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COLLECTIVE LAND TENURE IN COLOMBIA: CURRENT STATE AND PROSPECTIVE CHALLENGES

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Abstract

This presentation intends to introduce the current situation of the recognition of and legal protection to *collective land tenure* in Colombia, and the prospective challenges that such institution faces in the context of the country's transitional justice and peacebuilding project. In order to provide a comprehensive depiction of this institution, the presentation will first introduce a series of ideas that inspire the current state of the legal protection to collective land tenure in Colombia. Next, a brief historical account of the phenomenon is included so as to contextualize the evolution of the safeguarding given to particular social groups within the country, and provided the advancement of progressive changes in social, political and economic dynamics. Further, the current legal framework for the protection of collective land tenure in Colombia is systematically presented. Finally, a number of prospective challenges within the realm of transitional justice and peacebuilding project are discussed.

Key Words: Collective land tenure; Colombia; ethnic communities; human rights; legal protection.

1. Introduction

This presentation intends to introduce the current situation of the legal protection to *collective land tenure* in Colombia, as well as the prospective challenges that such institution faces in the context of the country's transitional justice and peacebuilding project. It comprises the main results of a research project funded by

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Nowadays, the idea of protecting collective land tenure in Colombia seems to be intimately linked to the country's national project: the consecutions of a *social rule of law state*, which is defined by democracy, participation, pluralism, and human rights[1]. This aspiration is projected on a diverse, multicultural, and pluri-ethnic society, which is characterized by wide social inequalities, the use of violence to settle conflicts and corruption. Under such context, the encounter and dialogue between a social vision of property, on the one hand, and the recognition of specific entitlements to ethnic groups and the peasantry, on the other, derives in the legitimation of a safeguarding to collective land tenure. This implies the progressive development of norms, institutions and procedures to assure legal protection.

How and under which grounds such -political, social, and legal- recognition consolidated in Colombia? When the law is no longer seen as a static and timeless structure, but as part of a process in which diverse actors, norms, and procedures intervene, these inquiries emerge to supplement research attempts to provide a diagnosis of the current state of the legal protection offered to collective land tenure in the country. Therefore, a characterization of the content and extent of the corresponding legal regime should be infused with a historical account under which it emerged and consolidated. This is, how the legal protection to collective land tenure was embedded in the Colombian constitutional order, thus acquiring juridical entity, social recognition and political representativeness.

In order to provide a comprehensive depiction of this phenomenon, the presentation will first provide a brief historical account to contextualize the evolution of the safeguarding given to particular social groups within the country, and provided the advancement of progressive changes in social, political and economic dynamics. Next, it will introduce a series of ideas that inspire the current state of the legal protection to collective land tenure in Colombia. Further, the current legal framework for the protection of collective land tenure in Colombia is systematically presented, using a methodology proposed by Edella Schlager and Elinor Ostrom (1992) to study the nature and extent of property rights regimes. Finally, a number of prospective challenges within the realm of transitional justice and peacebuilding project are discussed.

2. Historical evolution of collective land tenure in Colombia

[1] See *Constitución Política de Colombia*, preamble and art. 1-2.

While a proper legal structure of protection to collective land tenure in Colombia can be identified with the promulgation of the 1991 Constitution, the recognition of territorial entitlements to ethnic communities dates back to the *Colony*. The territory that nowadays belongs to the country was administered by the Spanish Empire, which created the figure of the *resguardo* (land reservation) around 1595 to limit the systematic annihilation of native peoples and keep control over their actions, as well as to allow access to low-cost labor and natural resources to the Spanish landowners (McGreevy, 1971). While the communities did not have proper rights over the territories they inhabited, the legal figure sought to exclude external interventions that could affect their existence under traditional parameters. On the other hand, the afro-descendent population that arrived in this territory during such period were considered as slaves. Therefore, they did not receive any kind of recognition as right-holders nor the lands they occupied acquired a particular status.

The independence of the country in the early XIX century entailed the construction of a national project that sought to homogenize Colombian population towards unity. Under such context, the *resguardos* were intended to be reduced, aggregated, or abolished. The purpose of this was twofold; on the one hand, transform indigenous peoples into "rural civilized communities", which in any case would serve the economic dynamics of an incipient accumulation of lands; and on the other, facilitate access to the reserved lands in favor of the incipient Colombian elites and their *haciendas.* Law 89 of 1890, which regulated the recognition of collective land tenure in favor of indigenous communities until the promulgation of a Constitution in 1991, established the *cabildo* as the governance unit for the *resguardos*, and included a procedure towards the administration of the figure under the premise of their progressive dissolution. Nevertheless, the emergence of an indigenous movement and consequent actions of resistance –prominently around the figure of Manuel Quintín Lame in the south of the country– impeded the definitive eradication of the institution within the country.

3. Basic statements

Three basic statements related to the current state of the legal protection of collective land tenure in Colombia are here included: *the right to territory; global influences; and social and judicial mobilization.*

3.1. The right to territory

The *right to territory* is considered as a fundamental concept to define the current configuration of the legal protection to collective land tenure in Colombia. It entails an integral view on the recognition of such institution, which is depicted as a representative -social, political, and economic- dynamic of the country's

national project. Its formulation and further evolution is one of the greatest achievements of the 1991 Constitution, which illustrates the consecution of and apparent consensus as to its association with the principles and values that supports the Colombian state. Two consequent ideas result from this formulation:

- With regards to the right to territory, it should be seen as a reparatory measure in favor of ethnic groups. In this regard, it recognizes the symbolic relevance of their historical vulnerability. This explains the development of particular legal mechanisms to safeguard their cultural integrity, autonomy, and human rights, which articulate around the protection of their lands and particular ways of interaction with them.
- The *social function of property*, a principle included in the 1991 Constitution, crystalizes in the recognition of collective land tenure by means of both specific protection offered to peoples or social groups, and the imposition of restriction to access to and enjoyment of private property in case it might affect collective interests. This means that the regulatory capacity of the state serves the abovementioned social function, so affirmative actions towards the safeguarding of collective entitlements emerge.

3.2. Global influences

The emergence of a legal system for the recognition and protection of collective land tenure in Colombia is highly influenced by international -political and legal- processes. While the International Labor Organization's Covenant 169 had a definitive impact on the constitutional process of 1991, the United Nations' Declaration on Indigenous Peoples influenced the development of a series of domestic norms that expanded what the Constitution mandated. The latter dynamic is crystallized in the recognition of a direct link between the rights to territory and the survival of ethnic groups, which should be supported through the development of legal means of protection. Likewise, certain global processes in the grounds of environmental protection influenced the configuration of domestic figures that advanced on the safeguarding of the people's surroundings.

3.3. Social and judicial mobilization

The emergence of –transnational and local- social movements that represent indigenous peoples, afro-Colombian communities, and peasants, is a key factor to explain the recognition of the right to territory and the consequent development of legal mechanisms of protection to collective land tenure. Likewise, within the country's constitutional and transitional realms, the role of judicial activism has been important to define the content and extent of the right to territory. Particularly, important judicial decisions have established

regulation on how the protection to collective land tenure interacts with both domestic and international regimes in the grounds of human rights.

4. Current state of collective land tenure in Colombia

The current state of collective land tenure in Colombia is presented through the revision and systematization of 26 norms that were produced after the promulgation of the 1991 Constitution. The analysis is based on five main categories of tenure rights: ***access, withdrawal, management, exclusion, and alienation*** (Schlager and Ostrom 1992; RRI 2012).

4.1. Access

Access is understood as the capacity to enter a defined physical property. Having this right to enter or pass through a particular space is the most basic tenure right and is closely linked to its opposite: the right to exclude or deny another party access to a particular resource (RRI 2012, 15).

4.1.1. Access in favor of indigenous communities

Law 21 of 1991 incorporated the principles contained in ILO Convention 169 for the "recognition of the aspirations of indigenous and tribal peoples to take control of their own institutions, forms of life, economic development, maintain and strengthen their identities, languages, and religions" (ILO, 1989). The right of access to property and the allocation of land are associated with purposes such as the coverage of vital minimums; the respect of cultural and spiritual dimension; and the access to conditions of equity in comparison to other sectors of the population. Decree 1088 of 1993 instituted *cabildos* and indigenous authorities as associations with legal personality, and stipulated registration guidelines before the General Directorate of Indigenous Affairs, which is the institution responsible for issuing the respective certificate of the territory where the requesting community exercises jurisdiction –the *resguardo*. These rules are based on a legal presumption of the property rights of indigenous communities, even though they did not occupy the lands but traditionally had access to them. The Colombian Institute for Agrarian Reform (INCORA), which had been exercising functions over public lands since 1961, acquired the function of providing indigenous and Afro-descendant communities with land, as well as verifying compliance with the ecological function and social preservation of the ethnic group.

Recently, Decree 2363 of 2015 created the National Land Agency, thus replacing the previous authority on the matter -INCODER. The Agency is in charge of implementing a public policy focused on the attention

to ethnic communities through programs of collective land titling, constitution, expansion, sanitation, restructuring, acquisition, expropriation, demarcation, clarification, and improvement.

4.1.2. Access in favor of Afro-Colombian communities

The 1991 Constitution provided for the promulgation of a law that recognizing afro-Colombian communities that have been occupying vacant lands in the rural areas of the rivers of the Pacific Basin, in accordance with their traditional production practices, the right to collective ownership over such areas. In that regard, Decree 1232 of 1992 created a Special Commission for the afro-Colombian communities with the objective of proposing programs to promote their economic and social development. In addition, like the indigenous communities, it provided for the preservation of their cultural identity. This decree set an important precedent for the further development of Law 70 of 1993, with the objective of formalizing a system of political authority and autonomy -the community councils- and the legalization of their territory, which was considered as vacant lands. Article 4 sets up a procedure for the adjudication of such lands, while article 16 establishes the gratuity of collective titling processes and article 22 indicates the procedure of relocation and titling in cases in which some communities were located in territories to be declared as National Natural Parks. Later on, by means of Decree 1745 of 1995, community councils were established as the maximum internal authority within the lands of Afro-Colombian groups and were assigned legal personality in order to facilitate collective land tenure.

4.2. Withdrawal

Withdrawal or exploitation is understood as the right to obtain products of a resource, and is perhaps the most important right for communities that interact with the territory for their livelihoods (RRI 2012, 16).

4.2.1. Withdrawal in favor of indigenous communities

Law 21 of 1991 stipulates the State's ownership of minerals and subsoil resources. However, it points out that their withdrawal should be conducted under the principle of prior consultation with ethnic communities. In this regard, priority over withdrawal is given to the communities for the access and use of resources within their jurisdiction, in order to conduct traditional activities of resource utilization for crafts, ancestral practices, self-support and self-sufficiency. Later on, article 85 of Law 160 of 1994 established limitations to forestry exploitation within preserved areas inhabited by indigenous peoples, in accordance with their traditional uses and practices. Articles 61 and 62 of Law 21 provide for the creation of areas of ecological interest, and designate Regional Autonomous Corporations to grant or deny environmental licenses to conduct mining activities within these areas. In addition, the Mining Code (Law 685 of 2001 in article 35)

sought preferential access in the granting of mining titles to ethnic communities. In particular, articles 35, 122, and 124 mention the priority that indigenous communities have to obtain licenses and concessions on mineral deposits and deposits located in their territories.

4.2.2. Withdrawal in favor of afro-Colombian communities

Law 70 of 1993 protects the use of resources on waters, beaches, riverbanks, watersheds, terrestrial and aquatic fauna and flora, for self-sustenance, food, fishing, industrial, semi-industrial or sports exploitation by the Afro-Colombian communities. The *ecological-function* principle is formulated to shape the withdrawal of natural resources, so a consequent duty of protection and preservation of marine ecosystems is included. At the same time, the law establishes that is possible to grant common mining licenses to indigenous and afro-Colombian communities. However, the withdrawal of coal, radioactive minerals, salts, and hydrocarbons is not allowed. On the other hand, the Mining Code requires the authorization by the municipal mayor for the activity of *barequeo* in riparian areas.

4.3. Management

Management refers to the right to regulate internal use patterns and transform the resource by making improvements. The concept used to define management rights is broad and includes those rights that communities have to make decisions about the resources and territories for which they have recognized access and withdrawal rights (RRI, 2012, 17).

4.3.1. Management in favor of indigenous peoples

The adoption of ILO Convention 169 through law 21 of 1991 allowed five crucial changes in the understanding of the management of collective territories. First, cross-border communication between ethnic communities. Second, the responsibility of states to ensure planning and cooperation with ethnic groups concerning the management of the subsoil. Third, the duty of the state to determine whether resource extraction programs could adversely affect the interests of ethnic peoples. Fourth, the right to access the benefits reported by said activities, and to receive equitable compensation for any damages suffered as a result thereof. Fifth, prior consultation to empower ethnic communities in relation to extractive activities conducted within their territories. Through Decree 1088 of 1993, an important degree of administrative autonomy was granted to *cabildos* and other traditional indigenous authorities.

The Mining Code, for its part, indicates three aspects to consider. The first is the possibility that indigenous peoples have to sub-contract part or the entirety of the infrastructure works within indigenous mining areas.

Also, the right to economic participation in the benefits reported by the extractive activities to be developed in their territories is reaffirmed. Finally, the communities may discretionally decide on the places where mining activities can be are carried out within their territories.

4.3.2. Management in favor of afro-Colombian communities

In accordance with Law 70 of 1993, the afro-Colombian community councils are entitled to preserve and administer natural resources within their territories; delimit the territory; settle internal conflicts; and designate functions between their members. In that regard, prior consultation is a crucial figure in the administrative development of the territories. For instance, article 24 establishes that the monitoring of the stages of exploitation at forest concessions should be done by community authorities, and provides for a priority space where indigenous peoples may formulate proposals around these projects. In the case of extractive activities, it is said that exploration and exploitation must be carried out with the participation of the communities.

4.4. Exclusion

Exclusion is understood as the right to determine who will have an access right –and who cannot–, and how that right may be transferred. It is both a defensive tool —in that those who are doing the excluding intend to protect their land, water, harvests, or trees from external capture or abuse— or an offensive tool, in that a more powerful party can expel a weaker one from a disputed resource (RRI 2012, 18).

4.4.1. Exclusion in favor of indigenous peoples

With regard to the right to exclusion, including the legitimate exercise of violence for the defense of the territory, article 18 of Law 21 of 1991establishes that the law shall provide for both preventive means and appropriate sanctions against any unauthorized intrusion on the lands of ethnic groups or any unauthorized use by external persons.

In parallel, Article 69 of Law 160 of 1994 forbids the adjudication of vacant lands where indigenous communities are established, but only with the purpose of establishing new *resguardos*. In that regard, a period of three (3) years is established for the legal clarification of the indigenous reserves that have been constituted in forest reserve zones of the Amazon and the Pacific.

The Mining Code, on the other hand, requires that exploration or exploitation activities should not affect the cultural and socioeconomic values of ethnic groups, which can be considered as a measure of exclusion.

Likewise, it is specified where *bareque* mining is not allowed, including indigenous and afro-Colombian mining areas.

4.4.2. Exclusion in favor of afro-Colombian communities

Article 6 of law 70 of 1993 delimits the areas which can be adjudicated to afro-Colombian communities. In that regard, public property; urban areas of municipalities; renewable and non-renewable natural resources; indigenous *resguardos*; the subsoil; rural properties in which private property is credited; and national parks are excluded. Likewise, article 15 precludes the legal recognition of occupations carried out by persons that do not belong to afro-Colombian communities within their collective lands, nor to obtain the recognition of improvements, as they are considered as possessing in bad faith.

4.5. Alienation

Alienation is the right to sell, transfer, or lease one's rights to another entity. However, it has to be taken into account that for many traditional groups and communities, the idea of alienating their territories conflicts with their understanding of their relationship with land (RRI 2012, 19).

4.5.1. Alienation in favor of indigenous peoples

With regards to the right to transfer, transaction, and alienation of property rights, article 63 of the Colombian constitution establishes that collective lands cannot be taken away by proscription, seized or transferred. Law 21 of 1991 had set up a series of fundamental principles that modulate such provision: first, the right to transfer is allowed only within ethnic communities of the same family; second, such transfer should be consulted within the community; and third, there is protection from deception by third parties wishing to appropriate their territories. Nevertheless, later on article 13 of decree 1088 of 1993 explicitly prohibited any transfer of lands destined for indigenous communities. On the other hand, the Mining Code establishes that the extractive mining concessions that are granted to both indigenous and afro-Colombian communities are not transferable.

4.5.2. Alienation in favor of afro-Colombian communities

Like in the case of *resguardos*, Law 70 of 1993 states that territories belonging to afro-Colombian communities are only transferable to members of the community. Article 17 restricts any act of alienation and provides for the nullity of resolutions on licenses and authorizations of exploitation in lands that are in

the process of adjudication to such groups. For its part, decree 1745 specifies that the usufruct of the territories awarded must be destined to the preservation of the integrity and cultural identity of the same.

5. Prospective challenges: transitional justice and peacebuilding

Having presented the current structure of legal protection to collective land tenure in Colombia, it is necessary to introduce the current opportunities and challenges arising from the implementation of a transitional justice and peacebuilding project in the country. In order to take up the problems related to the internal armed conflict, Law 1448 was issued in 2011. This legal instrument was designed to guarantee the rights to justice, truth, and reparation of victims, as well as to establish the conditions necessary for further peace negotiations with insurgent armed groups.

From the acceptance of the existence of a conflict, and the assumption of particular responsibilities on the part of the Colombian state, it was decided to locate the victims of the conflict in the center of attention of the transitional project, in order to contribute in the generation of structural transformations in the country. Under such context, the land question was identified as one of the primary causes of the Colombian civil war, and it was determined that, as a remedy, an effective mechanism should be developed to restore land stripped to the rural population during and on the hostilities.

With Law 1448 of 2011 (the Victims and Land Restitution Law), a new model of intervention is initiated by the government. After 60 years of internal armed conflict, the aim was to retrieve the land that was taken from the victims. Therefore, the law assigns the function of restitution to a Special Administrative Unit, which is in charge of activating a procedure, with both administrative and judicial phases, that intends to facilitate the management of despoiled lands and the effective compensation of those affected by the associated conflict dynamics.

Taking into account the social and cultural particularities of the country, the land restitution component has particular chapters in the matter of the protection of the territory of the Colombian ethnic groups. In this regard, decrees 4633 and 4635 were issued for indigenous communities and Afro-Colombian peoples respectively. Considering that those groups were the most affected by the conflict, as well as the collective nature of their territorial rights, special procedures of collective land restitution were established. Seen from a holistic point of view, these procedures intend to assure the effective enjoyment of collective land tenure, and the associated rights to access, withdrawal, management, exclusion and alienation of ethnic groups in Colombia.

In the same direction, the peace accords signed between the Colombian government and the FARC in 2016 seek to generate structural transformations around the land issue. Point 1 of the agreement proposes a comprehensive rural reform, which contains provisions that seek to ensure that indigenous groups and Afro-Colombian communities have access to adequate and sufficient land to develop their traditional lifestyle. For this, procedures are established for access to uncultivated land, productive projects and other basic subsistence guarantees.

The transitional justice and peacebuilding project can be seen as a mechanism to definitively secure the legal protection of collective land tenure in Colombia, according to the constitutional basis of the social state of law and the protection of rights Ethnic communities. However, it is also true that with the implementation of these legal provisions will create tensions that could eventually affect the normal mechanisms for safeguarding the rights to access, withdrawal, management, exclusion and alienation of ethnic groups in Colombia.

5.1. Case of the indigenous community JIW (Resguardo La María, Guaviare, Colombia)

The Jiw community, of semi-nomadic tradition, traditionally traveled and lived in the middle basin of the Guaviare River, between the departments of Guaviare and the south of Meta. As a result of the peasant colonization of this region, and the way in which the state has intervened by establishing limits and frontiers to space, its mobility has been drastically reduced to *resguardos*. Especially, those who were qualified near Puerto Concordia, San José del Guaviare, and Mapiripán. In this process of colonization, where the Jiw have ended up "locked up" within the resguardos, the indigenous territorialization has clashed in a conflictive way with the peasant territorialization, which is fundamentally based on the adaptation of the forestlands for the Establishment of farms, crops and pastures.

These conflicting territorialities have generated different disputes regarding the access and use of different natural resources. Thus, the forests, lagoons and channels that the Jiw usufructed collectively and without restrictions, have been appropriated by the peasant territoriality. Therefore, the indigenous have constant difficulties to access fish resources, fauna and flora. These two groups use different ways of accessing hunting and fishing resources. This is the case, for example, of hunting. While the peasants use dogs and shotguns, the indigenous community do it with bows and arrows. In the case of fishing, the peasants use *trasmallos*, and the natives, hooks or bows and arrows. The different fishing techniques cause that peasants catch large amounts of fish in different bodies of water, be lagoons or rivers, leaving little fish to be captured by other techniques. These different ways of getting food in the nearby ecosystems put the indigenous people at a disadvantage compared to peasants to access natural resources.

The clash between the different forms of appropriation of territory and resources is evidenced not only around material resources for the survival of groups, but also around other types of resources and symbolic goods. This is the case, for example, of the rock paintings found in the *Serrania de la Lindosa*, which are claimed by the indigenous community as "sacred sites" where their traditional doctors used to do different rituals. With peasant colonization, and subsequently with the articulation of the region to the economy of tourist services, these sites have been appropriated by the peasants and have become "tourist sites" of which some inhabitants of the region derive their livelihood. During the working day it is evident that there is also this type of territorial conflicts for the access and use of symbolic resources.

In the context of these conflicts over access to and use of natural resources, and in the current conjuncture generated by the peace process and law 1448, the indigenous community have begun procedures to manage the expansion of their territories by means of collective land restitution. This has generated new conflicts. The legal processes towards restitution have generated uncertainty in the peasant populations bordering the resguardos, who see in these processes the possibility of losing their lands and improvements. On the specific case of the *resguardo La María*, the process of restitution of territorial rights to the Jiw people was coordinated at some time by FAO, and generated among peasants resistance to the process, because the terms of the land claim were only socialized and agreed with the indigenous community, and not with the peasants. For this reason, even some indigenous people assured that the restitution process was an "outrage" to the peasants of the region.

Among the issues highlighted in the field, it is clear that the current situation of land tenure and access to resources of the Jiw people is insufficient to meet their cultural needs. In this sense, it is possible to assert that the *resguardos* in which the Jiw people live, rather than securing their constitutional right to territorial autonomy, represent the concretion of different processes of dispossession legitimized in the law and in official cartographies.

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