



[Dossier: Decolonial comparative property law]

Collective Property in the Nasa Community and the Community of San Basilio de Palenque from a Comparative, Decolonial, and Non-State Perspective

La propiedad Colectiva en la Comunidad Nasa y la Comunidad de San Basilio de Palenque desde una perspectiva Comparada, Decolonial y No Estatal.

Gabriela Niño Pedraza¹

¹University of Bonn, Bonn, Germany. E-mail: mninoped@uni-bonn.de. ORCID: <https://orcid.org/0009-0004-4703-9460>.

Pablo Gonzalez Delgado²

²Universidad Nacional de Colombia, Bogotá, Colombia. E-mail: pgonzalezd@unal.edu.co. ORCID: <https://orcid.org/0009-0000-0363-8673>.

Article received on 09/19/2025, accepted on 10/11/2025 and corrected on 15/12/2025.



This is an open access article distributed under the terms of the Creative Commons Attribution 4.0 International License.



Abstract

The concept of private property contrasts with collective property, which has origins predating colonialism. This article examines the understanding of property in the Nasa community of Cauca and in the Palenquera community of San Basilio in Bolívar, Colombia, through a decolonial comparative lens.

Keywords: Collective Property; Colonialism; Comparative Law.

Resumen

El concepto de propiedad privada contrasta con el de propiedad colectiva, cuyos orígenes son anteriores al colonialismo. Este artículo examina la comprensión de la propiedad en la comunidad Nasa del Cauca y la comunidad palenquera de San Basilio en Bolívar, Colombia, a través de un lente comparativo decolonial.

Palabras-clave: Propiedad Colectiva; Colonialismo; Derecho Comparado.



1. Introduction

This article is dedicated to analyzing the concept of property. Within the concept of protected private property, it asks explicitly whether Indigenous and Afro-descendant communities have been marginalized¹ in the use of their territories. The aim is to analyze the various sources of information in order to verify the marginalization mentioned above. First, we present our methodological approach and characterize private property in the conception of Colombian positive law. Next, the comparison and analysis around property offers a brief contextualization of the Nasa and Palenquero peoples. “Property”, in each people’s respective cosmovision, refers to collective property, which in Colombia is protected through Indigenous reserves and the collective territories of Black communities. These designations relate directly to the dynamics of land registration and conflict resolution. Finally, we present some conclusions on the subject.

Comparative law is a developing field of study that implies the existence of different legal systems. From its origins in Europe, it has imposed a hierarchy between systems that create law and consolidate themselves through the other category of systems, those that copy their regulations (Augenhofer 2021, p.222). This premise obeys colonial and liberal perspectives in the creation of legal knowledge and is criticized by decolonial theories.

Under the comparative law methods that have been dominant up to now, analysis and evaluation have been limited to those discourses and practices of legal cultures that are backed by formal sources of law, and to so-called “law in action” (Bonilla Maldonado 2022, p. 207). The need to opt for other regulative sources, to have other systems – outside state law – as the object of comparative law, is the subject of ongoing discussion. There is, therefore, a need to go beyond the study of state law and investigate the different regulatory orders present in a particular territory. The aim is to decolonize comparative law: to overcome the vertical dialogue between cultures, with a view to understanding their legal contexts through contrast. Decolonial comparative law focuses

¹ Although this document focuses on the study and emphasis of different normative orders other than the state, it is based on the premise of exclusion or marginalization of the collective property of traditional communities with respect to private property. It should be clarified that, in theory, there are differences between marginalization, economic marginality, marginality, and social exclusion (Cortés, 2006), a situation that we do not intend to problematize in this document. Therefore, we understand these concepts indistinctly, in the sense that they encompass the different forms of structural segregation against a group of individuals or collectivities that have been socially separated at the social level. In this case, historical segregation rooted in social and political structures against indigenous and afrodescendant groups.



on capturing the legal theories implicit in fields above or outside positive state law in reaction to the colonial versions of exclusively positivist law and state law (Lopez Medina, 2004).

Thus, the present study adopts a comparative decolonial methodology that is applicable to the comparative study of concepts of private law with a focus on Latin American decolonial theories. Indeed, this paper questions the very origins of these private-law concepts, in particular the concept of property.

2. Methodology

The methodology of comparative law has led to the development of the modern conception of a hierarchy among legal systems. A milestone of these epistemic hierarchies rooted in colonialism and Eurocentrism was the first international congress of comparative law in Paris in 1900 (Frankenberg et. al. 2021, p.5). For example, legal orders were classified as Mutterrechtsordnungen (“mother” legal orders) and Tochterrechtsordnungen (“daughter” legal orders) under the premise that the daughter legal systems were not an original source of regulation but rather were copies of the so-called “mother” systems; another premise was that their legal traditions were not relevant (Zweigert and Kötz 1996, p. 40). In alignment with the ideas of Eurocentrism and colonialism, the mother legal systems indicated as valid ground for comparative study belonged to the countries that historically occupied colonizing roles and that were, with the exception of the United States, located in Europe.

One of the direct critics of this view of the relationship among legal systems was the legal scholar Ulrich Drobnig, who argued early on that these “maternal” legal systems “in no way have a monopoly on original legal discoveries” (Ibid. p. 41). Works by Latin American (Bonilla Maldonado, 2022) and European scholars (Salaymeh & Michaels, 2022), influenced by the postcolonial theories of authors such as Edward Said, Daniel Bonilla, Roger Merino, Homi K. Bhabha, and Gayatri C. Spivak (Said 2019; Bhabha 2006, 1994; Morris y Spivak 2010; Bonilla Maldonado, 2022; Merino, 2018.), have laid the groundwork for the decolonial and critical movements of law.



The evolution of decolonial comparative law involves a critical examination of legal systems through the lens of decoloniality, with the aim of questioning and dismantling colonial legacies within legal frameworks. It highlights the importance of unraveling the global geographies and logics that perpetuate the supremacy of the Global North and coloniality. Drawing on decolonial perspectives, legal scholars, using legal methods (Juma, 2023), can translate decolonial agendas into normative frameworks. It is crucial to avoid processes of “unequal legal integration” (Gargarella 2010-2011, p.1538) or “inferior recognition” that may dilute decolonial notions within legal systems (Tapia, 2016).

In the Latin American context, the discussion has focused on post-development theories. These revolve around a critique that goes beyond neo-Marxism and postcolonial studies. The discussion, developed by authors such as Arturo Escobar, Jorge Esquirol, and Roger Merino, locates the beginning of modernity with the event of colonization and thus distorts the original nature of law within Western positive and state law, acknowledging the existence of earlier developments in regulation outside Europe. In this sense, modernity is understood as an epistemological framework linked to the European colonial project, as well as their vision of the originality of law.

Noteworthy academic work on decolonial and critical comparative law in Latin America is the publication of Professor Daniel Bonilla Maldonado; “El giro hacia el Sur en el derecho constitucional comparado” (The turn to the South in comparative constitutional law), which proposes to criticize traditional (functional) methods for “their cognitively dissonant commitment to the liberal and colonial models of legal knowledge creation”. It emphasizes that the “study of paper law, as well as its systematization, allows us to describe, analyze and evaluate only a marginal part of the discourses and practices that compose legal cultures”. The author suggests the sine-qua-non study of formal sources of law as well as the study of law in action, with sensitivity to the intersections between law and politics (Bonilla Maldonado, 2022, p.207).

Drawing on studies of comparative constitutional law from the Global South, it is possible to formulate a methodology to apply to the comparative study of concepts specific to private law, with a focus on Latin American decolonial theories². For this reason, we propose the following stages of analysis:

² For an in-depth review of Latin American decolonial theories, see Quijano y Arturo Escobar.



(1) The starting point is to reflect on the concept to be analyzed comparatively. For example, it should not be taken as a given that the concept of “property” is a matter of positive law alone. It must be preceded by an analysis of the society to which notions of property are to be applied, and this cannot occur without careful study of the particular characteristics of the society (and, if applicable, its legal system).

Sociological, cultural, economic, and historical studies should give the comparator first insights into the functioning of the society under study, with a special focus on the society’s role in colonization, the “milestone” of modernity. A clarification in this sense should not be haphazard but rather should be based on historical sources. In this regard, sources such as laws, scholarship, and court and administrative rulings are not sufficient to provide the comparator with the required level of understanding. Also required are sources of information from the society itself, which for this purpose will include consideration of fanzines, cultural exhibitions, journalistic documents, and speeches by politicians and community leaders. Of relevance are sources that directly convey something of the stances of those community actors who bear some practical relationship with the concept to be compared (in this case property); among other things, these sources may comprise interviews, ethnographies, or analyses of narratives.

(2) The systems and communities to be analyzed must be chosen after a reflective analysis by the comparator that integrates a dialogical perspective, in the sense that it lets the community raise its own interests and express how these coexist with the choosed concepts. In doing so, consider the answers to the following questions and any that may arise from interaction with the community: What is the relationship between the comparator and the system? If the comparator does not belong to the population where the system applies its rules, is it possible to do collaborative comparative work with someone who does? For practical reasons, are the aforementioned sources easily accessible? Do they require data collection, collaborative work, fieldwork etc.?

(3) The dialogical constitution of knowledge this study proposes begins with informal interactions with community members and materializes in the conduct of interviews. The used tool aligns with the purpose of preserving the security of the people belonging to the communities of San Basilio de Palenque and the Nasa community. A collaborative effort had to be limited due to the violence issues in these two regions³.

³ In ethical terms, the possible disclosure of these members' names may mean a threat to their security and human rights. Take into account the latent conflicts in the communities' territories, as well as the murder



(4) The comparator's task is then to present the worldview of the system and population they have chosen for comparative study. This will be the system in which the concept (again, in our case, the concept of property) is applicable. In this regard, we must return to the previous point: In this regard, we must return to the previous point: This approach structures the way in which the comparator conceives of the concept of property as understood by the population.

(5) One must then formulate units of comparison. Based on Daniel Bonilla's proposal to generate a comparative dialogue, comparative units arise from an initial analysis of the data collected or from the research needs. The justification of the selection of comparative units should allow a third party to identify the comparative perspective and approach. The formulation of these comparative units, as a living and dialogic process, must be focused on the information provided by the interaction with the communities and by the initial exploratory work. The units reflect the conflicts or disagreements presented by the community with respect to the object of comparative analysis. From the information collected, the key units the present study recognizes are the community's relationship with objects, its understanding of property, the recognition of the collective, and conflict resolution. These units are interconnected; an example of this interconnectedness is that if the recognition of collective property did not represent an exception within the state's understanding of property, there would be no conflicts regarding its recognition and defense. As long as these conflicts exist, an analysis of their resolution and of the effectiveness of legal tools for the community's protection becomes necessary.

(6) Subsequently, it is necessary to categorize the information given and analyze the systems to be compared with respect to the questions specifically formulated for the specific case. Here, the comparator must integrate into this part of the analysis the non-state sources of regulation and the possible uses and customs given by (living) law.

(7) The comparative study revealed predictable patterns in the responses. The objective, then, will not be to qualify a regulatory system as "better" or "worse" but rather to analyze the particular problems of either situation: What are its virtues, and in what way can the solutions proposed in one or the other legal system be utilized?.

rates of social leaders and political activists in Colombia. See interview with the Nasa Indigenous Authority and the Mayor of San Basilio de Palenque. They are in the custody of the researchers.



3. Property in Positive Law

The 1991⁴ Constitution recognizes Colombia as a pluri-ethnic and multicultural social state governed by the rule of law, making it a benchmark for the recognition of cultural diversity, as well as for the recognition of the Special Indigenous Jurisdiction (Dorado, 2019, p. 9). However, the same document has also been a catalyst for the neoliberal economic model, creating the ideal institutional environment for maintaining the most important premise of a liberal society: the protection of private property (Mejía, 2003, p. 116.). Therefore, the social and political marginalization of ethnic communities has not been overcome.⁵

In this regard, it should be clarified that in Colombia, the right to property is established in the constitution of 1991 as a right that enjoys special protection and recognition. Article 58 of the Constitution of Colombia states: "Private property and other rights acquired in accordance with civil laws are guaranteed and cannot be disregarded or violated by subsequent laws." Article 59 then relativizes the right to private property, subordinating it to its social function. Owning property is therefore subject to certain obligations and responsibilities toward society in general. Private property as a right in Colombia is also extensively regulated in the Colombian Civil Code (Congreso de los Estados Unidos de Colombia, Ley 84 de 1873). The regulations permit owners to protect their rights and demand respect from others. That is to say, Colombian law offers owners suitable judicial mechanisms to protect their rights (Ibid. Libro segundo Capítulos II a XII). But the social and political marginalization of ethnic communities becomes evident, both on Colombian territory and in Latin America more broadly, when national judicial mechanisms for the protection of collective property prove insufficient, and the collective's demand for protection of its property must be brought before supranational courts. Proof of this are the multiple cases before the Inter-American Court of Human

⁴ Although the concept of property dates back to colonial times, including the recognition of Indigenous Reservations, as will be reviewed in the following section, the 1991 Constitution is a milestone in Colombia in terms of Recognition of Rights for Indigenous Communities.

⁵ Cultural identity plays a crucial role in land ownership, especially among Colombia's indigenous populations. The failure of state and market mechanisms to commodify land has paradoxically fostered a revival of indigenous identities and legal frameworks that emphasize communal land rights. This affects a broader trend in which cultural heritage and identity are intertwined with land ownership, as indigenous communities often conceive of land not as a commodity, but as an integral part of their cultural identity and survival. (Rueda-Saiz, 2017). Recognition of these cultural dimensions is essential to understanding the complexities of property, as they influence both legal frameworks and social practices surrounding land tenure.



Rights intended to force states to comply with their obligations to protect Indigenous communities and the use of their assigned collective property.

In the case of the Indigenous People of Ú'wa v. Colombia, the court's judgment of 14 July 2024 refers to human rights violations derived from the absence of demarcation and formal titling of their territories, the granting of extractive projects without consultation, and acts of violence of which they have been victims since the early 1990s.⁶In its rulings, the court has also extended the protection of collective property to Afro-descendant communities.⁷

It is interesting to see how private property has a higher level of protection than collective property; ultimately, this represents a battle for the prevalence of one worldview over another. And the difference acquires greater relevance within the international legal arena, in which the rights of communities are recognized but in practice the most vulnerable continue to be dispossessed and displaced from their territories. Property will only fulfill its social function when it is guaranteed to those who have historically been marginalized.

However, the Nasa indigenous community and the community of San Basilio de Palenque are two distinct peoples that have both been historically marginalized and that both have a vision of collective property linked to territory. They are two examples of resistance in different spheres. Their territories also represent places in which a dialogical relationship has been established, one of the methodological presuppositions for the proposed comparative analysis of state or positive law with the communities' respective attitudes.

4. Nasa People: Contextualization

The cradle of the Nasa community in Colombia is the Department of Cauca, in what is commonly known as Tierradentro, on the eastern slope of the Central Ranges, in a geographic triangle formed by the eastern foothills of the Cordillera Central and the watersheds of the Páez and Yaguará rivers in the east and by La Plata and Páez in the

⁶ See among others: Corte Interamericana de Derechos Humanos, *Yakye Axa vs. Paraguay*, 17.6.2005; *Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, 31.8.2001; *Xucuru v. Brasil*, 5.2.2018.

⁷ See among others: Corte Interamericana de Derechos Humanos, *Comunidades Afrodescendientes Desplazadas de la Cuenca del Río Cacarica (Operación Génesis) Vs. Colombia*, 20.11.2013.



south, between the departments of Huila and Cauca (Pachón 1996). Currently, there are also territories of the Nasa community in Tolima, Valle, Caquetá and Putumayo. The Nasa population is divided into 6 zones within the national territory—the Tierradentro Zone, the Eastern Zone, the Northern Zone, the Resettlement Zone, the Western Zone, and the Northeastern Zone—with 60 reserves either already or in the process of being established. The Nasa language is referred to as Paéz or Nasa Yuwe (Ministerio de Justicia y Derecho y Consejo Regional Indígena del Cauca, 2020, p. 54); the latter is considered one of the most important languages in Colombia, given the high number of Nasa indigenous people. Likewise, a Nasa diaspora is present in Colombia’s urban centers as well as throughout the country.

Around the year 1700, the highest representatives of the Nasa people, the caciques Juan Tama de la Estrella (of Paéz origin) and Quilo y Sicos (from Tacueyó), traveled to the Viceroyalty of Peru, a Spanish administrative center consolidated in 1542 (Marquardt, 2018, p.500), to seek recognition of and delimit their territories⁸. So called “Royal Certificates” were delivered and subsequently registered with the authorities at Popayan (Bonilla, 2015, p.25). These documents are still used today to geographically delimit Indigenous reservations as territories in which “ethnic groups exercise the fundamental right of collective ownership”(Sentencia T-011, 2019).

After the wars of independence at the end of the 19th century, pressure from the Nasa community led to the enactment of Law 89 of 1890, “Which determines the manner in which savages who are being reduced to civilized life should be governed.” It represented an attempt to respect the places, known as cabildos, where an Indigenous faction was located.

In terms of recognizing and protecting Indigenous territories, the legislative process took a step backward in the first half of the 20th century⁹. The paradigm shifts at the legal level came with the introduction of Convention 169 of the International Labor Organization (ILO) into the legal order and the enactment of the 1991 constitution. It highlighted the pluri-ethnic character of the Colombian nation. It granted Indigenous communities’ autonomy and territorial rights, thus marking the beginning of a new era in

⁸ The royal decrees issued by the Spanish monarchs were conceived as a form of protection for the indigenous population and a source of common land ownership, although subjugated under the *encomienda* system, which allowed the Spanish to collect taxes on behalf of the king. (España, 2005, pp. 72-75).

⁹ Law 55 of 1905, Law 104 of 1919, Law 200 of 1936, and Law 200 of 1936, which allowed for the appraisal, census, and distribution of indigenous reserves, as well as the possibility of eliminating, dividing, or expropriating indigenous reserves without requiring the consent of the communities.



the defense of the rights of ethnic communities in the country. This process continues to this day (Castro y Tellez, 2018). Likewise, the ethnic chapter of the 2016 peace agreements with the FARC guerrilla group sets a historic precedent for the struggle and recognition of the rights of ethnic communities in Colombia.

However, in the Nasa worldview – in contrast to that of the Western world – nothing is inert; everything – mountains, rivers, or la madre tierra (Mother Earth) – is alive; “everything is interwoven”(Entrevista Autoridad Indígena, 2023). The world is conceived as a big house (yet or yat) in which everyone coexists. According to Nasa mythology, our first grandparents and parents lived on another earth, in one home. With the origin of life on earth, which they inhabited, the first parents and grandparents became the guardians and protectors of their own environment, assuming the role of custodians of the Nasa world (Osorio, 2009, p. 16). In this way, territory represents the core of the earth and the space that sustains existence. They consider the territory to embody a historical narrative that preserves the customs of its inhabitants; that is, it symbolizes and narrates the history of their culture (Ministerio de Justicia y el Derecho y Consejo Regional Indígena del Cauca, 2020, p. 55-56).

Thus, based on the Ley de Origen [the law of origin], buen vivir (good living) appears at the center, as the basis of life and community development, seeking other forms of interaction that allow for the promotion of life and culture. Buen vivir is understood as “a way of life in harmony with yourself, with society, and with nature”(Cifuentes Pechucue y Mosquera Ramírez, 2023, p. 2).

The Derecho Mayor or Ley de Origen (Major Law) is founded on the principles of oral tradition, ancestry, customs and traditions. It represents the set of laws, processes and actions supported by the word of origin (mantey yuwe) and the history of the ancients (jughte yuwe), and its aim is to remedy disharmony (yuween) and restore balance (37). It serves as a guide in resolving conflicts that arise in the community, the resolution of which is carried out by individuals in charge of imparting traditional justice¹⁰.

Various persons are involved in the resolution of conflicts using internal justice. First come the Spiritual Elders, who always accompany the community’s processes as the

¹⁰ Although conflicts are resolved using the *Derecho Mayor* and it is this that sustains the relations in the community and has preponderance over the Positive Law, the State Law is necessary, for example, when it comes to consolidating collective territorial rights in reserves for the community. Once the reservations have been constituted through the established positive legal procedure, the special indigenous jurisdiction operates within the territory.



central pillar thereof. Second comes the Assembly, the highest authority, composed of the Spiritual Elders, the authorities, and the community. Third, there is the Council of Elders, whose membership serves as guides and supporters of the authorities and the community. Fourth, there are the Traditional Indigenous Authorities, who impart justice on behalf of the community based on wishes expressed in the Assembly. Fifth comes the membership of the regional or zonal councils (called thuthenas), who support decision-making when more than one part of the territory is affected or when particularly serious conduct is at issue (Ministerio de Justicia y el Derecho y Consejo Regional Indígena del Cauca, 2020, p. 61-62).

5. The Afro-Descendant Palanquero Community: Contextualization

The Afro-descendant Palanquero community of San Basilio is located in the municipality of Mahates, in the Department of Bolívar(40). The village of San Basilio has been proclaimed by UNESCO as one of the masterpieces of the oral and intangible heritage of humanity. The Afro-descendant Palanquero community has been recognized as the first free Afro-descendant community in Colombia (41). Its origin dates to the 16th and 18th centuries, when groups of Maroons or “rebel slaves” of African origin escaped in a rejection of the treatment imposed upon them by the Spanish conquistadores. Their escape resulted in the founding of Palenques (free settlements), but their autonomy was not recognized until the 17th century (42).

A peace agreement between the Maroons and the Spanish was signed in 1603, but it was not until 1714 that the Spanish Crown issued a royal decree declaring San Basilio de Palenque free from slavery (Navarrete, 2017).

Unlike the Nasa community, the legal-administrative figure of San Basilio de Palenque received no recognition from the Spanish Crown comparable to the Indigenous Reserves. During the Republican era and throughout much of the 20th century, no specific legislation – apart from those laws mentioned in the previous section – provided anything for the territories occupied by Afro-descendant communities that might have affected them (Hoffman, 2007). Thus, while the Indigenous Reserves served as a place to maintain the traditions and identity of the Indigenous peoples there, the spaces inhabited by the Afro-descendant communities had no comparable status. In this respect, San Basilio de



Palenque was privileged: Its geographical location left it at the margins of state interference, which permitted it to preserve its identity and customs for centuries.

When the 1991 Constitution took effect, the transitional Article 55 and the subsequent enactment of Law 70 of 1993 ushered in a new stage of recognition of the identities as well as of protection for the Afro-descendant communities' ancestral territory. This included the direct protection established in the constitution and also saw the institution of "Territorios Colectivos de Comunidades Negras" (Collective Territories of Black Communities) as a safeguard for these peoples, who had historically been relegated to the margins of society (ibid.).

The religion, language (Palenquero), music, dance, medicine, and organizational structure of the Palenquero people are deeply rooted in their traditions and have names of their own. These aspects of their culture are particularly influenced by their worldview, of Yoruba origin (Congreso de Colombia, 2019, p. 2), of three worlds: the world of the living, the world of the dead, and the world of the mojanas, which refers to El Palenque in reverse, a world inhabited by beings with supernatural powers (Montoya y Solarte, 2016).

Social organization is defined by kuagros¹¹, a form of consolidation of the social collective led by its most advantaged leader in terms of strength or skills (Ávila Torres 2017, p. 159). Despite its history and cultural heritage, the people of Palenque have been affected throughout their history by a lack of recognition and state activity; by the Colombian armed conflict, with the arrival of armed groups in the Montes de María region; and by poverty (ibid.). Based on data from the Sisbén survey, updated in 2007, it is estimated that poverty affects 76.7% of the population; that is, they have at least one unsatisfied basic need¹².

San Basilio de Palenque has developed its own system of community justice in which local leaders and authorities participate in the resolution of disputes based on the customs and traditions of the territory passed down from generation to generation. These community justice practices are based on a set of knowledge and skills that have historically allowed ethnic peoples to preserve their worldview with respect to the

¹¹ Kuagros: These are age groups composed of women and men around six to nine years of age, which strengthened at puberty and lasts until death.

¹² The UBN (Unsatisfied Basic Needs) is an integrated method for measuring poverty. It aims to identify households and individuals who are unable to meet a set of needs considered essential according to universally accepted standards of well-being, using primarily census data.



collective, the individual, the environment, and the territory. They promote community dialogue. In addition to the kuagros, which are social entities that exercise their own justice, there is the Guardia Cimarrona (the Maroon Guard), whose origins date back to colonial times (Comisión para el Esclarecimiento de la Verdad, la Convivencia y la No Repetición 2022, p. 74).

The main authority in matters of justice is the Community Council, which is composed of the legal representatives, representatives of the Maroon Guard, two elders and four young people. Within these social dynamics, the role of the police inspector is noteworthy: This figure is also responsible for conflict resolution and applies state or local law as appropriate (Entrevista Mayor, 2023).

6. Comparative units and analysis

6.1. Recognizing something as one's own

The Nasa recognize individual rights to administer land from the perspective of the connection of the lineage to the territory in an approach that refers to "territory"¹³: Community authorities designate individual group members as administrators of specific spaces, and this property can be transferred to other community members for administration by them (Entrevista Autoridad Indígena, 2023). In terms of state law, administration can be understood as the use and enjoyment of the thus-delimited territory (a usufruct), and the surviving members of the family nucleus will succeed to this administration or management of the property (Ibid.).

The customary background associated with the recognition of individual administration of territory also has a collective character in the community of San Basilio del Palenque (Comisión para el Esclarecimiento de la Verdad, la Convivencia y la No Repetición, 2022), which is headed by the Community Council (Congreso de Colombia, 1993, Ley 70). The tenure of specific spaces does not in principle conform to positive law but rather has a communal, family character (Comisión para el Esclarecimiento de la Verdad, la Convivencia y la No Repetición, 2022, p. 8.). The Community Council hands over administration of the property to its new members, who may acquire or inherit the right

¹³ As referred in section 4



to manage¹⁴; however, as land tenure is collective, the Community Council retains ultimate authority on it: “It is not possible to sell the property to those who do not belong to the Palenquera community”(Entrevista Mayor, 2023).

Decolonial theory allows the emergence of the Nasa community to precede colonization, the milestone of modernity. In fact, the Nasa community is descended from the ancient communities that inhabited America before the Spanish conquest. The right of the Nasa over the territory is perceived as predating the King and even the Colombian state (Bonilla, 2015, p. 20). For its part, the Community of San Basilio de Palenque has its origin precisely in this watershed moment of modernity: It is a clear consequence of the slavery of the colonial era. Although the community did not emerge immediately upon colonization, the arrival of people from the African continent to the Americas could have been delayed but for colonization. Without slavery, the rebellion of the Maroons, led by Benkos Biojo, which led to the emergence of San Basilio de Palenque (Dieck 2000, p. 14), would not have arisen. This population became a key to resistance and autonomy and promoted the preservation of cultural identity and historical heritage. Its people are recognized as the first free people in America.

The complexity of collective property has a foundation in both the Nasa and the Palenque communities. The basis for collectivity and the idea of community is present in many factors, such as the administration of the collective by dedicated community bodies, the qualities of the inhabitants of the community to be administrators of territory, the state recognition of the general collective territory, or official protections against outside interventions in their territories.

Thus, for the Nasa, collective property means that land and natural resources are not personal property but are owned by the community as a whole. Instead of being managed and used by individuals for the personal benefit of each, property is managed and distributed equitably for the well-being of all members of the community. This approach is based on the concept that land is a fundamental element of life, culture, and the survival of the community, and therefore must be managed in harmony with nature.

¹⁴ It should be noted that the community was formed from groups of maroons or “black rebels of African origin who rejected the yoke of slavery and fled to the mountains, swamps, and inaccessible places” (Friedemann 1983:18), so the arrival of new members was usual in the consolidation of the community of San Basilio de Palenque. It should be clarified that the property or its administration cannot be acquired by people who do not belong to the community (foreigners). From the information obtained from the interviews, there are currently problems in the community because the property was sold to outsiders, who fenced it off and did not allow the community to enjoy it. Currently, it is in the process of judicial restitution



Indigenous land ownership is a form of property founded not on official recognition by the state but on the traditional use and possession of lands that belong to the Indigenous people through ancestral use and occupation. In principle, Indigenous law stands in dialog and coexists with state law based on Colombia's multi-ethnic and pluricultural character, which the 1991 Constitution recognized (Ramírez, 2007, p. 138).

6.2. What does “property” mean?

In the specific case of the Nasa community, collective property is rooted in their cosmovision and in their history as descendants of ancient communities that inhabited the Americas before the Spanish conquest. They consider the earth to be their Mother, and as a sign of respect for her, they strive to care for her and keep her healthy. Collective ownership implies that decisions about how to use the land and its resources are made communally, taking into account the needs and aspirations of all community members and in line with their culture and traditions.

Similar to the Nasa people, the territory of Palenque is held collectively, such that the land and natural resources belong to the entire community and must be managed for the well-being of all its members. However, unlike the Nasa, their worldview and identity, as well as their customary law, is based on different traditions. Ownership is collective, which means that the property belongs to all members of the community; the Community Council ...keeps records of it and entrusts it to an administrator (Entrevista Mayor, 2023).

For the Palenquero People, property is rooted in aspects of community and family (Comisión para el Esclarecimiento de la Verdad, la Convivencia y la No Repetición 2022, p. 8). Because it is linked to the history and cultural identity of the Palenquero, it has a strong relationship with the land: it is the space that connects the community with its roots¹⁵. Therefore, all decisions must be made collectively, with an emphasis on preserving the people's cultural identity, knowledge, and traditions.

Unlike the Nasa community, the community of San Basilio de Palenque does not base its ideas on the Law of Origin but rather on a concept of justice based on customs and traditions of the territory, which is influenced by the knowledge and abilities of the people. This concept of justice integrates the collective and the individual as well as the

¹⁵ Represented in six sociocultural activities: music, dance, gastronomy, language, rituals, and traditional medicine, resulting both from their sociocultural and productive practices and from their recognition of the territory and its social organization, Ana Montoya Esteban Solarte 2016, p. 3.



environment and the territory (Comisión para el Esclarecimiento de la Verdad, la Convivencia y la No Repetición 2022, p. 74). Another contrast with the Nasa community is that the Palenquero people can acquire territories the administration of which has been entrusted to them or that they have inherited under the terms of state law. This means that the spaces demarcated within the collective territory can be registered with the real estate registry.

6.3. How collective property is recognized in relation to outsiders¹⁶

The right of ethnic¹⁷ communities to collective property is protected in Articles 55, 63, 329 and 330 of the Colombian Constitution, in Law 21 of 1991, Law 160 of 1994, and Law 70 of 1993, and in Decree 1071 of 2015 as well as the ILO Convention 169.

Chapter XIV of Law 160 of 1994 indicates that the Indigenous reservations are a special legal and socio-political institution made up of one or more Indigenous communities who hold collective tenure over the territory, such that, governed by an autonomous organization and protected by the Indigenous jurisdiction and the Derecho mayor, these collective territories are inalienable and not subject to prescription or seizure. The Indigenous authorities exercise full administration over the collective territories.

The collective rights of Black communities are established in positive law¹⁸. Article 5 of Law 70 of 1993 granted the Community Councils of Black communities status as legal entities that, in addition to the powers already mentioned, ensure the protection and preservation of the property rights within the community as well as the safeguarding of the cultural identity of Black people.

Both the Nasa indigenous authorities and the Community Council of San Basilio de Palenque exercise full administration over their collective territories. These are covered by ILO Convention 169 on Indigenous and Tribal Peoples. In this sense, no one may intervene in the territory without advance consultation with the designated

¹⁶ It should be clarified that the expression "others" refers to groups outside the community, that is, state agents and other communities in the territory.

¹⁷ Ethnic groups are understood to be those groups from both the afro-colombian community and indigenous groups.

¹⁸ Ley 70 de 1993.



authorities¹⁹. Colombia ratified the effects of this instrument of international public law in its national legal system with Law 21 of 1991.

6.4. How conflicts are resolved

Whether in the form of an Indigenous reservation or collective territory, the recognition of collective property gives the communities full powers to exercise their own rights within them. However, this is not an entirely harmless assertion. Regarding the Nasa people, Indigenous justice has at times prevailed over positive law, and on some occasions public opinion has disagreed with decisions taken by the Indigenous authorities to remedy discord (Ministerio de Justicia y el Derecho y Consejo Regional Indígena del Cauca, 2020, p. 70). With regard to San Basilio de Palenque, its own law prevails over state law, although it may in some cases cause conflict with those who would prefer to resolve disputes using procedures that are foreign to Palenque customs and are considered time-consuming, resource-intensive, and an inefficient means of resolving conflict²⁰.

The Nasa seeks to remedy disharmony in relation to other people's property; mainly, this is evident in thefts of what is known in state law as movable property (Ministerio de Justicia y el Derecho y Consejo Regional Indígena del Cauca, 2020, p. 67). Palenqueros resolve disputes arising from the undue possession of property that does not belong to a specific person by seeking to find a solution that will remedy the situation. In both cases, some notion of private property is evident; but the same notion does not apply to the territory due to its sacred character. It does, however, demonstrate the influence of Westernization on the communities.

Otherwise, there is environmental disharmony and illegal economic activity in the Nasa territories that consists in illegal logging, illegal mining, the spread of illicit crops, and the expansion of drug trafficking, and in consequence those engaging in this illegal activity find themselves in territorial disputes with the Nasa people (Ibid.).

Today, these territorial struggles have reached a critical stage. Both the community and its customs and traditions are in danger of disappearing at the hands of guerrilla groups and paramilitary and state forces. For the Nasa, their struggle is the result

¹⁹ Corte Constitucional de Colombia (1997 -2018), Sentencias, SU-039/97, SU-383/03, C 073/18.

²⁰ Mayor relates that while a conflict can be resolved in approximately one week using its Derecho Proprio, if state law is used, the same controversy can take months to be resolved, without reaching a solution with which both parties are satisfied.



of centuries of oppression in search of recognition of their Derecho Preferencial (preferential right) over the territories in which they are settled, which is assimilated into the Derecho Mayor (Bonilla, 2015, p. 19-21).

Both the Nasa and Palenquero peoples have a history of struggling for the recognition of their autonomy, identity, and ancestral territories. These were highlighted to some extent in the 1991 Constitution, but the contest continues. For example, Resolution 0466 of 2012 of the Colombian Institute for Rural Development (Incoder) recognizes the collective territory of San Basilio de Palenque; however, despite the symbolic transfer, the Oficina de Registro de Instrumentos Públicos (Registry Office of public Instrument) declined to carry out the registration because certain formalities had not been satisfied (Comisión para el Esclarecimiento de la Verdad, la Convivencia y la No Repetición 2022, p. 13).

For the Nasa people, the land problem transformed the way their community has conducted the struggle. Initially, they appealed to state law as the mechanism by which to assert their demands. However, having exhausted these “legal remedies” without a positive outcome, they resorted to “de facto remedies” to enforce their rights. Hence, the proceso de liberación de la Madre Tierra or “Mother Earth’s liberation process” emerged as a social movement that carries on an alternative discourse that seeks to recover the Nasa’s ancestral territories, avoid land taxes, and claim the Nasa’s own rights²¹.

7. Conclusions

This document highlights the potential for academic growth and research in decolonial comparative law, including sources specific to constitutional law.

As a primary source of information – and with the objective of opening a space for communication and comparison between two different regulatory systems – we consulted both written sources (laws, studies, community statements, census surveys, reports, news) and primary sources (interviews with members of the groups under study). The results of the analysis facilitate the identification of both common factors and ones that lead to differentiation of the two systems. However, it is important to recognize that the methodological approach is subject to adaptation over the course of the inquiry. The

²¹ For more information, visit the website <https://liberaciondelamadretierra.org/>



inquiry was formulated as a “living” process in which questions that were designed deductively prior to data collection could be reformulated based on priorities that emerged during information collection and in dialog with community members.

This study has departed from the idea of state law as a standard for comparative analysis. Under the premise that the proper, autonomous rights of ethnic and Black communities are in themselves separate from the systems that earlier comparative analyses have studied, this study has focused on the idea that decolonial comparative law must go beyond state positive law and center on the communities that live and produce law in their ancestral territories. The understanding must be that that these law communities predate even colonialism, which decolonial theory conceives as the milestone of modernity. Not only must the colonial, and Eurocentric, conception be overcome that comparison must center around the “mother” legal systems (the *Mütterrechtsordnungen*) and state law, but focus also must be directed toward the communities’ own normative systems from an autonomous, but also dialogical, perspective.

As for what is recognized as the ethnic and Black communities’ own, both the Nasa and the Palenquero community regard property as collective, so property is given over to the administration of individuals on the authority of the community. It is understood that the territory is vital for the community's livelihood. The concept of common benefit remains central, which differs from positive law where the private notion of property takes precedence.

Thus, while property in positive law has a private connotation, property in the studied communities is collective. For the Nasa, it is rooted in their cosmovision and in their history as descendants of ancient communities that inhabited America before the conquest, with the land being regarded as their Mother (*Madre*), which implies respect and care. In Palenque, land tenure is similarly collective, but the Palenquero worldview and identity as well as its customary law is based on different traditions. This community’s strong relationship with the land is linked to its history and cultural identity and to the palenque as a space that connects the community with its roots. The notion of justice is central; but unlike in the Nasa community, the Palenquero tradition holds out a possibility of acquiring private ownership of the goods under Palenquero administration.

Regarding the recognition of collective property in the respective communities in relation to outsiders, the Constitution of Colombia recognizes these community rights in



several articles, which in turn is supported by ILO Convention 169. There are also national regulations for each community: Law 160 of 1994 for Indigenous peoples; Law 70 of 1993 for Afro-descendant, Black, Raizal, and Palenquero communities.

Ultimately, the conflict between the different normative orders was also evidenced in the Derecho Mayor and in state law. Although recognition of ancestral territories is governed by positive law, the Derecho Proprio prevails in the respective communities' exercise of autonomy, as it represents the more efficient way to resolve the conflicts that arise within the community. The communities resorting to the Derecho Proprio always comes at the cost of a certain degree of skepticism regarding this law's application from an external perspective.

The present work has been an effort to highlight alternative visions, regarding both the connotations of property and its uses as well as the resolution of the resolution of conflicts over land tenure in the territory, making visible collective notions that transcend hegemonic Western approaches by using a novel methodology based on concepts of non-state as well as decolonial comparative law. The idea of dialog between different normative orders, regardless of whether they constitute positive law, aims to find solutions to the problems that communities face directly, at their root, quickly and accurately, in accordance with local customs and traditions.

References

ACUÑA R. Comparación jurídica desde el sur global genealogía de un proyecto crítico. *THEMIS: Revista de Derecho*, 73, 131–145. 2018.

AUGENHOFER, S. Rechtsvergleichung. En: Krüper (Coords.). *Grundlagen des Rechts* (p. 222-247). Baden Baden: Nomos. 2021.

BHABHA, H. K. *The location of culture*. London, New York: Routledge, 1994.

BONILLA S., V. D. *Historia Política del Pueblo Nasa*. Santander De Quilichao: Asociación de Cabildos Indígenas de la Zona Norte del Cauca, 2015

BONILLA MALDONADO, D. El giro hacia el Sur en el derecho constitucional comparado Ensayo sobre el libro *Comparative Constitutional Law and the Global South*. *Revista de derecho, Barranquilla*, 57, 186–211, 2022.



CASTRO, A.; TELLÉZ, R. Explorando el origen de nuestros ancestros: el nacimiento del pueblo Nasa: la historia de un genocidio, *Revista Republicana*, Bogotá, 24, 181-201. Enero/junio 2018.

COLOMBIA. Ley nº 89, de 25 de noviembre de 1890. Por la cual se determina la manera como deben ser gobernados los salvajes que vayan reduciéndose a la vida civilizada. *Diario Oficial de la República de Colombia*, n.8263, 8 de diciembre de 1890.

COLOMBIA. Ley nº 55, de 29 de abril de 1905. Por la cual se ratifica la venta de varios bienes nacionales y se hace cesión de otros. *Diario Oficial de la República de Colombia*, n.12345, 9 de mayo de 1905.

COLOMBIA. Ley nº 104, de 16 de diciembre de 1919. Por la cual se dispone la división de algunos terrenos de resguardo. *Diario Oficial de la República de Colombia*, n.16998, 19 de diciembre de 1919.

COLOMBIA. Ley nº 21, de 04 de marzo de 1991. Por medio de la cual se aprueba el Convenio número 169 sobre pueblos indígenas y tribales en países independientes, adoptado por la 76ª. reunión de la Conferencia General de la O.I.T., Ginebra 1989. *Diario Oficial de la República de Colombia*, n.39720, 6 de marzo de 1991.

COLOMBIA. Ley nº 160, de 3 de agosto de 1994. por la cual se crea el Sistema Nacional de Reforma Agraria y Desarrollo Rural Campesino, se establece un subsidio para la adquisición de tierras, se reforma el Instituto Colombiano de la Reforma Agraria y se dictan otras disposiciones. *Diario Oficial de la República de Colombia*, n.41479, 5 de agosto de 1994.

COLOMBIA. Constitución Política de Colombia, de 13 de junio de 1991. *Gaceta Constitucional*, n.114, 7 de julio de 1991.

CORTÉS, F. Consideraciones sobre la marginación, la marginalidad, marginalidad económica y exclusión social. *Papeles de población*, online, 12 (47),71-84, 2006.

DE ÁVILA TORRES, D. San Basilio de Palenque y su organización social: El kuagro como referente histórico cultural. *Hexágono Pedagógico*, Chile, 8 (1), 155–163, noviembre 2017.

DE CRUZ, P. *Comparative Law in a Changing World*. London, Sidney: Taylor & Francis, 2024.

DIECK, M. *La negación en el palenquero: Análisis sincrónico, estudio comparativo y consecuencias teóricas*. 1. Ed., Iberoamericana Editorial Vervuert. Frankfurt am Main, 2000.

DORADO, O. *La administración de justicia y su relación con el derecho propio del pueblo Nasa*. 354 . Tesis Doctoral sin publicar. Universidad Libre de Colombia, Bogotá, 2019.

ESCOBAR, A. *La intervención del Tercer Mundo*. Caracas: Fundación Editorial El Perro y La Rana, 2007.



ESPAÑA, P. El régimen de la tierra en el cedulario de Encinas. Bogotá: Pontificia Universidad Javeriana. 2005.

FEHRENBACHER, A.; PATEL, D. Translating the theory of intersectionality into quantitative and mixed methods for empirical gender transformative research on health. *Culture Health & Sexuality*, 22(1), 145-160. 2019.

FORSTER, D. Zur Methode des Rechtsvergleichs in der Rechtswissenschaft. On the Methods for Comparative Law Research in Legal Studies. *Ancilla Iuris*, Zürich, 98, 99–109. 2018.

FÚNEZ-FLORES, J. Decolonial and ontological challenges in social and anthropological theory. *Theory Culture & Society*, 39(6), 21-41. 2022.

GARGARELLA, R. Grafting Social Rights into Hostile Constitutions. *Texas Law Review*, 89, 1537-1556. 2010-2011.

HYLAND, R. *Gifts*. Oxford: Oxford University Press, 2009.

HOFFMANN, O. *Comunidades negras en el Pacífico colombiano*. Lima: Institut français d'études andines, Centro Cultural Abya-Yala, Centro de investigaciones y estudios superiores en antropología social, 2007.

JUMA, P. Decolonizing African mental health laws: a case for Kenya. *Journal of African Law*, 68(1), 73-88. 2023.

KOCH, H.; MAGNUS, U.; WINKLER, P. *IPR und Rechtsvergleichung*. 3. ed. München: Beck, C H, 2004.

LUGONES, M. Toward a Decolonial Feminism. *Hypatia*. 25 (4), 742–759. 2010.

MAXIM B. et al. *Derecho comparado crítico*. Bogotá: Siglo Editorial, 2021.

MEDINA, D. *Teoría impura del derecho*. Bogotá: Legis-Universidad de los Andes-Universidad Nacional de Colombia. 2004.

MEJIA, O. Teoría Crítica, Estado autoritario y sociedad global, La heterodoxia Marxista y el reto de la globalización. En: Estrada, J. (Coords.). *Marx Vive: dominación, crisis y resistencias en el nuevo orden capitalista* (p. 111-116). Bogotá: Universidad Nacional de Colombia. 2003.

MIGNOLO, W. Epistemic Disobedience and the Decolonial Option: A Manifesto. *TRANSMODERNITY: Journal of Peripheral Cultural Production of the Luso-Hispanic World*. 1 (2).44-66. 2011.

MONTOYA, A.; SOLARTE, E. *San Basilio de Palenque. Patrimonio intangible en riesgo*. Uni-pluriversidad, Medellín, 16, 2016.

MORRIS, R.; SPIVAK, C.; GAYATRI C.(Coord.). *Can the subaltern speak? Reflections on the history of an idea*. New York: Columbia University Press. 2010.



NAVARRETE, M. Formas sociales organizativas en los palenques de las Sierras de María, siglo XVII. *Historia y Espacio*. 13(48).19-44.2017.

OSORIO RODRÍGUEZ, G. Cosmovisión del pueblo indígena Nasa en Colombia. Lima, Perú: Secretaría General de la Comunidad Andina, 2009.

PACHON, X. Los Nasa o la gente paez. En: Oliveros D., Pachón, X; Wiesner, D; Wiesner L. (Coords.). *Geografía Humana de Colombia: Región Andina Central* (p.61-106). Bogotá: Instituto Colombiano de Cultura Hispánica, 1996.

PENARANDA, D. Guerra propia, guerra ajena. Bogotá: Centro Nacional de Memoria Histórica: Iepri: Universidad Nacional de Colombia, 2015.

RAMÍREZ, A. La etno-Constitución de 1991: criterios para determinar derechos comunitarios étnicos indígenas. *Estudios Socio-jurídicos*, 9(1), 130-153. 2007.

RUEDA-SAIZ, P. Indigenous autonomy in Colombia: State-building processes and multiculturalism. *Global Constitutionalism*, 6(2), 265-297. 2017.

SACCO, R.; ROSSI, P. Einführung in die Rechtsvergleichung. Baden-Baden: Nomos, 2017.

SAID, E. W. *Cultura e imperialismo*. Barcelona: DEBATE, 2018.

SALAYMEH, L., MICHAELS, R. Decolonial Comparative Law. A Conceptual Beginning. *Max Planck Private Law Research Paper*. Hamburg, 22(1), 2022.

Srivastava, A. Time use and household division of labor in india within gender dynamics. *Population and Development Review*, 46(2), 249-285. 2020.

TAPIA, S. (2016): Sumak Kawsay, coloniality and the criminalisation of violence against women in Ecuador. *Feminist Theory*, 17(2), 141-156. 2016.

VEIGEL, J. Die funktionale Methode bei der Rechtsvergleichung. *Juridica International*, 30, 71-80. 2021.

ZWEIGERT, K; KÖTZ, H. Einführung in die Rechtsvergleichung auf dem Gebiet des Privatrechts: Grundlagen. Tübingen: Mohr Siebeck, 1984-.



About the authors

Gabriela Niño Pedraza is a PhD candidate and associate researcher at the Institute of International Private Law and Comparative Law at the University of Bonn (Germany).

Pablo Gonzalez Delgado is a doctor and Teaching Assistant at the National University of Colombia (UNAL). He is a scholarship recipient of the Program for the Support of Doctoral Training (PAFD) from the Institute of Environmental Studies (IDEA) at the National University of Colombia and the Center for Development Research (ZEF) at the University of Bonn (Germany).

Authorship credits

The first author is responsible for the conceptualization, particularly in the formulation and evolution of ideas, as well as in defining relevant research goals and objectives within the methodological part. The second author is responsible for conducting the fieldwork, specifically in data collection through interviews as part of their doctoral thesis. Both authors participated jointly in writing, reviewing, and editing the manuscript, including preparation, critical revision, and commentary, both in stages prior to and following publication.

Conflict of interest statement

There are no possible conflicts of interest in carrying out and communicating the research.

Funding information

This research was written as part of the Decolonial Comparative Law programme, a programme hosted and run by Max Planck Institute for Comparative and International Private Law. This edition gave rise to two scientific events co-organised with Brazilian partners, one with the Catholic University of Brasília (UCB) and another one with the Federal University of Bahia (UFBA). The workshop conference leading to the finalisation of the article was funded by Max Planck Förderstiftung.

Data Availability Statement

The data that support the findings of this study are available from the corresponding author, upon reasonable request.

Statement on the Use of Artificial Intelligence

AI tools were not used in the development of this work.

Editors Responsible for the Evaluation Process and Editing

Carolina Alves Vestena and Bruna Bataglia.

This document contains an errata: <https://doi.org/10.1590/2179-8966/2025/95630>

