

SMALL SCALE COASTAL FISHING AND THE CULTURAL RIGHTS OF ETHNIC COMMUNITIES IN COLOMBIA

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ABSTRACT

Diverse ethnic communities in Colombia practice artisanal fishing in coastal marine areas. The relationship of these communities with the ocean and fishing creates a dynamic addressed by the legal notion of territory. The ocean, however, is a public good under the domain of the State, and as such cannot be affected by any kind of property rights. Without recognition of their territorial rights in those areas, the communities are prevented from exercising any kind of control over the areas where they traditionally fish, and their ways of life are frequently disturbed by extractive activities, tourism development and even the creation of conservation areas such as marine national parks. This text examines how Colombian law and the Constitutional Court's jurisprudence view the cultural rights of ethnic communities whose territories contain portions of coastal marine areas.

Keywords: cultural rights; ethnic communities; indigenous peoples; marine territory; small scale fishing.

*PESCA ARTESANAL MARINHO-COSTEIRAS E OS DIREITOS
CULTURAIS DAS COMUNIDADES ÉTNICAS DA COLÔMBIA*

RESUMO

Diversas comunidades étnicas na Colômbia praticam a pesca artesanal em corpos de água marítimos costeiras. A relação dessas comunidades com o mar e com a atividade pesqueira configura dinâmicas que são juridicamente abarcadas pela noção de território. A zona marítima costeira, no

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entanto, é um bem público no domínio do Estado sobre o qual os direitos privados não incidem. Impossibilitadas juridicamente de exercer direitos de propriedade ou posse sobre porções territoriais marinho-costeiras, as comunidades étnicas pesqueiras são impedidas de exercer qualquer tipo de controle sobre as áreas em que tradicionalmente pescam. Essa situação as torna mais vulneráveis diante das atividades extrativas, ao turismo, ao desenvolvimento imobiliário, e à criação de áreas de preservação e parques nacionais em seus territórios. Usando o método de análise dedutiva, e com base na leitura de quatro casos de conflitos de pesca judicializados, este texto revisa o modo como a lei e a jurisprudência da Corte Constitucional colombiana tratam os direitos culturais das comunidades étnicas quando seus territórios abarcam zonas marinho-costeiras.

Palavras-chave: *comunidades étnicas; direitos culturais; pesca artesanal; povos indígenas; território marinho.*

INTRODUCTION

To several Palenquero and Raizal indigenous communities in Colombia, the small-scale coastal fishing is the main economic activity. Although these communities usually fish in coastal waters part of their ancestral territories, they cannot impose fishing restrictions or limitations on others, other than those imposed by the national legislation. Thus, a relevant number of domestic migrants in Colombia, in addition to those arriving at the Colombian Caribe coming from Venezuela, gained access to fishing areas belonging to these traditional communities, often with destructive tools or practices, resulting in conflicts related to the resource distribution and the well-being of communities (SAAVEDRA-DÍAZ; ROSENBERG; MARTÍN-LOPEZ, 2015; ALDANA, 2020). Even worse are the effects of the extractive industry over these territories, whether through the extraction, production, transportation, or storage of underground resources (mining, oil and gas, vessel handling, ports construction). Yet, when it comes to assessing the impact of these projects over the Colombians life conditions and well-being, the voices of fishermen are often ignored and their lifestyles are obliterated.

From the perspective of the ethnical fishermen communities, the sea and the coast are a continuity of the life spaces (MÁRQUEZ PÉREZ, 2019). This holistic view, however, has no room in the fishing regulation in Colombia. The sea is legislated as a space of international borders, trade routes, and as a hydrobiological source of economic resources. The coastal areas are non-appropriable public spaces, which prevents the recognition of territorial rights over these spaces. Even though the Colombian Constitution offers general protection to the cultural rights of the fishing ethnical communities, neither their traditional knowledge nor their fishing technology find protection under the laws that regulate fishing or the ocean space. According to the Colombian legal system, small-scale fishing is commercial or subsistence fishing. This view is far from the sensible perspective of the traditional fishing communities, who follow the sea rhythm and are versatile in shifting between the sea and the terrestrial lifestyle (SATIZABAL; BATTERBURY, 2019).

This article explores the way as the law and the jurisprudence of the Colombian Constitutional Court protect the cultural rights of ethnical communities over their territories, especially in relation to their traditional fishing ways, when these take place in sea-coastal areas of the country.

We are interested to know whether the Constitutional Court considers that the cultural rights of ethnical communities expand to the sea and – if they do – how are these rights conciliated with the ocean perspective of the Colombian State institutions. The method used was reviewing the Colombian legislation and the jurisprudence that somehow address the rights of the traditional fishing communities. We also reviewed the scarce literature about the indigenous communities and their relation to the coastal sea fishing in Colombia. Despite a couple of works studying the relation of Black communities with the sea-coastal fishing in the Colombian Pacific, and the relevance of fishing in the Raizales de San Andrés culture, not much has been written about the relation of fishing with the cultural rights of the indigenous and tribal peoples in Colombia, especially concerning rights related to the territory. The cases of four distinct ethnical populations engaged in small-scale fishing illustrate the issue, which remains largely invisible in the Colombian legislation.

1 COASTAL FISHING IN COLOMBIA

The Colombian law categorizes the coastal fishing, as subsistence, research, sports, and commercial fishing (COLOMBIA, 1990), different to the inland fishery. Depending on its ends, fishing volume, and equipment, the commercial fishing is either industrial or small-scale (COLOMBIA, 2019). The subsistence fishing has the aim of providing food for the fishermen and their families, although part of the capture – no more than 5kg – may be sold, while the fishing is legal in the entire Colombian territory (COLOMBIA, 2019). The small-scale commercial fishing is that carried out by fishermen with their personal and independent work through smaller fishing systems and arts. Their capture cannot exceed 40kg (COLOMBIA, 2019). Distinct decrees and regulations establish the rights for small-scale fishing.

The Colombian legislation regulating the small-scale fishing is quite fragmented, preventing a proper coordination of governmental activities and hindering the comprehension of the national fishing public policies by the local actors. For the past decades, five governmental institutions managed small-scale fishing in Colombia (SAAVEDRA-DÍAZ; ROSENBERG; MARTÍN-LOPEZ, 2015), and as of now, six ministries are managing this sort of activity, whereas the Ministry of Agriculture and Rural Development plays a central role.

The Colombian Constitution (article no. 332) establishes that all renewable and nonrenewable natural resources are a property of the State, who is responsible for guaranteeing its conservancy and sustainable use. Even though Colombia had signed it, the country has yet to ratify the United Nations Convention on the Law of the Sea (UNCLOS) (NACIONES UNIDAS, 1982). The Colombian Constitution, however, recognizes the international customary law regarding the territorial waters (territorial sea, contiguous zone, exclusive economic zone). The Colombian State has the domain over the hydro-biological resources in the territorial sea, in which it exercises full sovereignty, over its economic zone, and continental waters. The resources called hydro-biological are of public domain of the state and fishing activities, such as research, cropping, processing, and trade are of public and social interests and shall be managed by the State (COLOMBIA, 1990). In 2015, the Colombian Constitutional Court ruled that the fishing resources are analogous to the common goods, because they are not subject to the property rules, whereas the State has the duty of ensuring its management and creating rules for its conditions and access (COLOMBIA, 2015). The State also has the duty of protecting the food production, giving priority to the implementation and development of agricultural policies, fishing included (COLOMBIA, 1991, art. 65).

2 ETHNICAL COMMUNITIES AND MARINE RESOURCES IN COLOMBIA

The Colombian coast extends over 3,240 km in the Pacific and Atlantic Oceans (NACIONES UNIDAS, 2003). Small-scale fishing in Colombia happens both in coastal areas as in numerous river and lake bays, with an estimated participation of 160,000 fishermen (OECD, 2016). In 2016, the Universidad de Magdalena, in partnership with the National Authority of Aquaculture and Fisheries (AUNAP) conducted a small-scale fishing inventory in the country and found 21,885 economic units of small-scale fishing (except for the Archipelago of San Andrés, Providencia and Santa Catalina, and the Ciénaga Grande de Santa Marta). Of those, 17% are located in the Caribbean Sea, while 15% are in the Pacific (PARDO, 2017). The balance consists of small-scale inland fishing. Even though it is an activity with little impact over the Gross Domestic Product, it is an important asset for the domestic economy of nearly 20,000 families, providing them with an import protein source and ensuring food security (PARDO, 2017).

However, the official sociocultural data about the small-scale coastal fishing are scarce. Montalvo e Silva (2009) indicate that, from over 2,000 references of research projects on the Colombian coastal zone, less than 5% look at the region under a social perspective. Ninety-five percent of academic works about the sea in the country have either a commercial or a hydro-biological perspective (MONTALVO; SILVA, 2009). This causes the national institutions and the scientific community to see the Colombian shore mostly as an empty space regulated by national and regional policies of trade and integration (MONTALVO; SILVA, 2009). This perspective causes the lack of questioning of public policies conceived and implemented without taking the voices of people directly affected by them into consideration (BENNETT *et al*, 2020).

When we study the Law of the Sea in Colombian Law schools, we usually review the legal division of the ocean, the extend of sovereignty attributed to the States in each of the sea areas, or whether it is convenient or not to Colombia to finally ratify the UNCLOS (NACIONES UNIDAS, 1982). In academic discussions related to the International Court of Justice (ICJ, 2012) ruling, the consequences of fishing and the use of other sea resources by the State are usually considered, with little questioning about the low control the local populations have in the definition of State policies affecting them.

The invisibility of fishing communities and the human rights related to this activity have a direct impact over the quality of life, placing them in one of the weakest ends of the Colombian economy and society. In 1992, the Constitutional Court recognized that, in spite of small-scale fishing cater for the national consumption of sea food, it is one of the most marginalized activities in the Colombian economy. As the Court described it (COLOMBIA, 1992):

Different ethnic groups engage in small-scale fishing on the shores of both oceans, on riverbanks, and on the margins of marshes and estuaries. The small-scale fishermen across the country suffer the impact of common issues that condemn them to a low life standard. Industrial water pollution, coastal owners who block free access to the margins or the beaches, the drying of the marshes for cattle-stocking or agriculture, the uncontrolled intensive fishing explored by national or foreign vessels, and the and usury by middlemen are some of the problems that place Colombian fishermen among the poorest population groups; with the least capacity to generate income.

Indeed, the small-scale fisherman usually earns less than the minimum wage and depends on the economic and social benefits of the country.

Consolidated data on the number of fishermen families who are beneficiaries of several social assistance programs in Colombia are not available to the public. The legislative initiative related to the protection of their rights tend to be forgotten during the legislative processes and, to this date, the small-scale fishermen in Colombia have no special regime to protect their social rights, nor offer economic alternatives for the closed season. This rise their vulnerability, especially in the ethnic communities, which may be up to 15 times more dependent of fishing than non-indigenous communities (BENNETT *et al.*, 2020), and whose fishing is not only a mean for material subsistence, but rather a part of their well-being views.

3 INDIGENOUS PEOPLE IN COASTAL AREAS

Colombia has no ethnographic study showing which indigenous peoples or communities, Raizal and/or Palenquero, include the sea in their territoriality, nor how national policies affect the exercise of their territorial rights in the sea. In a document about the impact of violence on the indigenous peoples territories, the United Nations identified several coastal and riverside communities where fishing is a crucial element in their dietary habits and culture. The indigenous communities identified in the coastal areas are the Awá Kaiker (Nariño, Pacific Ocean); the Tule/Cuna (Urabá, Antioquia and Chocó, Pacific Ocean); the Embera Chamí (Risaralda, Pacific Ocean); the Emebrá Dobidá (Chocó, Pacific Ocean), the Zenues (Córdoba, Pacific Ocean), the Emberá Katio (Antioquia, Córdoba, and Chocó, Pacífico), the Wounnan (Chocó, Pacific Ocean), the Kogui (Magdalena, Caribbean Sea), the Arhuacos (Magdalena, Caribbean Sea), and the Wayúu (Guajira, Caribbean Sea) (NAÇÕES UNIDAS, n/i). The Taganga people (Magdalena), recently recognized as indigenous community by the Ministry of the Interior (2020) is fighting to protect their fishing rights, as we will discuss further ahead.

To illustrate the challenges related to the lack of protection of sea territories by the ethnical peoples, we will now present four socio-legal conflicts related to the small-scale fishing in Colombia.

3.1 The Wayuu de La Guajira

The Wayuu people, the largest indigenous people in Colombia, are located in La Guajira Department, on the Caribbean Sea and bordering

Venezuela. Their traditional continental territory encompasses nearly 1.080.336 ha located in the border of the Alta and Media Guajira. Living in the most desert area of the country, small-scale fishing and grazing activities are the main sectors of their economy and the guarantee of protein in their diets. Colombia Law, however, does not recognize any part of the ocean as being covered by their traditional territory.

In addition to the exodus from the past century due to agricultural colonization schemes, these people currently face the disastrous impacts of El Cerrejón, one of the greatest open-pit mines in the world, whose project covers a 69.000 ha area in the southern La Guajira (CERREJÓN, 2009). The mining titans BHP Group, Anglo American, and Glencore own El Cerrejón.

Some of the communities directly affected by the Cerrejón project refused to leave their territories. As of now, their members have severe health conditions, presenting skin rashes, hearing impairment, food deficiencies, and reduced mobility. The Wayuu houses in the mining influence zone are made out of mining residues, given the materials with which they built their houses were left inside the portion of land closed by the mining (LA LIGA CONTRA EL SILENCIO, 2019). Furthermore, the installation of the mining implied a modification in the Ranchería riverbank, aggravating the drought in their desert territory and causing an epidemic of malnutrition and infant mortality of alarming severity. In 2015, the Inter-American Commission on Human Rights advised the Colombian State to guarantee the access and quality of health care services to children and adolescents in the Wayuu communities, ensuring their immediate access to drinking water and nutritious food (CIDH, 2015). In 2017, the CIDH expanded the scope of the precautionary measures to include pregnant women and nursing mothers in the protection rights (CIDH, 2017). In June 2020, Wayuu women, concerned with their sick children, presented an urgent notice to the United Nations Special Rapporteur on Human Rights and Environment and to the UN Working Group on Business and Human Rights, declaring that their vulnerability, caused by the mining project, is aggravated by the COVID-19 pandemic, given the emission of granulated material by the mining operations (LOS WAYUU ALERTAN..., 2020).

To the Wayuu, the sea is intimately related to their spirituality in its several modalities of navigation and fishing, and in their ancestral knowledge of day and night fishing. These perspectives establish a complex notion of territoriality entirely ignored by the State (MONTALVO; SILVA,

2009). In different interviews with anthropologists from the Universidad de Magdalena, the Wayuu expressed their lack of comprehension and frustration because the national law kept them from fishing in the sea, while allowing the capture of huge fish amounts by large fishing vessels (MONTALVO; SILVA, 2009).

In 2016, the community media outlet Wayuu Luna Dos, located in the Cabo de la Vela sector, filled a request for relief against the Colombian State for not being heard about the Integrated Management Plan related to the expansion of the Bolívar Port, a part of the Cerrejón project. After analyzing the case, the Court decided that the monitoring of the process should be tolled until the State conducted a consultation in accordance with the international law. The Court understood that there has been a direct impact of the project over the community, while also arguing, however, that direct effects of a project against the rights of an indigenous community is not necessarily synonym with a territorial impact:

What constitutional jurisprudence has been emphatic about is that direct impact is not synonymous with impact on territory, nor that territory equals physical space. The latter is only one of many hypotheses that allow consultation in concrete cases (COLOMBIA, 2016, p. 19).

Later, the Court recognized that fishing practices are part of the indigenous territoriality, although – once again the Court argued – this territoriality not always coincide the entitled territorial space:

[...] the concept of collective territory is not limited to civil law concepts: the state recognition of territories and the delimitation of their area constitute relevant mechanisms for the protection of indigenous lands. However, collective territory is not a spatial concept, but a cultural concept (the community's sphere of life) instead. And, consequently, it can have an expansive effect, aiming at the inclusion of spaces of social, cultural and, religious relevance for the communities" (Sentencia C-389 de 2016 *apud* COLOMBIA, 2016, p. 27).

In 2012, the Constitutional Court had already ruled on the right to a healthy environment and the participation of a fishermen association in the decision-making processes related to the construction of a road that kept them from freely accessing the beach to perform their activities. Even though the Court does not use the notion of territory, it mentions some of its elements and dynamics, understanding that when it comes to

[...] groups of people who are permanently engaged in fishing in order to have food security and economic means for their families, [...] *the area of the sea or beach they use for fishing becomes a vital space*. Thus, the fishing area and the fishing trade

are connected to the food sovereignty of these communities, which is yet another reason to ensure their participation in the decision-making process and in the design of compensation measures (COLOMBIA, 2012, emphasis added).

The International Labour Organization (ILO) clearly stated the distinction between the notion of territory and entitled lands. The Article 13 of the 169 ILO Convention (rectified by Colombia in 1991) established that “The use of the term lands in Articles 15 and 16 shall include the concept of territories, which covers the total environment of the areas which the peoples concerned occupy or otherwise use” (OIT, 1989). The concept of land, according to the ILO, “usually covers the entire territory they use, including forests, rivers, mountains, and seas, and their surface and underground” (OIT, 2003). Thus, ocean portions that are traditionally occupied, or whose resources are traditionally used, by the indigenous peoples are part of their territory, despite an official title protecting this use or occupation.

Indeed, this lack of formal recognition of a territorial relation among certain peoples and specific areas of the ocean that keeps them from protecting this territoriality. By defining the sea as a public good to which no ownership title of any sort may be granted, this part of the ethnical territory stands unprotected, which, in its turn, causes other violations of their continental territory related to the right to food and to the preservation of their culture, among other rights.

Although the Constitutional Court be reluctant in more clearly and unequivocally establish the territorial relation between ethnical peoples and sea sectors, and in ordering others to refrain from acts that violate this relation, it has done it already concerning the relation between these peoples and the continental water bodies. In 1993, the Court analyzed a case of deforestation in Emberá-Catío lands that affected the Charedajó River, traditionally accessed and used by the Emberá-Catío people. The Court observed that, given the interdependency between the population and the ecosystem, the lack of action by the State could contribute for an ethnocide. The Court ruled that a company who engaged in deforestation activities to “restore the natural resources affected by the illegal logging that occurred in the reserve of the Emberá-Catío indigenous community on the Chajeradó River between July 1998 and November 1990” (COLOMBIA, 1993). The Court presented the following argument:

The close relationship between a balanced ecosystem and the survival of the indigenous communities that inhabit tropical forests transforms the environmental deterioration factors produced by deforestation, sedimentation, and river pollution [...] into a potential danger to life and cultural, social and economic integrity of minority groups that, given their ethnic and cultural diversity, require special protection by the State [.] the inactivity of the State, after causing serious damage to the environment of an ethnic group, given the biological interdependence of the ecosystem, may passively contribute to the perpetration of **ethnocide**, which consists of the forced disappearance of an ethnic group [...] through the destruction of its living conditions and belief system. From a constitutional point of view, the omission of the duty to restore natural resources [...] constitutes a direct threat to the fundamental rights to life and the unforced disappearance of the Emberá-Catío indigenous community (COLOMBIA, 1993, emphasis in original).

In another occasion, after analyzing a case in which some land owners in the coastal shore tried to block the access of small-scale fishermen to the sea, the Court understood that, when two progress views have a practical dispute (hospitality industry *versus* small-scale fisherman), the conflict of interest must be resolved in the light of the principles of the plural democracy and of the participation of all in the general prosperity of the country (COLOMBIA, 1992). In this sense, the Court ruled that the coastal land owners

[...] cannot block sea access through their properties when there are no other ways to reach the coast due to the characteristics of the area. Businessmen who acquire large land plots adjacent to beaches in order to legitimately carry out hotel activities cannot block access to the sea under the pretext that there are other places of access. The burden imposed on the inhabitants of the coastal zone by this requirement lacks constitutional and legal justification. In particular, motorized access roads to the sea in marshy areas constitute an essential element for the integral development of fishing activities, the *preservation of a diverse cultural form*, and the free use of public goods for the benefit of the entire population (COLOMBIA, 1992, emphasis added).

Among others, this interdependency between the traditional activities that occur in certain sea areas and the preservation of a diversified form of culture is what configures a territorial relation. That is, even though the Constitutional Court does not unequivocally recognize the existence of a territorial relation between the ethnic peoples that traditionally access the sea resources and the areas in which such access occur, in the aforementioned rulings, the Court points to and develops the elements of this relation.

Despite the existence of a solid jurisprudence defending the territorial rights of ethnic peoples over continental portions in Colombia, and

although, as seen, in various occasions the Constitutional Court had inferred the close relation of fishermen with their water bodies, it has yet to evidence the territorial rights of the ethnic peoples over sea areas. By failing to evidence this legal relation – the territory – the traditional peoples who depend on fishing, just as their practices, remain unprotected.

Many of the Constitutional Court rulings that partially protect some rights of the indigenous small-scale fishermen, Palenqueros ou Raizales, are discussed under the light of the right to labor/trade freedom and of the right to food. These perspectives, however, do not reflect the cultural importance of the ancestral practice of small-scale fishing, not to mention the special relation of communities to the sea.

3.2 Afro-Colombian traditional communities

By the end of the 16th century, a considerable number of African-en-slaved individuals were brought to the coastal area of the Colombian Pacific, especially to work in the gold mining at Chocó. Now, organized in communities, their descendants preserve their sociocultural, economic, and political traditions (STEER RUÍZ *et al.*, 1997). In 1996, when the Constitutional Court analyzed the rights of these communities affected by several oil spill in the Salahonda beach, Tumaco municipality, in the Pacific Coast, it recognizes that:

An oil spill causes drastic changes to reefs, which is why the growth rate on contaminated reefs is reduced for three years, although the regeneration time per species varies. States and individuals must protect the ecology. Ecological damage in the sea has a great impact on those whose *craft* is fishing. Furthermore, if this craft is part of the culture of an ethnic group, it becomes even more necessary to protect the fisherman. This protection of ethnic diversity, in the case of a Black fishing community, strengthens *the protection of this craft because it is an integral part of the culture* (COLOMBIA, 1996, emphasis added).

Even though the Court recognized the relevance of fishing as part of the culture of an ethnic community, it failed to develop the cultural rights of the fishing ethnic communities. The Court also did not recognize the territorial aspects of the relation of these communities and the sea, appreciating this dynamics from an individual-liberal perspective – *the craft* – rather than a collective perspective. In this same appellate decision, the Court established the perspective of the right to a profession as an individual

freedom: “[one of the freedoms that for its own essence shall be a factual freedom is the freedom of craft, which refers not only to the freedom of choice, but for being a successive tract, is the free exercise of the right to choose one’s own profession” (COLOMBIA, 1996).

In 2012, the Court consolidated the understanding of the need of engaging small-scale fishermen in decisions related to the development of megaprojects, understanding that this would protect their participation, food, labor, free choice of profession or trade and human dignity rights of the members of an Afro-descendent fishermen association in Cartagena (COLOMBIA, 2012). Even though the association members were not considered part of an ethnic group – hence the need of previous consultation being disregarded – the Constitutional Court recognized these as communities that rely on natural resources surrounding them, which depend on the land, the water sources, and its fruits. For the Court,

These are communities of people who, in their *self-determination* and because of their cultural identity, have chosen as their *craft* the planting, production, fishing, and distribution of food using rudimentary and artisanal means. For these communities, artisanal trade generally has two dimensions: a) as a source of income, and b) as a guarantee of their right to food (COLOMBIA, 2012, emphasis added).

Note that, in spite of recognizing the traditional relation of the communities with fishing, the Court was careful enough to indicate that it is a question of personal self-determination, rather than collective (opposite to what it could indicate in the case of ethnic communities). The Colombian Institute of Anthropology and History (ICANH) guided the Court’s understanding in this case, by concluding that fishing was an intergenerational practice:

In the regional context and in the urban-poor area of Cartagena, fishing constitutes a practice passed down from generation to generation and has allowed for the physical, social, and cultural reproduction of an important sector of the population. Along with other informal economic tasks, fishing contributes to subsistence and to the establishment of social relationships that function as networks for the exchange of knowledge and resources (COLOMBIA, 2012).

In 2018, the Constitutional Court ruled on another case of violation of the rights of small-scale fishermen in Cartagena. This time, fishermen belonging to Afro-Colombian ethnic communities, who demanded the protection of their right to prior consultation related to the Compas S.A. Maritime Terminal expansion project. They argued that the project affected

their mobility and fishing activities in the project area. Following the ethnic verification visit conducted by the Ministry of Interior, it indicated that “the social tracing exercise conducted with members of each of the petitioning communities allowed to establish the broad concept of territory that each community has that is reflected beyond the places of settlement and makes the sea part of their territorial scope” (COLOMBIA, 2018, emphasis added). While acknowledging the existence of a notion of territory that would encompass parts of the sea, the Ministry of Interior also cautioned that some interviewed members of the fishing communities, distinct from that of the plaintiffs,

[...] stated that it is not possible to identify specific and permanent places to carry out the fishing activity, since the routes of the workplaces depend on the weather, the time of year (dry or rainy season), the fishing gear, the type of boats, among other factors. Therefore, it is not possible to mention the area of interest of the project “EXPANSION OF THE MARITIME TERMINAL OF COMPAS S.A.” as a permanent or exclusive fishing area of the communities (COLOMBIA, 2018).

In this case, the Court decided to uphold the second instance judgment that granted protection of the fundamental rights to administrative due process and prior consultation to the Community Councils of Tierra Bomba, Punta Arena, Bocachica, and Caño del Oro. However, considering the statements of the Ministry of the Interior – who lacked the will or capacity to understand the territorial dynamics existing in the bodies of water - the Constitutional Court missed another opportunity to develop the territorial rights of the ethnic fishing communities at sea.

3.3 The lack of protection for the Raizales from the Archipelago of San Andrés, Providencia and Santa Catalina

In the Caribbean Sea, 770 km far from Cartagena, in Colombia, and 180km from the Nicaragua coast, nearly 3,000 Raizales live in the 46 km² of dry land Archipelago of San Andrés, Providencia and Santa Catalina. In spite of being the smallest political division in Colombia, the archipelago represents about 250,000 km² of the Caribbean Sea in the Colombian territory. Colonized alternately by the Netherlands, France, Spain, and England, the archipelago enjoyed relative autonomy until 1822, when it was finally annexed to Colombia by treaties between its local authorities and the national patriots. In 1912, Colombia instituted a colonization policy in an organized scheme of administration of the archipelago

(COLOMBIA, 1912). In 1959, the archipelago was transformed into a Free Port (COLOMBIA, 1959), which brought an important migration flow from the continent, causing its current overpopulation and deteriorating the quality of life of its inhabitants (COLOMBIA, 1959.)

With a population characterized by an intertwining of Afro-Anglo-Antillean identities that to this day maintain their own customs and language (Creole), the Raizales differ from the rest of the Colombian population. Originally brought to the islands by the British, as enslaved individuals to work on the cotton plantations, after the decline of the plantations they were left to their own devices, surviving on a subsistence economy based mainly on fishing and seafood catching. According to Londoño and Gonzalez (2017), men spend nearly 16 hours a day at sea, catching lobster or other species to meet the needs of their family. To keep the population of lobsters and other crustaceans stable, the Raizales have agreed to ban the use of oxygen tanks and long nets, limiting fishing to the fishermen's ability of immersion.

The Raizal denomination enables the Colombian State and society to distinguish them from the rest of the Afro-Colombian population in the Pacific region (LONDOÑO; GONZÁLEZ, 2017). While the African descendants of the Pacific coast built a social movement of resistance that has urged the State to recognize their land and other collective rights, the Raizales face the challenges brought on by a growing tourism industry that employs them as cheap labor in San Andrés and, to a lesser extent, in Providencia (IBID.). Tourism is also one of the driving forces behind the ocean capture process² (MÁRQUEZ PÉREZ, 2019).

In 2000, the UNESCO declared the archipelago a world biosphere reserve, which allowed the islanders to reverse some intensive exploitation practices (MÁRQUEZ PÉREZ, 2019). In 2002, a group of Raizales, who called themselves The Archipelago Movement for Ethnic Natives Self Determination (AMEN-SD), claiming the rights established by Convention 169 of the International Labor Organization, declared self-determination for the island's residents (AMEN-SD, 2002), the effects of which were more political than legal. Island residents have been relatively successful in defending their territory against tourist exploitation projects, such as the spa and the Midnight Dream Theater, as well as a favorable ruling in a class action brought by island residents to prevent the expansion of the airport (MÁRQUEZ PÉREZ, 2019). In 2003, the United Nations Special Rapporteur on Racism visited the island and, upon hearing the claims of

its inhabitants, found that the natives suffer a strong demographic pressure and complete political marginalization. Thus, the Special Rapporteur recommended Colombia to recognize a special political status to the island of San Andrés to “guarantee the granting of a special status to the island, guaranteeing its cultural and linguistic identity and the increasing participation of its indigenous population (the Raizales) in the management and economic development of the island” (UNITED NATIONS, 2004).

In 2012, the International Court of Justice (ICJ) resolved a border dispute between Nicaragua and Colombia over the maritime zone of the Archipelago. The ICJ’s decision affected the rights of Raizal fishermen by decreasing the state boundaries of their marine fishing territory. Most of Raizal’s fishing areas are outside the reef surrounding the archipelago, an area recognized by the ICJ as belonging to Nicaragua (LONDOÑO; GONZÁLEZ, 2017). In 2014, the General Confederation of Workers (CGT) of Colombia expressed its concern about the rights of the Raizal people in light of the ILO Convention 169. The CGT indicated that, at no point, in the international legal proceedings before the ICJ did the Colombian state consult the Raizal people. Hence, in 2015 the ILO Committee of Experts on the Application of Conventions and Recommendations (CEARC) urged the government to provide evidence of the consultations it claimed to hold concerning the issues covered by Convention 169 (ILO, 2015), which has yet to be heeded. In fact, to this day, the government has failed to promote, in the archipelago, any type of consultation in accordance with the framework of ILO Convention 169. Currently, the situation of the fishermen of San Andrés, Providencia, and Santa Catalina is quite disheartening, due to the loss of territory through “processes of closure, privatization, and commodification of ecosystems that promote the accumulation of capital by certain elites, based on the expropriation of communities” (MÁRQUEZ PÉREZ, 2019). The passage of the Hurricane Iota in November 2020 strongly aggravated the vulnerability of the fishing communities of San Andrés.

4 INDIGENOUS FISHING TERRITORIES IN NATURAL PROTECTED AREAS

National Natural Parks are geographical zones delimited by the national government, in which the allocation of vacant land, the sale of land, hunting, fishing, and all industrial, livestock, or agricultural activities are

prohibited (COLOMBIA, 1991, 1959). One of the exceptions to this rule is subsistence fishing (COLOMBIA, 1977), provided it is developed according to zoning established by the national authority. The law also restricts the use of beaches, prohibiting fishing in areas identified as breeding grounds of wild species, national parks, or public beaches (COLOMBIA, 1974a).

The National Aquaculture and Fisheries Authority (AUNAP) is the government body that implements the fisheries and aquaculture policies, formulates sectoral planning, and grants licenses for fishing activities, in addition to establishing mechanisms for the control and monitoring of regulations. Then, The National Natural Parks of Colombia (PNNC) is the entity responsible for the administration and management of the National Natural Parks System (SPNN), in addition to the coordination of the National System of Protected Areas. The latter is tied to the Environment and Sustainable Development Sector of the Ministry of Environment. The PNNC's functions include managing and administering the SPNN, regulating the use and operation of the areas that comprise it, granting licenses, concessions and other environmental authorizations for the use and exploitation of its natural resources (COLOMBIA, 2011). Fishing activities allowed within the park should be regulated based on joint planning between AUNAP and the PNNC, which makes the administration effective, transparent, and thoughtful of the voices of local communities.

The Constitution of Colombia (Article 8) recognizes and protects the ethnic and cultural diversity of the nation. Similarly, national legislation and the jurisprudence of the Constitutional Court widely recognize that cultural diversity is related to representations of life and conceptions of the world that are not synchronized with dominant political and legal customs (COLOMBIA, 2011). The Decree no. 622 (COLOMBIA, 1977), which partially regulates the Parks Act of 1974, states that there is no incompatibility between the declaration of a national nature park with the constitution of an indigenous reserve. In such cases, the national authorities have the duty to establish a special regime for the benefit of the indigenous population that respects the permanence of the community and its right to the economic use of renewable natural resources (COLOMBIA, 1977).

The Organic Law of the Development Plan, which regulates the preparation and implementation of development plans of the nation, territorial entities, and other administrative bodies, provides that national development plans must be in harmony with national, regional, and local planning

and that of indigenous and black territorial entities (COLOMBIA, 1994). In this sense, it is understood that the delimitation of coastal zones, in addition to the conservation policies of national parks must consider the policies of indigenous jurisdictional administration units. To date, however, this legal harmonization has not been carried out in relation to fisheries.

In some parts of the world, restrictions on small-scale fishing, motivated mainly by conservationist reasons, led to capital accumulation in the coastal tourism sectors, excluding local communities and dispossessing them of their coastal lands (BENNETT et al., 2020). Something similar is happening in the Tayrona NP area, as we will see below. In 2019, the director of Colombian National Park System publicly stated the great pressures she is under from high government officials and local economic elites to modify the Tayrona Park Management Plan and allow the construction of a seven-star hotel within the park (MIRANDA, 2019).

4.1 The case of the Tagangueros at the Tayrona National Park

In the department of Magdalena, northern Santa Marta, is located the fishing community of Taganga. Its inhabitants are currently called Tagangueros. After a long process of claiming their identity as Taganga indigenous people (originally from *Taguangua*, which means land and sea), descendants of the Great Caribbean people, they achieved in 2020 the official recognition of their indigenous identity (COLOMBIA, 2020).

The ancestral land of the Taganga people was within by the Tayrona National Park, an area of 15,000 ha of land and 4,500 ha of sea, established in 1964. At the time of its creation, in addition to the Tagangueros, indigenous communities of Tayrona descent and some peasant communities lived in the area. With the creation of the Park, the fishing activities of the communities were criminalized, displacing the traditional fishermen and their knowledge to areas outside the Park.

As of now, these fishermen, including indigenous people and Tagangueros, demand decent living conditions, recognition of their own knowledge, and decriminalization of their activities (CANTILLO, 2017). The main issue revolves around the notion of territoriality, and one of their central demands is prior consultation, as members of the Taganga people understand that all the beaches covered by Tayrona Park are part of their territory. The Colombian Constitutional Court, however, has a different understanding (COLOMBIA, 2015). In 2015, the Court analyzed a case of

conflict between Tagangueros fishermen in a marine area covered by the park, in which the environmental authority confiscated their fishing tools, and held that, in addition to determining whether fishing in the park was legal or not (which for the Court was arguably illegal), it was important to determine the degree of responsibility of the State in not implementing compensation measures to mitigate the damage caused by the ban on fishing in that area. For the Court, the State omission constituted a violation of the plaintiffs' fundamental rights to freedom of trade and commerce, food sovereignty, participation, minimum subsistence, and human dignity. As the case was analyzed prior to the recognition of the Tagangueros as an indigenous people, the Court did not raise any questions about the indigenous and tribal rights protected by ILO Convention 169, the Colombian Constitution, and other international instruments in-force in Colombia.

The Court considered that the ban on small-scale fishing in Tayrona Park is not an arbitrary measure, but rather aims at protecting the reproduction of marine species. For the Court, the ban protects the environmental services of this ecosystem and contributes to the guarantee of food sovereignty for all Colombians. The Court, however, emphasized that the loss of marine species is due to more damaging - yet legal - activities than small scale fishing, such as coal mining and transportation, the presence of illegal construction, and the expansion of port infrastructure, among others. Still, the Court did not take any measures to reconcile traditional fishing with the preservation of the Park, but limited itself to exhorting the State authorities to establish compensatory measures for the fishermen prevented from exercising their profession (individual right). The Court stated that the damages suffered can be overcome through relocation programs and fishing training, led by the corresponding authorities linked to the relief process.

Among other rulings in this decision, the Court ordered the Colombian State to design and implement a master plan for the protection and restoration of Tayrona Park, while remaining silent on the rights of local fishermen to participate in the matter. The Court also set a 60-day deadline for the PNNT to design a compensation plan that would guarantee the small-scale fishermen affected by the Park the satisfaction of their fundamental rights to work, food sovereignty, and a minimum subsistence.

The Court added that the Government of Magdalena has the responsibility to provide temporary food, and economic support to people whom traditionally carried out these activities, and who currently lack the

necessary resources to satisfy their right to the minimum vital and dignified subsistence.

Lastly, the Court ordered the construction of a working group to negotiate compensation for the small-scale fishermen of the Tayrona National Natural Park. This group shall be composed of the Ministry of Environment and Territorial Development, the Special Administrative Unit of the National Natural Parks System of Colombia, the Colombian Institute of Rural Development, the Regional Autonomous Corporation of Magdalena, the National Learning Service, the Public Defender's Office of Magdalena, the Attorney General's Office, the Magdalena Government Secretariat, and the various associations of small scale fishermen of the Tayrona National Natural Park. These are diverse national actors with multiple interests negotiating with representatives of an indigenous community that has historically been invisible and marginalized. This illustrates the lack of knowledge of Bogotá institutions about the reality of traditional small-scale fishers and reflects the reluctance of the state to include local knowledge in national development plans.

CONCLUSION

The conflicts surrounding fishing activities in Colombian coastal areas are many and extensive. Fishing communities and their knowledge are marginalized and obliterated, national laws and policies are fragmented and unknown to most local communities. Development plans are not properly consulted and subsidies for fishing and small-scale enterprises do not adequately reach their intended recipients. In addition, we have the ignorance of Colombian law and jurisprudence that the sea is also part of indigenous territories and other ethnic peoples, hence being a portion of the national territory over which the self-determination rights of these peoples apply.

Institutionally, the sea is under an economic perspective, either for its exploitation or for its preservation. On the other hand, the sea is under a geopolitical perspective as a place for the expansion of physical, economic, and commercial frontiers. In these perspectives, there is no room for the knowledge of traditional peoples, much less for the legal construction of a notion of territory that extends to the sea. An example of this is the determination of Colombian international borders, which affected the daily life of the Raizal people of San Andrés, and yet was never discussed with them. Culture develops in a territory, and the lack of knowledge of this territory

leaves cultural practices unprotected.

In its decisions on indigenous territorial rights in continental lands, the Colombian Constitutional Court has made important jurisprudential advances, which contrasts with the timidity it employed in deciding cases involving the exercise of cultural rights in portions of the sea. It is at least curious that the Colombian Constitutional Court, which has historically tended to decide cases of indigenous rights disputes in harmony with international human rights jurisprudence, on none of these occasions even considered any of the cultural rights of indigenous peoples and/or ethnic communities when analyzing these cases. In these occasions, the Court understood fishing only as an economic and subsistence resource and disconnected from the cultural or spiritual sphere of traditional fishermen. Even in the judgments in which the Court recognized the cultural importance of the sea for ethnic fishermen, it has been unwilling to recognize their marine territorial rights.

One of the challenges left to jurists and academics who work with the right to work is to make traditional knowledge visible in order to incorporate it into national policies for the administration of this physical and ontological space understood as ocean, sea or coastal zone. The task is to demonstrate that territorial rights are also exercised over portions of the sea, despite the fact that the institutional perspective understands it differently. As a first step in this direction it is necessary – and urgent – to seek a re-signification or another legal conceptualization of small-scale and subsistence fishing that includes the cosmogony of traditional fishing communities. Colombian legislation and jurisprudence, as seen, have the elements to do so, and especially the Constitutional Court has a history of commitment to the rights of ethnic peoples and communities. There has been a lack of agency and willingness to discuss with more seriousness and commitment the rights of small-scale fishermen, whether ethnic or non-ethnic.

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