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Unsettled Rights: Afro-descendant recognition and ex-situ titling in Colombia

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ABSTRACT

Ethnic recognition and collective titling have since the second half of the 20th century been promoted as ways of compensating for historical injustices and countering the destructive effects of capitalist development. While holding promise of autonomy, territorial rights, and resource control, they have also been seen as political technologies governing, spatially tying identities to place, and incorporating new areas into capitalist market relations. This paper draws on and contributes to these debates by exploring how the Colombian legislation for Afro-descendants ethnic recognition and collective titling is understood, employed and ‘reworked’ from below as well as from above. Drawing on ethnographic fieldwork, interviews, and document analysis, the paper follows the case of an Afro-descendant sand-extracting community in the Cauca Valley Region, Colombia. Threatened by a competing mining claim, the villagers seek to gain ethnic recognition among other things to secure rights and control mining resources. In the process, the villagers are offered a land plot away from where they live and work to title as their collective territory; a mechanism that I term ‘ex-situ titling’. As the villagers have no prior relation to the land, nor intend to resettle there, I argue that the ex-situ land titling only serves as a procedural step in the process of ethnic recognition, which, nevertheless, contributes to the uncertainty and incertitude around the villagers’ ethnic rights and resource control.

1. Introduction: looking for land

I am meeting Fernando, 1 the president of the Community Council in the village Brisas del Frayle, to talk about the status of their efforts to be recognised as an Afro-descendant group by the Colombian state. 2 He shows me the latest letter from the National Land Agency (Agencia Nacional de Tierras – ANT), which states that there is a vacant plot in the neighbouring town that the Community Council can get titled as their collective territory. Currently, the plot is under the domain of the Society of Special Assets (Sociedad de Activos Especiales – SAE), a semi-public agency that manages land that has been confiscated by the state – typically from drug lords – and makes it available for distribution. The letter states that to start the process of collective titling, the SAE will have to transfer the land to the ANT, specifying that it is destined for collective titling to the Community Council in Brisas del Frayle, or, alternatively, directly to the Community Council. Fernando says that the plot is located in a town 7 km from Brisas del Frayle, 3 and that he wants to see it before sending the application to SAE.

The meeting with Fernando left me puzzled: Why is the Community Council offered land in a neighbouring town to title as their collective territory? And how is this related to their efforts for ethnic recognition? Ethnic recognition and collective titling have since the second half of the 20th century been promoted as ways of compensating for historical injustices and countering the destructive effects of capitalist development (Anthias & Radcliffe, 2015; Li, 2010). While holding promise of autonomy, territorial rights, and resource control, they have also been seen as political technologies governing, spatially tying identities to place, and incorporating new areas into capitalist market relations (Anthias & Hoffmann, 2021; Gordon et al., 2003; Hale, 2002; Moore, 2005; Restrepo, 2011). Building on these insights, this paper explores an
example of how the Colombian legislation for Afro-descendants ethnic recognition and collective titling is understood, employed and ‘reworked’ from below as well as from above, and what potential effects this has on ethnic rights and territorial control. The paper follows the case of the villagers in Brisas del Frayle, an Afro-descendant sand-extracting community in the Cauca Valley Region, Colombia, who, threatened by a competing mining claim, seek to gain ethnic recognition to among other things secure rights and control over their mining resources. Appearing in the national Registry of Grassroots Organisations of Black, Afro-Colombian, Raizal and Palenque Communities (Registro de Organizaciones de Base de Comunidades Negras, Afrocolombianas, Raizales y Palenqueras – henceforth, Registry of Black Communities), the villagers envision to be protected under the Colombian Constitution and international conventions, securing right to prior consultation against the competing mining claim, and, in accordance with the mining law, having priority right to extraction within their territory. Yet, along with previous studies (Ng’weno, 2007b; Vélez-Torres, 2016), the case illustrates that, contravening international conventions and national Constitutional Court rulings (Bocarejo, 2012; Vallejo Trujillo, 2016), statutory institutions continue to base ethnic recognition on the possession of collective territory.

However, the correspondence between the villagers and statutory institutions reveals a reworking of this requirement from below as well as from above: As the villagers do not have any vacant land to title, they are offered a 0.74 ha plot of land away from their site of production and residence to title as their collective territory; a mechanism I term ‘ex-situ titling’. The villagers have no prior relation to the land, nor do they intend to resettle there; thus, the land titling resembles merely a procedural step in the process of ethnic recognition. Nevertheless, it leaves the villagers in a legal uncertainty and incertitude as to what effect ex-situ titling may have on their ethnic rights and resource control. Thus, by highlighting how the villagers are seeking recognition to defend their rights, and at the same time are subject to (neo)liberal techniques of government that leave their rights status unsettled, this paper draws on and contributes to the literature on ethnic recognition (Bocarejo, 2012; Povinelli, 1999; Restrepo, 2002), neoliberal multiculturalism (Bocarejo & Restrepo, 2011; Hale, 2002; Li, 2010), and ethnic collective territories as sites of both autonomy and governmentality (Anthias & Hoffmann, 2021).

The paper is based on a total of ten months of ethnographic fieldwork in the village Brisas del Frayle conducted 2016–2018. During the last seven months, I lived in the village for two months and visited it several times a week the remaining time. The data construction methods include participatory observation, informal conversations, audio-visual methods, document analysis, 38 semi-structured interviews with villagers and public functionaries, and attendance to 16 institutional and community meetings. The documents analysed cover laws, regulation and correspondence between the villagers and the statutory institutions concerning ethnic recognition and collective titling, while informal conversations were mainly with villagers but also with a former employee in the Ministry of Interior responsible for registering community councils. Further, as part of negotiating access and constructing data, I engaged in collaborative research with the Community Council by conducting a household survey and accompanying the villagers in their encounters with the statutory institutions. In this, I seek to practice a form of ‘critical solidarity’ (Asher, 2009), in which I critically analyse the villagers’ attempts to navigate the field of ethnic recognition as well as the statutory institutions’ governance thereof, while holding solidarity with an organised group of people in struggle (see also Hale, 2006). Inspired by Povinelli (2011), I critically scrutinise the concept of ethnic recognition, while supporting the villagers’ efforts to improve their situation within the existing system, acknowledging the limitations of such endeavours (see also Schepers-Hughes, 1995).

The remainder of the paper is organised as follows: First, I discuss the broader literature on ethnic recognition and collective territories, relating it to the mechanism I call ex-situ titling, before venturing into how ethnic recognition and collective titling have historically unfolded in Colombia, with emphasis on Afro-descendant recognition. Following a brief introduction to the case of Brisas del Frayle, I explore how the villagers understand, utilise, and navigate the legal and institutional framework to gain recognition as an Afro-descendant community, and how statutory institutions likewise rework the (unconstitutional) requirement of collective territory. Finally, I discuss what implications the mechanism of ex-situ titling can have for the villagers’ territorial rights and resource control.

2. Ethnic recognition and collective territories

Continuing the conversation about the potential collective territory in the neighbouring town, I ask Fernando what the Community Council can achieve by being accepted in the Registry of Black Communities, They are already recognised as an ethnic group by the local municipality, the regional government, and the regional environmental agency, so why do they need recognition at the national level? “It’s very important at the national level,” Fernando says. “It’s a recognition that we exist!”

Recognition is a vital human need, an acknowledgement of the equal worth of human beings (Honeth, 1995; Taylor, 1994). In the area of ethnic recognition, it means having rights equal to those of other citizens, as well as having special or preferential rights (Taylor, 1994) as reparation for historical injustices (Povinelli, 1999), or as a way to achieve participation parity (Fraser, 2001; Rosaldo, 1994). Hence, Fernando’s call for recognition can be seen both as a call for inclusion in the national political community and a call for special rights to compensate for historical and contemporary injustices.

Since the second half of the 20th century, ethnic recognition and collective titling have gained importance as ways of compensating for historical injustices and countering the destructive effects of capitalist development (Anthias & Radcliffe, 2015; Li, 2010). In the 1990s, following the International Labour Organisation Convention 169 of 1989, multiculturalism was widely embraced, and many governments, especially in Latin America, incorporated ethnic recognition and ethnic territories into their legal frameworks (Hale, 2002; Offen, 2003). Ethnic recognition and collective titling are held up as ways for historically disfavoured groups to assert cultural difference, claim autonomy and territorial rights, and (re)gain a degree of resource control (Restrepo, 2002; Velez, 2011; Vélez-Torres, 2014). In contrast to land claims, territorial claims challenge existing rules and regulations, imply a devaluation of authority, and suggest a new relationship to the state (Lund, 2013; Ng’weno, 2007a; Offen, 2003; Sánchez-Ayala, 2021). Territories are autonomous spaces with their own social organisation; they are given meaning and invoke notions of belonging and identity (Halvorson, 2019; Offen, 2003; Sánchez-Ayala, 2021). Thus, ethnic collective territories are ways of claiming autonomy, proposing alternative life projects, and defending rights against external interests.

However, ethnic recognition and collective territories are also seen as political techniques of governing, in which places and populations are mapped, ordered, measured and demarcated (Anthias & Hoffmann, 2021; Elden, 2010). Ethnic recognition has been criticised for idealising or essentialising ethnic difference (Povinelli, 1999; Restrepo, 2011), creating a particular ‘ethnic slot’ (Li, 2000). Further, ethnic collective territories have been criticised for building on colonial practices of spatially tying identities to place (Anthias & Hoffmann, 2021; Bryan, 2012; Li, 2010; Malkki, 1992), what Moore (2005) calls an ‘ethnic-spatial fix’. Though collective territories have been intended to protect

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1 Thanks to one of the anonymous reviewers for highlighting this.
2 I consider ‘community’ as dynamic and continually under construction through engagements between people and their natural surroundings as well as in relation to local and national authorities (Escobar, 2008; Lund, 2016; Malkki, 1992).
In Colombia, ethnic recognition of Afro-descendant communities has been widely studied over the years (Asher, 2009; Escobar, 2008; Friedman, 1979; Ng weno, 2007a; Oslander, 2002; Rojas, 2012; Wade, 1993). In the Colombian Pacific, Afro-descendant ethnic territories are conceptualised as social, cultural and material spaces, simultaneously networked and place-based (Escobar, 2008). They are “linked to and shaped by historical settlement patterns, cultural conceptions of nature, production practices, and the relationship between humans and their environment” (PCN-OREWA, 1995 in Asher, 2009, p. 87). Various scholars argue that ethnic recognition and collective titling have enabled Afro-descendants to organise, claim rights, and defend their territories against capitalist interests (Burneyet, 2013; Peña-Huertas et al., 2021; Restrepo, 2002; Rosas Guevara, 2015; Velez, 2011). Yet, others argue that Afro-descendant territorial integrity is challenged. First, capitalist interests in the form of plantation and extraction companies have managed to exploit land and resources through partnership agreements or other forms of engagements with local institutions (Baquero Melo, 2014, 2015; Cárdenas, 2012; Oslander, 2002). Further, conflict, violence and capitalist dispossession cause displacement and migration, which challenge communities in exercising their territorial rights (Asher, 2009; Baquero Melo, 2014, 2015; Escobar, 2008; Velez, 2011). This creates new mobile ethnic identities, which statutory institutions are hesitant to acknowledge (Bocarejo, 2012; Ramirez Sarabia, 2018; Velez-Torres & Aggergaard, 2014). Thus, in the Inter-Andean region, in a context of recent conflict, capitalist development, and internal migration-displacement, territory is understood as a historical, political and cultural space, that connects trans-local communities, and creates openings for attaining citizenship, resource rights, social justice, and for being included in the nation state (Ng weno, 2007a; Rojas, 2012; Velez-Torres & Aggergaard, 2014).

However, mobile ethnic identities challenge the mutually constitutive relation between community and territory: When considered as a form of differential treatment, material redistribution, or reparation for historical injustices (Fraser, 2001), collective territories can be seen as an outcome of recognition. On the other hand, the formalisation of collective territories can also be seen as a way of reclaiming pre-existing (informal) collective lands (Bryan, 2012; Restrepo, 2002). This leads to a catch-22, in which people need to prove collective identity in order to claim territory, but also need territory to prove collective identity (Lund, 2016; Ng weno, 2007a). Nevertheless, despite this mutually constitutive relation between community and territory, land is sometimes titled outside a community’s site of residence. This is seen when compensation or relocation is used to make up for a loss or damage; yet, these are often related to extractive activities (see e.g. Paredes Penafiel & Li, 2019; Salaman et al., 2018; Sánchez-Ayala, 2021), not processes of ethnic recognition. Relocation and compensation are seldomly sufficient to restore the harm suffered (Lenzerini, 2007), and the relation between community and territory is broken. In contrast reparation and restitution are used to restore something to its prior state (Lenzerini, 2007), e.g. Indigenous people in Argentina have in some cases been offered land that they consider part of their ancestral territories outside their current site of residence (G_Disamano & Curti, 2017; Rossi, 2007). Likewise, in Colombia, Afro-descendant communities in the Pacific region, who were granted collective title in the late 1990s or early 2000s and then displaced by capitalist expansion and armed conflict, have managed to reclaim their collective territory through the Law of Victims and Land Restitution, Law 1448 from 2011 (Angel-Botero, 2017; Baquero Melo, 2015; Peña-Huertas et al., 2021), or by forming a Peace Community or a Humanitarian Zone (Burneyet, 2013). These cases illustrate situations where displaced communities have been able to – at least partly – (re)gain rights to and control over land that they have a prior relation to, either through collective ethnic title and/or through claim to ancestral territories. Thus, people are returning and the mutually constitutive relation between territory and community is re-established. In contrast, the mechanism of ex-situ titling, as conceptualised in this study, does not concern the return to previously titled land or titling of ancestral territory; nor does it concern land offered in compensation. Instead, ex-situ titling is the titling of land outside the community’s site of residence as a step in the process of ethnic recognition, for them to live up to the requirement of collective territory. Thus, the study draws on, and contributes to, literature on neoliberal multiculturalism (Gordon et al., 2003; Hale, 2002; Oslander, 2002), ethnic recognition and collective titling as techniques of government (Anthias & Hoffmann, 2021; Elden, 2010), and by exploring the potential effects of ex-situ titling on ethnic rights and resource control, literature challenging the practice of spatially tying ethnic identity to place (Bocarejo, 2012; Mälki, 1992; Rojas, 2012).

3. The struggle for recognition and territory in Colombia

Colombia is considered a pioneer in ethnic recognition, yet the country has a long history of institutionalised racial discrimination (Asher, 2009; Friedman, 1979; Restrepo, 2018; Wade, 1993). While Indigenous peoples since colonial times have been seen as a distinct social category, Afro-descendants have historically not been accorded a special legal status. Brought to the continent to forcibly labour in the mines and haciendas, the African and Afro-descendant population was initially categorised as enslavable (Ng weno, 2007a; Wade, 1993). While racial distinctions were widely used, race was never a legal category, and the ‘legal assimilation’ obscured the de facto discrimination against the Afro-descendant population (Ng weno, 2007a). Afro-descendants’ position in society has, according to Wade (1993), been marked by a contradiction between a constant denial and ‘invisibilisation’ and a simultaneous reiteration of Blackness as a category; leaving Afro-descendants strung out in tensions between assimilation and discrimination, exclusion and suppression.

This has affected their access and right to land and resources. While Indigenous reserves were administratively delineated through Law 89 in 1890, and Indigenous cabildos (councils) were recognised as authorities to govern affairs within the territories (Asher, 2009; Ng weno, 2007a).\(^6\) Afro-descendants faced difficulties in gaining legal control over land. In the Caribbean region, Afro-descendants escaped enslavement and formed independent settlements, Palenques, while others, in the Pacific and Inter-Andean region, freed themselves from forced labour in mines or haciendas and settled in the surrounding areas or along the rivers and streams (Friedemann, 1979; Ng weno, 2007a; Oslander, 2002; Restrepo, 2017; Wade, 1995). Some obtained individual or collective titles as peasants in the general struggle for land during the 20th century (Baquero Melo, 2014; Ng weno, 2007a), yet many – particularly in the Inter-Andean region – had difficulties in asserting land and resource rights (Ng weno, 2007b). In the Pacific region, many Afro-descendant communities saw their informal tenure systems undermined by the Forest Law, Law 2 from 1959, as the government declared vast areas of the Pacific Basin as forest reserves or tierras baldias – ‘empty public lands’ (Asher, 2009; Cárdenas, 2012; Ng weno, 2007a; Wade, 1995). Later, the government granted external parties licenses to timber and extractive activities in the region, and thus the discourse of ‘empty land’ – as elsewhere (Fields, 2012; Moore, 2005) – paved the way for subsequent dispossession (Asher, 2009; Escobar, 2008; Restrepo, 2011).

In response, Afro-descendant peasant organisations started
mobilising to claim land rights and collective titles to defend their way of life against external actors (Restrepo, 2002). By 1987 communities had gained usufruct rights over 600,000 ha in the Pacific region (Asher, 2009; Escobar, 2008). At the same time, urban students and academics had with the international wave of self-determination for ethnic groups had expanded their claims for territorial control (Asher, 2009; Ng weno, 2007a). While Afro-descendant demands were initially framed as peasant organisations’ claims for land, their struggle became increasingly framed in ethnic, environmental and territorial terms (Asher, 2009; Ng weno, 2007a; Oslender, 2002; Restrepo, 2002, 2011). In the late 1980s and early 1990s, this converged with the general call for constitutional reform in Colombia and the opportunity for territorial reorganisation in the country (Asher, 2009).

While many interest groups were represented in the Constitutional Assembly reforming the constitution, the Afro-descendant movements were not (Asher, 2009; Restrepo, 2002). Instead, they were represented by Indigenous candidates, and mobilised outside the Constitutional Assembly to formulate a proposal for Afro-descendant ethnic and territorial rights (Asher, 2009; Restrepo, 2002). Yet, the historical discrimination against Afro-descendants was carried into the Constituent Assembly, and the proposal was met with hostility; it was questioned whether people labelled as ‘Blacks’ could have status as an ethnic group (Asher, 2009; Wade, 1995). Members of the Assembly who, after several decades of internal conflict had seen many Afro-descendants become their urban neighbours, claimed that Afro-descendants had not “retained their cultural identity” (ONIC, 1994 in Ng weno, 2007a, p. 86). To paraphrase Povinelli (2007), Afro-descendants were not considered ‘sufficiently distinct’ from the rest of the Colombian society to merit special treatment.

Nevertheless, the proposal for Afro-descendant ethnic and territorial rights was in the last moment accepted by the Constitutional Assembly in the form of Transitional Article 55 (Artículo Transitorio 55 – AT55). While ambiguously formulated, AT55 opened institutional space for the recognition of Afro-descendant rights, and according to Restrepo (2002) it instigated the largest social and political Afro-descendant movement in recent Colombian history. It stipulated that, within two years, Congress should issue a law recognising Afro-descendant communities’ right to collective property based on a study by a Special Commission. The Commission had a difficult start with miscommunication, foot-dragging, and a general lack of financing and political will. The Afro-descendant movement was divided between an urban branch focussing on anti-discrimination, and a rural branch, focussing on cultural distinction and advocating for an ‘autonomous collective ethnic territory’ covering the Pacific region (Asher, 2009; Wade, 2009). Nevertheless, despite diverging conceptualisations and lack of political will, Ley 70 or Ley de Comunidades Negras (Law 70 or Law of Black Communities) became reality in August 1993 (Asher, 2009; Restrepo, 2011).

### 3.1. Multicultural turns

Law 70 was celebrated as ground-breaking for the recognition of Afro-descendant rights in Colombia. It recognised Afro-descendant territorial, ethnic and cultural rights, described the formation of community councils and adjudication of collective property, established rules for land and resource use, including mining resources, and described mechanisms for protection and development of rights and cultural identity. Nevertheless, it was ambiguously formulated and allowed for diverging interpretations of Afro-descendant ethnic identity and right to collective territory (Asher, 2009; Ng weno, 2007a). On the one hand it was aimed at:

… recognising Black communities (comunidades negras), who have come to occupy empty public lands (tierras baldíos) in the rural riverine zones of the rivers in the Pacific Basin, according to their traditional production practices, the right to collective property ...

(Congreso de Colombia, 1993, Article 1, my translation, emphasis added)

In this, the relation to the Pacific region was emphasised. On the other hand, it stated that the “law also applies in rural, empty and riverine zones that have been occupied by Black communities who have traditional production practices in other zones of the country.” (Congreso de Colombia, 1993, Article 1, my translation, emphasis added). Thus, it was principally oriented towards communities located in the Pacific basin (Rojas, 2012), while opening for recognition of Afro-descendants residing in other parts of the country, even though it comes, as Ng weno (2007a, p. 88) describes it, almost as “an afterthought”.

Further, emphasising ‘traditional production practices’ it reflected what Restrepo (2018) calls an ‘ethnic-culturalist’ conceptualisation of multiculturalism. This is characterised by notions of community, territoriality, rurality, and environmentally sustainable production practices – notions derived from what is considered to characterise Indigenous ethnicity (Restrepo, 2018; Wade, 1995). In this restricted category, not all Afro-descendants could fit, and not all who were recognised as members of Afro-descendant communities were locally marked as Black (Restrepo, 2018; Rojas, 2012). The ethnic-culturalist conceptualisation with the notion of ‘traditional production practices’ reflects the hard-fought recognition of a special Afro-descendant way of life, which stands as an alternative to capitalist production and extractivist activities (Escobar, 2008; Restrepo, 2002). On the other hand, it has been criticised for ignoring the diversity of Afro-descendant livelihoods, their mobility and links with the wider economy (Saquero Melo, 2014; Wade, 1995), as well as their difficulty in maintaining traditional production practices (Rojas, 2012). Moreover, the ethnic-culturalist conceptualisation illustrates that ethnicity in Colombia – as elsewhere (Li, 2010) – is based on a ‘special relation to land’ (Ng weno, 2007b), where ethnicity is explicitly related to territory. This evokes notions of collective territories as sites of autonomy and resistance (Escobar, 2008), but also reflects the ‘ethnic spatial fix’ of colonial and post-colonial government (Hoffmann, 2021; Moore, 2005). While the ethno-culturalist conceptualisation and the orientation towards the Pacific region can be seen as a result of both historic, political and strategic choices (Asher, 2009; Ng weno, 2007a; Restrepo, 2002, 2011), it made it difficult for Afro-descendants in other parts of the country to obtain ethnic recognition (Ng weno, 2007a; Ramírez Sarabia, 2018).

Following the initial ethnic-culturalist conceptualisation, Restrepo (2018) identifies a second phase in Colombian multiculturalism, namely

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7 According to Wade (2009), the term ‘Black communities’ (comunidades negras) was used in the 1990s, including in the Constitution and Law 70. Later the terms ‘Afro-Colombian’ (‘afrocolombiano’) and ‘Afro-descendant’ (‘afrodescendiente’) emerged, while the more recent term ‘Afro’ (‘afro’) resonates with “a globalised, mass-mediated culture of Blackness” (Wade, 2009, pp. 173–175). In my empirical material, the different terms are used interchangeably.

8 In addition to the Afro-descendant mobilisation, AT55 was pushed by the World Bank, as the institution promised a loan for an environmental programme in the Pacific region (considered one of the world’s biodiversity hotspots) on the condition that Afro-descendant rights were included in the new constitution (Ng weno, 2007a; Offer, 2003).

9 The Afro-descendant movement found it politically more feasible to target a limited geographical area, and in particular the Pacific region rather than the inter-Andean region and the flat valleys dominated by a white landed elite (Ng weno, 2007a).
the ‘diasporic-culturalist’ conceptualisation. This phase opened space for urban and Inter-Andean residents, who based their mobilisation for recognition on a shared experience of racism, discrimination and marginalisation (Restrepo, 2018). This second phase, I suggest, can be seen as an outcome and reflection of a continuous mobilisation by Afro-descendant movements and communities, as well as an ongoing societal dialogue concerning what ethnicity means (Angel-Bozler, 2017; see also; Cárdenas, 2018; Restrepo, 2018), including the Constitutional Court expanding the terms under which ethnic rights are granted (Ngıweno, 2007b; Restrepo, 2011; Vallejo Trujillo, 2016). It is also reflected in the internal disagreements within and between statutory institutions about how to understand and implement the law concerning Afro-descendant rights (Asher, 2009; Bolanos Cardenas et al., 2021; Ngyweno, 2007a; Restrepo, 2002, 2011). For instance, subtly challenging the formulation in Law 70, the National Administrative Department of Statistics (Departamento Administrativo Nacional de Estadística – DANE) introduced the term ‘self-recognition’ in the 2005 national census (Wade, 2009). This created a divergence between how Afro-descendant identity was understood in different institutions and opened space for mobilisation around new notions of identity and ethnicity.

Despite this second phase, many communities outside the Pacific region still have difficulties obtaining ethnic recognition and corresponding rights (Bolanos Cardenas et al., 2021). A recent mapping from the Process of the Black Communities (Proceso de Comunidades Negras – PCN) and the Observatory of Ethnic and Peasant Territories (Observatorio de Territorios Étnicos y Campesinos – OTEC) from Universidad Javeriana indicates that the Inter-Andean region is one of the areas where most unresolved claims for Afro-descendant collective territories are found (El Espectador, 2021). With Brisas del Frayle located this region, this study offers insight to some of the mechanisms behind this phenomenon, for instance that collective territory continues to be a requirement for recognition. Moreover, since the requirement is reworked from above and from below, it questions what the emerging mechanism of ‘ex-situ titling’ means for territorial integrity, rights and resource control.

4. Ethnicity in the agro-industrial margin

The village Brisas del Frayle is situated on the shores of the Frayle River in the municipality of Candelaria in the Cauca Valley department in western Colombia. The area of southern Cauca Valley and northern Norte de Santander department has a relatively high population of Afro-descendants compared to national figures; a population that grew out of the small-scale peasantry that formed around haciendas and in the wetlands as people escaped enslavement or gradually gained their freedom (Mejía Prado, 1993; Restrepo, 2017). Brisas del Frayle was established in the late 1970s when people started settling along what was then the main road between Candelaria and Puerto Tejada in the Cauca department. The first families were migrants from the neighbouring departments of Cauca, Narino and Chocó, and many were displaced by a combination of internal conflict and capitalist expansion (see also Achinte, 1999; Vélez-Torres & Agergaard, 2014). Some people had lived a few years in Cali or Candelaria before they, through a relative or other connection, heard about the possibility of settling in Brisas del Frayle. This gradual expansion has given the village its particular layout; a long row of houses located along a tiny strip of land, surrounded by sugarcane plantations to all sides. Along the road, the villagers built makeshift houses, and, similarly to other communities in the region (Vélez-Torres & Varela, 2014), they combined wage-labour on the nearby haciendas with fishing and sand extraction in the river. Some had come specifically to work in the growing sugarcane industry, which gradually replaced the multiproduct haciendas. As increasing mechanisation of the sector made labour redundant (Achinte, 1999; Knight, 1972), the villagers had to find other income sources. Surrounded by plantations, they had no available land to grow food; instead, manual sand extraction from the river became the main livelihood activity in the village.

Today, the village consists of approximately 105 households, located along one side of the gravel road. In the 1990s, they formed a Communal Action Board (Junta de Acción Comunal – JAC) and many gained land titles to their household plots through the national land reform. As elaborated below, in 2013 the villagers formed a Community Council (Consejo Comunitario), which under Law 70 is recognised as the legal entity of Afro-descendant communities. While some of the villagers draw their sustenance from the limited income opportunities in the agro-industrial landscape, more than half of the households are engaged in sand extraction. As described elsewhere (Hougaard, 2019), the villagers extract sand manually and with self-crafted tools. They work in teams: some go upriver and scoop sand into canoes, while others work at the unloading site, shovelling sand up the terraces and unto the trucks transporting it to regional construction sites. The villagers adapt their extraction pace to the regenerative cycles of the sand deposits in the river, and the collective work practices form part of their construction of community and territory (cf. Escobar, 2008).

Yet, the villagers’ control over the resource is threatened by a competing mining claimant, who wishes to privatise and gain formal right to what the villagers consider theirs; what they have held in de facto control for decades, and even had formal right to in the 1990s (Hougaard & Vélez-Torres, 2020). As argued elsewhere (Hougaard & Vélez-Torres, 2020), the case itself reflects the wider trend of capitalist expansion and extractivism in Colombia, where political-economic elites converge to dispossess small-scale miners from their subsistence livelihoods (see also Echavarria, 2014; Vélez-Torres, 2016, 2014; Weitzner, 2017). In this context, ethnic recognition becomes one of the ways in which the villagers seek to defend their rights; by constituting themselves as an ethnic community, the villagers would, according to the law, have the right to prior consultation against the competing mining claim, priority right to extraction, and right to establish a Black Community Mining Zone within their collective territory.

4.1. Seeking recognition

According to one of the members of the Community Council, the idea of seeking recognition as an ethnic community came from Fernando and Doña Zuleima, the president of the Community Council in a neighbouring village. Working with a lawyer specialised in Afro-descendants’
After its constitution in March 2013, the Community Council was registered in the municipality through Resolution 1105 in June the same year. According to Fernando this should serve as legal recognition of the Community Council: “For us, Law 70 is very clear (…) in Chapter 2 it says that a community council presents itself before the municipality where the majority of its territory is located (…) and it serves as the legal representation.” However, he adds, “There is another entity, the Ministry of Interior.” For the Community Council to be recognised at the national level, the municipal government must register it in the Registry of Black Communities in the Ministry of Interior within 30 days. However, when trying to claim their rights against the competing mining claim, the Community Council found out that the municipality had not done this and the council did not figure in the Registry of Black Communities. When the mining authorities checked for spatial overlap between the polygon of the competing mining claim (which is the same area as where the villagers extract sand) and ethnic collective territories, the Community Council did not appear in the system. Fernando criticises this ‘cartographic blindness’ (Moore, 2005):

We can see from the actions of the central [institutions] in Bogotá, they decide directly from the desk. So, when they consult if there is an Afro community [comunidad afro] they do not even go to the Planning Secretary [in the municipality and ask] if an Afro community exists or if an Indigenous community exists or if there are any Blacks or if there are not any Blacks. They only say: ‘No, when you are not in my registry, you do not exist!’

Frustrated by the institutions’ remote management, the villagers took matters into their own hands and contacted different institutions directly to be recognised and appear in the national registry. Here they were faced with the requirement that, as Fernando says: “To be recognised as Black, you have to have a collective title.” For the Ministry of Interior, it was not enough for the villagers to self-recognise as Afro-descendants; they had to have a ‘special relation to land’.

Basing ethnic recognition on possession of collective territory raises several concerns. First, it reinforces the mutually constitutive relation between community and territory, and leave people in a catch-22 where they have to prove their collective identity in order to claim territory, but have to have territory in order to claim collective identity (Lund, 2016; Ng’weno, 2007a). Second, it ignores the global dispossession that colonialism brought about (Kobayashi & de Leeuw, 2010) and denies that ethnic populations across the world, due to conflict, rural transformations and agrarian reform, share their territories with other actors not locally marked as ethnic (Anthias, 2018; Anthias & Radcliffe, 2015; Li, 2000). Further, it disregards the consequences of half a century of armed conflict in Colombia; the country has the largest number of internally displaced people in the world (UNHCR, 2020), and Afro-descendants are disproportionally represented among the affected population (Cárdenas, 2018; Ng’weno, 2007a). Finally, basing ethnic recognition on prior possession of collective land is against international conventions, and the practice has been rejected by the Constitutional Court rulings T-422/1996 and T-1045A/2010 (see Ng’weno, 2007b; Restrepo, 2017; Vélez-Torres, 2014). Nevertheless, in their interpretation of the law, some institutions and functionaries continue to use the existence of collective territory as a requirement for recognition.

Located in the Inter-Andean region in the flat plains of the Cauca Valley, Brisas del Frayle is surrounded by sugarcane plantations on all sides, and there is no available land left for the villagers to title as their own.
collective property. Everything belongs to the nearby agro-industrial sugarcane company or independent sugarcane growers, while the small plots where their houses are located have been individually titled through land reform devised by the Colombian Institute for the Agrarian Reform (Instituto Colombiano para la Reforma Agraria – INCORA). While individual land rights are often considered a sign of tenure security, in Brisas del Frayle they – together with the spatial dominance of the sugarcane plantations – now stood in the way for ethnic recognition. With a history of migration and as beneficiaries of the land reform, they had opted for the ‘wrong’ form of property right, and were now mere land-owners; too culturally assimilated to “fit the clear cut ethno-and-territorial niche” (Li, 2000, p. 20). “Neither good tribes nor good peasants” (Li, 2000), they failed to fit the requirements for ethnic recognition.

4.2. Institutional navigation

However, just as the road to recognition seemed blocked, a new option appeared. In general, there are two ways of titling land in Colombia whether for individual or collective title: adjudication of ‘tierras baldías’ (empty public land), or titling land from the National Agrarian Fund, which, in turn, obtains land by purchasing it on the private property market or by acquiring confiscated land e.g. from drug traffickers (interview, land rights expert, Cali, 02.03.2018). In areas where there are no longer baldíos, like the Inter-Andean region, the statutory institutions have started buying lands to initiate processes of collective titling (interview, land rights expert, Cali, 02.03.2018; see also Bolaños Cárdenas et al., 2021). Thus, instead of abandoning the (unconstitutional) requirement of collective territory, the institutions reinterpreted the legislation and opened for the mechanism of ex-situ titling. While they maintained a “cartographic anxiety” (Moore, 2005)’ the ‘special relation to land’ was no longer strictly tied to prior occupation.

Hence, asked by the Ministry of Interior to produce a collective title, the villagers addressed the land institutions with their concern. In November 2014, the Community Council wrote to the Colombian Institute for Rural Development (Instituto Colombiano de Desarrollo Rural – INCADER), which had taken over from INCORA in 2003, with an appeal to “have us in mind for the acquisition of a piece of land that allows us to develop our agricultural activities and have a territory where we can claim our collective and cultural rights and all the traditional ancestral practices …” The available documents do not reveal any response from the institution, but, in March 2016, the Community Council submitted an elaborate application to the Ministry of Interior (Office for Black, Afro-Colombian, Raizal and Palenque Communities’ Affairs) to be accepted to the Registry of Black Communities, with reference to Decree 3770 from 2008 (which among other things regulates the registration of community councils). The Community Council attached the official form applying for admission to the Registry of Black Communities and several other documents to support their case, including a map indicating the location of the village and the Community Council, and a copy of the above-mentioned solicitation for the acquisition of territory, addressed to INCODER. A month later, the Ministry of Interior responded that the application did not live up to the requirements, referring to Decree 1066 from 2015 (which concerns the administrative functions of the Ministry of Interior, but includes reference to the stipulations in Decree 3770/2008). The Ministry asked the Community Council to complete the information, specifically “[A] copy of the resolution of adjudication of the collective territory in question or certification that states that the application of the adjudication of the same is in process.” Thus, the copy of the solicitation for the acquisition of territory, addressed to INCODER, did not suffice as proof of application in process.

In November 2016, the Community Council addresses the ANT (which in December 2015 took over from INCODER), reiterating the appeal to keep the Community Council in mind for the acquisition of collective title, attaching several documents to support their case. In December 2016, the ANT Subdirector of Ethnic Affairs replies that there is a vacant plot in a nearby town that belongs to the SAE. The Community Council should solicit this institution for the donation of the land to the ANT, or directly to the Community Council in Brisas del Frayle. Further, the ANT states, to initiate the process of Collective Titling to Black Communities, the Community Council should send various documents to the Ethnic Affairs Unit in the ANT, including a freehand sketch of the territory, identity card of the legal representative, and other requirements listed in Decree 1066/2015 (again, concerning administrative functions of the Ministry of Interior, but referring to Decree 1745/1995). This is the letter Fernando shows me as we discuss the status of their efforts to be recognised as ethnic community, and the reason why he is looking for land in the nearby town.

The case itself reveals considerably inter- and intra-institutional inconsistencies and competing mandates and legislations (Asher, 2009; Ng’weno, 2007a; Oslander, 2002; Restrepo, 2002), which requires a high level of legal literacy to navigate. Moreover, I argue, while the villagers may be interpreting and reworking the legislation to claim rights and ethnic recognition from below, the statutory institutions are also reworking from above: as a step in the process of ethnic recognition and to accommodate the requirement of collective territory they offer the villagers a piece of land outside the villagers’ site of residence to title as their collective territory; a procedure I term ex-situ titling. As a former employee in the Ministry of Interior says, some public functionaries do seek to ‘make the law work’ and expand the space for ethnic recognition and collective titling (fieldnotes, 16.12.2017). At the time of writing, Fernando has still not inspected the piece of land offered, and the case remain pending. Yet, emerging from this reworking form above and from below, what are the potential effects of ex-situ titling?

5. Recognition without rights?

While a central feature of territories is the devolution of authority and resource control (Offen, 2003), it is, more than 25 years after Law 70, still unclear to what extent Afro-descendant community councils are granted rights and control over resources within their collective lands (Oslander, 2002; Weitzner, 2017). Moreover, Afro-descendant collective areas are not included among the ‘territorial entities’ described in Article 286 of the 1991 Constitution,” and Afro-descendant collective areas are indeed labelled ‘Lands of Black Communities’ (Tierras de las Comunidades Negras) – not territories. The mechanism of ex-situ titling, as suggested in Brisas del Frayle, adds a further layer of uncertainty to the territorial status of Afro-descendant collective lands. Rather than territorial notions of autonomy, rights and resource control, the mechanism of ex-situ titling evokes notions of ‘land’. The villagers are for instance asked to demonstrate a ‘lack of land’ ‘carencia de tierra’ and formulate a ‘productive project’ to implement in their envisioned collective property. These requests reflect the idea of the ‘social function of land’, in which land is distributed to ‘those who work it’ (Fields, 2012). Thus, parts of the Cauca valley have been marked by armed conflicts and disappearances linking the sugarcane industry with paramilitary actors (Aguilar-Ararat et al., 2021). While activists have called for the reclamation of land from the sugarcane companies, it is not a dynamic I witnessed in Brisas del Frayle. As argued elsewhere (Hougaard, 2019), the sugarcane company is rather constituted as a local authority (cf. Lund, 2016), with whom the villagers keep an ambiguous relation.

Collective titling can also happen by pooling individual titles, though this process is more complicated and requires a great degree of trust and unity among community members (interview, land rights expert, Cali, 02.03.2018).

Territorial entities mentioned in article 286 are departments, districts, municipalities, and Indigenous territories.
the villagers have to perform the double manoeuvre of i) illustrating ethnic difference, and ii) performing as deserving (peasant) subjects of land restitution; paraphrasing Li (2000, p. 21), they have to “be both good tribes and good peasants.” At the same time, since the villagers do not have a prior relation to the land, nor intend to relocate there, the suggested land plot is bereft of territorial notions of identity and belonging (cf. Halvorsen, 2019; Offen, 2003). Together, this makes the mechanism of ex-situ titling resemble a regular land reform.

On the surface, ex-situ titling may indicate a rupture with the colonial practice of spatially tying identity to place (Li, 2010; Moore, 2005) and instead point towards mobile identities and networked community relations (Bocarejo, 2012; Escobar, 2008; Velez-Torres & Agergaard, 2014). It may be seen as a neoliberal form of multiculturalism, where land as a commodity can be bought on the private property market and enter into productive relations. Yet, with its 0.74 ha, the land plot offered stands in stark contrast to the collective lands titled to Afro-descendants mainly in the Pacific region, with an average size of 3412 ha.22 The restricted size of the land offered neither suggests a networked relation to land in expansionist terms (Anthias, 2021; Escobar, 2008), nor offers much space for developing agricultural projects.

Yet, most importantly, it is unclear what ex-situ titling would mean for the villagers’ control over resources. Currently, resource rights are still spatially tied, as special mining rights to Afro-descendant communities are only granted within the collective lands of these communities. Likewise, and though this goes against international conventions and Constitutional Court rulings, the right to prior consultation is also granted on the basis of collective territory: The mining agencies cross-check solicited mining polygons with the Registry of Black Communities, and if no ethnic community is seen on the screen, they will not appear as eligible for prior consultation, nor for priority right to mining and the establishment of a Black Community Mining Zone. Thus, ex-situ titling may reflect a neoliberal commodification of land, yet rights are currently still spatially tied, echoing a colonial legacy of an ‘ethnic spatial fix’ (Moore, 2005).

Yet, law and procedures may change, and public functionaries may continue to ‘make the law work’ by reworking from above. Thus, it is too early to conclude what material effects and changes in rights status the mechanism of ex-situ titling may have. Nevertheless, the unclear consequences of ex-situ titling situate the villagers in Brisas del Frayle in a legal incertitude, where it is unclear how the law will be interpreted. Since the villagers in Brisas del Frayle do not have a prior relation to the land offered, nor intend relocating there, the mechanism of ex-situ titling seems merely a procedural step in the process of ethnic recognition. More than that, ex-situ titling contributes to the uncertainty and incertitude around villagers’ ethnic rights and resource control, prompting the question whether the villagers may be granted ethnic recognition without corresponding rights.

6. Conclusion

Contributing to the literature on ethnic recognition, neoliberal multiculturalism, and ethnic collective territories as sites of both autonomy and governmentality, I have in this paper investigated how the Colombian legislation for ethnic recognition and collective titling is understood, employed and ‘reworked’ from above as well as from below in the case of Brisas del Frayle. The case illustrates that, though contravening international conventions and Constitutional Court rulings, collective territory is still positioned as a requirement for ethnic recognition in Colombia, making it difficult for communities affected by violence, conflict and capitalist expansion to obtain ethnic recognition and corresponding rights. While the villagers in Brisas del Frayle are interpreting and reworking the legislation to claim rights and ethnic recognition from below, the emergence of the mechanism of ex-situ titling also reflects a degree of reworking from above as the institutions seek to accommodate the requirement of collective territory.

While the mechanism of ex-situ titling may indicate a rupture with the idea of tying identity to place, it is unclear what effects ex-situ titling can have on resource rights and territorial control. If, as current, the mining legislation is implemented remotely, where institutions are only checking for spatial overlap between solicited mining area and the Registry of Black Communities, then right to (mining) resources and prior consultation are in effect still spatially tied. In such case, the suggested collective land would neither secure the villagers’ right to prior consultation nor yield them territorial rights or resource control; this would result in recognition without corresponding rights. Yet, laws and procedures may change, and public functionaries may practice further reworking from above; thus, it is too early to conclude what material and rights effects the mechanism of ex-situ titling may have. Nevertheless, it leaves the villagers in Brisas del Frayle in a state of legal uncertainty concerning their rights to resources and territorial control. In this way, the mechanism of ex-situ titling serves as a political technology that may grant the villagers ethnic recognition but rights status unsettled.

Declaration of interest

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Submission declaration

This manuscript has not been published previously, but it has theoretical and analytical overlaps with a chapter from my PhD thesis, which – according to the journal’s author guidelines – is exempt from the limitation of multiple publications. The manuscript is not under consideration for publication elsewhere and will not be published elsewhere if accepted by Political Geography.

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References


22 Until 2014, 5,407,336 ha had been titled to 1585 Afro-descendant communities (DNP, 2015), giving an average size of 3412 ha. Further, Velez (2011) reports that the smallest area titled among 25 community councils surveyed in the Pacific region was 20 ha, while the largest comprises 75,710 ha. Bolanos Cárdenas et al. (2021) report that 14 titles have been granted in the years 2015–2019, with an average size of 13,934 ha, ranging from 214 ha to 177,960 ha.