Chilean nation.

It is the duty of society in general and the state in particular, through its institutions, to respect, protect and promote the development of indigenous peoples, their cultures, families and communities, adopting the proper measures for these ends and to protect indigenous lands, guarantee their adequate use for ecological balance and expansion.

**Article 54 of Law 19.253:** The customary law of an indigenous group prevails unless it is incompatible with the Chilean Constitution. In relation to a criminal proceeding, customary law will be considered when it can serve as an antecedent for application of an exemption or extenuating circumstance for responsibility.

When customary law must be accredited in a trial it can be proven by all measures allowed by law, especially in the expert report that should be presented to the court.

### **Article 27 of the International Covenant on Civil and Political Rights**

In those states in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language.

### **Article 40 U.N. Declaration on the Rights of Indigenous Peoples:**

Indigenous peoples have the right to access to and prompt decision through just and fair procedures for the resolution of conflicts and disputes with States or other parties, as well as to effective remedies for all infringements of their individual and collective rights. Such a decision shall give due consideration to the customs, traditions, rules and legal systems of the indigenous peoples concerned and international human rights.

### **Article 2 of the International Labour Organization's Convention 169**

1. Governments shall have the responsibility for developing, with the participation of the peoples concerned, coordinated and systematic action to protect the rights of these peoples and to guarantee respect for their integrity;
2. Such action shall include measures for ... (b) promoting the full realization of the social, economic and cultural rights of these peoples with respect for their social and cultural identity, their customs and traditions and their institutions...;

### **Article 5 of the International Labour Organization's Convention 169**

In applying the provisions of this Convention:

- (a) the social, cultural, religious and spiritual values and practices of these peoples shall be recognized and protected, and due account shall be taken of the nature of the problems which face them both as groups and as individuals;
- (b) the integrity of the values, practices and institutions of these peoples shall be respected;
- (c) policies aimed at mitigating the difficulties experienced by these peoples in facing new conditions of life and work shall be adopted, with the participation and co-operation of the peoples affected;

### **Article 8 of the International Labour Organization's Convention 169**

1. In applying national laws and regulations to the peoples concerned, due regard shall be had to their customs or customary laws.
2. These peoples shall have the right to retain their own customs and institutions, where these are not incompatible with fundamental rights defined by the national legal system and with internationally recognized human rights. Procedures shall be established, whenever necessary, to resolve conflicts which may arise in the application of this principle.
3. The application of paragraphs 1 and 2 of this Article shall not prevent members of these peoples from exercising the rights granted to all citizens and from assuming the corresponding duties.