

Effectiveness of Sentencia T-622/16 and biocultural rights

Eficacia de la Sentencia T-622/16 y derechos bioculturales

Eficácia da Sentença T-622/16 e direitos bioculturais

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Abstract

Introduction: Effectiveness of the Colombian state, institutions and communities in the defense, promotion and guarantee of the biocultural rights of the populations located around the Atrato River, according to the rulings of the constitutional court in ruling Sentencia T-622/16. **Objective:** This article was prepared with the purpose of examining the effectiveness of ruling Sentencia T-622/16 and sustainability of the biocultural rights of the Afro-Colombian communities of Chocó, and the influence on the living conditions of the riverine communities. **Methodology:** The qualitative method was chosen as the study perspective, with respect to the materialization of ruling Sentencia T-622/16 and for its preparation, ethnographic studies, interviews with members of the community and joint bodies of guardians of the Atrato River were carried out. **Results:** Based on the study carried out and, it is inferred that the orders of the constitutional court in order to guarantee the protection of biocultural rights and preservation of the Atrato River have not had real consequences in the practical life of these ethnic communities. **Conclusions:** To conclude, state abandonment and institutional ineffectiveness threaten the sustainability of the biocultural rights of the community residents of the department of Chocó and impact their quality of life.

Keywords: Biocultural Rights; Communities; Riverside Set; Sustainability.

Resumen

Introducción: Se aborda la efectividad del Estado colombiano, sus instituciones y comunidades en la defensa, promoción y salvaguarda de los derechos bioculturales de las poblaciones situadas en la cuenca del río Atrato de acuerdo con las determinaciones de la Corte Constitucional en la Sentencia T-622/16. **Objetivo:** Examinar el efecto útil de la Sentencia T-622/16, el nivel de sostenibilidad de los derechos bioculturales de las comunidades afrocolombianas del Chocó y su eficacia real frente a las condiciones de vida de las comunidades ribereñas de tan importante afluente. **Metodología:** Se eligió el método cualitativo como perspectiva de estudio con respecto a la materialización de la Sentencia T-622/16 y para su elaboración se realizaron estudios etnográficos, entrevistas a miembros de la comunidad, autoridades ambientales y órganos conjuntos como los guardianes del río Atrato. **Resultados:** Con base en el estudio y los resultados obtenidos, se advierte que las órdenes del tribunal constitucional dirigidas a garantizar la protección de los derechos bioculturales de quienes componen el elemento humano del territorio que comprende el nuevo sujeto de derechos y su preservación no han tenido consecuencias benéficas reales en la vida práctica de estas comunidades étnicas. **Conclusiones:** El abandono estatal, la inoperancia y la ineficiencia institucional contribuyen a la contaminación del río Atrato y atentan contra la sostenibilidad de los derechos bioculturales de los residentes comunitarios del Chocó impactando negativamente su calidad de vida.

Palabras clave: Derechos bioculturales; Población, Conjunto ribereño; Sostenibilidad

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Resumo

Introdução: Aborda-se a eficácia do Estado colombiano, suas instituições e comunidades na defesa, promoção e salvaguarda dos direitos bioculturais das populações localizadas na bacia do rio Atrato, de acordo com as determinações da Corte Constitucional na Decisão T-622/16. **Objetivo:** Examinar o efeito útil da Resolução T-622/16, o nível de sustentabilidade dos direitos bioculturais das comunidades afro-colombianas de Chocó e sua real eficácia em termos das condições de vida das comunidades ribeirinhas desse importante afluente. **Metodologia:** O método qualitativo foi escolhido como perspectiva de estudo com relação à materialização da sentença T-622/16 e, para sua elaboração, foram realizados estudos etnográficos, entrevistas com membros da comunidade, autoridades ambientais e órgãos conjuntos, como os guardiões do rio Atrato. **Resultados:** Com base no estudo e nos resultados obtidos, observa-se que as ordens do tribunal constitucional destinadas a garantir a proteção dos direitos bioculturais daqueles que compõem o elemento humano do território que compreende o novo sujeito de direitos e sua preservação não tiveram consequências benéficas reais na vida prática dessas comunidades étnicas. **Conclusões:** O descaso estatal, a inoperância e a ineficiência institucional contribuem para a contaminação do rio Atrato e ameaçam a sustentabilidade dos direitos bioculturais dos moradores da comunidade de Chocó, impactando negativamente sua qualidade de vida.

Palabras clave: Direitos bioculturais; População; Complexo ribeirinho; Sustentabilidade.



Introduction

As a result of the constant complaints and an amparo petition filed by some of the affected ethnic communities in the territory, the Constitutional Court issued Ruling T-622/16 in which it addressed the concept of *biocultural rights* and declared the Atrato River as a subject of rights. The actions of the Colombian State, its institutions and those of the community to promote sustainable development and protect the biocultural rights of the Afro-Colombian communities have not been effective in that the orders of the Constitutional Court contained in such a distinguished ruling regarding the design and implementation of a plan to decontaminate the Atrato river basin, achieve the recovery of ecosystems and prevent further damage to the environment is crucial. A comprehensive action plan (PAI) must be developed to neutralize and definitively regulate illegal mining activities. This PAI should not only address operations on the Atrato River and its tributaries, but also extend to the entire Chocó.

The design and implementation of strategic measures to obtain integral results with high impact on the social, cultural and environmental development of these communities in the Atrato river basin in harmony with the true and real emotion of their biocultural rights, promoting the periodic toxicological and epidemiological studies of the river, its tributaries and communities.

Theoretical framework

Ruling T-622/16, issued by the Constitutional Court, addresses the protection of biocultural rights in the Atrato River. This judgment is based on an environmental context, which emphasizes the importance of guaranteeing the rights of indigenous and Afro-descendant communities that depend on the river for their subsistence and cultural development.

The communities living in the Atrato river basin have made this area their territory, where they reproduce life and preserve their culture. They are located along the upper and middle Atrato, and are organized through community councils.

They have inhabited these territories ancestrally and have developed traditional ways of life that allow them to guarantee their food sustenance. However, the region is strongly affected by various causes derived from the internal armed conflict, such as illegal mining and logging. In these tributaries and in the Atrato River itself, there has been an excessive increase in these activities, using heavy machinery such as dredges and backhoes, and the excessive use of mercury.

There is a lack of effective coordination between the political-administrative regulations that are provided from the national level to the departments and municipalities. Although there are regulations in this area, the lack of synchronization between the authorities makes it difficult to establish effective control. This, in turn, contributes to the possibility of the development of practices that are detrimental to mining sites, as well as to forests and protected areas (Mayorquín Tovar and Moreno Carvajal, 2022).



As Peña Chacón (2018) argues, the constant in legal systems is that they still do not expressly recognize the status of subject of the right to nature, consisting of any person being able to exercise adequate representation through broad procedural legitimacy schemes in defense of supra-individual interests and, at the same time, being able to request through the procedural claim the conservation and recomposition of the environment.

Therefore, the environmental crisis that the department of Chocó is going through makes it necessary for the courts and other forms of conflict resolution, such as the mechanisms of the black communities, to coexist and become effective ways to find adequate tools to stop the environmental and social impacts generated by this type of conflict, as is the case of the black and indigenous communities, which due to the serious environmental damage caused by illegal and industrialized mining have lost their means of subsistence such as hunting, agriculture, fishing and even mining as an ancestral practice, in the particular case of the black communities (Echavarría-Rentría). (Echavarría-Rentería and Hinestroza-Cuesta, 2021).

Ruling T-622/16, in turn, ratifies and recognizes the importance of recognizing the cultural and environmental diversity demanded by these communities. According to international jurisprudence and international treaties, such as Convention 169 of the International Labor Organization (ILO), communities have the right to be adequately and effectively consulted before making decisions that may affect their territory and rights.

Thus, the iconic ruling establishes a solid framework that recognizes the importance of protecting the biocultural rights of indigenous and Afro-descendant communities in the context of the Atrato River based on the *pro persona* interpretation and the principles of prior consultation, recognizing that the communities have a special relationship with their natural environment and that their rights must be respected and protected by the State.

The so-called biocultural rights, in their simplest definition, refer to the rights of ethnic communities to administer and exercise autonomous guardianship over their territories, in accordance with their own laws, customs and the natural resources that make up their habitat, where their culture, traditions and way of life are developed based on the special relationship they have with the environment and biodiversity. Indeed, these rights result from the recognition of the deep and intrinsic connection between nature, its resources and the culture of the ethnic and indigenous communities that inhabit them, which are interdependent and cannot be understood in isolation (Constitutional Court, Decision T-622/16, 2016).

Methodology

The methodology applied in the research is qualitative and used the ethnographic research technique aimed at understanding the behavior of these communities and, in turn, interviews were conducted with members of the community, scholars of ethnic law, environmental authorities and guardians of the Atrato River, with an exploratory and descriptive analysis approach, seeking to establish the patterns that result from the current situation and relating the documents that are connected to the topic to be addressed.



Results

Based on the reports that are socialized in the monitoring roundtables and those signed by two of the guardians of the Atrato River that the Consejo Comunitario Mayor de la Organización Campesina y Popular del Alto Atrato (Cocomopoca) has (Maryori Mosquera and Américo Mosquera), to date, seven years after the emblematic ruling of the Constitutional Court was issued, the reality of illegal mining and contamination of the Atrato River, which the Constitutional Court thought it would have prevented, remains unchanged, as the truth is that the ruling has resulted in an excess of diagnoses and reports that have been unable to achieve practical benefits in the lives of the communities and in the environmental recovery of the river. Of the orders issued by the Constitutional Court, only the protocol ones, such as the appointment of the river's guardian or the appointment of the guardians, have had a useful effect.

The State institutions linked to these orders have focused on spending substantial resources on hiring consultants or preparing technical documents that result in what we all know: the serious environmental situation of the Atrato River and the ethnic communities that inhabit it. But from there to effective actions to restore the life and health of the Atrato River and its biodiverse ecosystem is something that we have not yet witnessed. So far, there is a symptomatic inter-institutional disarticulation necessary to move forward, since the different municipal, departmental or national entities that should intervene in a coordinated manner to take forceful actions against illegal mining and the environmental reconstruction of the Atrato river do not dialogue in an assertive manner.

On the other hand, the institutions and oversight bodies declared in the same sentence today find themselves visibly unable to do their job. Some intervene in an anodyne and infrequent manner, and the guardians, delegates appointed by the communities, do their best, but their voices and complaints fall on deaf ears. Today, the environmental gravity that led the Constitutional Court to issue this representative ruling is still visible and threatening; therefore, this corporation should take radical and bolder measures than what the ruling meant at the time, otherwise it will remain a judicial anecdote in world constitutional law with no useful effect whatsoever.

Discussion

Judicial decisions, especially the sentences of the closing courts, are not by themselves suitable legal mechanisms to guarantee effective protection, conservation and restoration of the environment, especially when their compliance depends on high levels of inter-institutional articulation and coordination both in the exercise of functions and in the foresight and execution of budgetary resources. It is not expected that the sentences will immediately transform situations of serious environmental deterioration, but they should provide the necessary tools to transform those situations that have an impact on the generation of damage (García Pachón, 2020).

According to Sarmiento Erazo (2022), "safeguarding nature is the greatest challenge facing contemporary constitutionalism in environmental matters" (p. 321). For this reason, it is necessary to propose truly effective actions to strengthen the special protection of rivers, forests, and other natural resources.

The aim is to protect the natural resources, food sources, environment and biodiversity present in the territory from which these communities draw their sustenance, guarantee their sustainability and food security, and promote their physical, cultural and spiritual survival as ethnic communities.

It is evident that the expectations that arose due to the promulgation of this ruling have not been satisfied and the orders of the Constitutional Court have not been complied with. The Colombian institutional framework does not encourage economic efficiency and social equity (Llinás Toledo, n. d.).

The complexity of the public management required to comply with the orders of Judgment T-622/16, which as we know introduces not only the figure of a subject of rights to an object of nature, but also a model of co-management based on the shared exercise between the Government and the community organizations within a space of co-responsibility, implies comprehensive views for its understanding and analysis. These measures should include clear and precise indicators that allow for effective evaluation and monitoring of the measures adopted (Corporación Autónoma Regional para el Desarrollo Sostenible del Chocó [CodeChocó], 2020).

In this order of ideas, Ruling T-622/16 contributes, to a certain extent, to the visibility and resolution of the problem; but, in practice, the declaration of the Atrato River as a subject of rights hardly influences environmental protection. Despite having granted legal personality to the river, its situation persists without notable improvements after several months. It should be noted that this legal practice did not originate in Colombia's high constitutional court, this ruling being the third case in which a river is recognized as a subject of rights, following the precedents of the Ganges River in India and the Wanganui River in New Zealand.

The intention of the Constitutional Court, in terms of facilitating access to justice, is urgent and well-intentioned. It adopts a posture of openness towards the constitutional courts and supports the communities in demanding the immediate interruption of the violation of fundamental and collective rights affecting the region. However, the implementation of Ruling T-622/16 faces the harsh reality that a significant part of the river is already allocated for gold mining, its main source of contamination. The Constitutional Court does not prohibit this activity, but rather advocates for its regulation and practice with social and environmental responsibility (Guzmán Jiménez, 2022).

Conclusions

First, it is essential to understand the concept of *biocultural* rights, which recognize the interrelationship between biological and cultural diversity, and the importance of preserving both the natural and cultural heritage of a community. For the Afro-Colombian communities of Chocó, this means protecting both the richness of their natural environment, including their forests, rivers and unique bio- diversity, as well as their deep-rooted cultural traditions, their connection to the land and their traditional way of life.

The armed conflict, illegal mining and logging constitute a threat to the biocultural rights of the Afro-Colombian communities in Chocó, since they have generated a series of



of negative impacts on the environment, which threatens its sustainability. First, unregulated mineral extraction has caused serious environmental degradation. Deforestation, river contamination, and the use of mercury in gold extraction are just some of the environmental problems associated with illegal mining. These destructive practices threaten Chocó's unique biodiversity, which includes endangered species and fragile ecosystems, and compromise the ability of communities to access vital natural resources for their livelihoods.

It is necessary to promote the protection of the natural environment and the traditional knowledge of Afro-Colombian communities, while at the same time promoting sustainable economic alternatives and strengthening the institutional framework for better monitoring and control, through collaborative environments and coordinated actions with grassroots organizations.

It is also urgent that based on this paradigm shift, which meant the Ruling T-622/16, measures be taken to provide judicial guarantees, this means interpreting the law in favor of an adequate application of the principles and rights in environmental matters, promoting the strengthening of the judicial apparatus and, in turn, empowering the institutions responsible for ensuring their protection and safeguarding, with concrete actions for the preservation and protection of these biocultural rights.

The Colombian State must adopt measures that guarantee the exercise of sovereignty, law and order throughout the national territory, as there cannot be zones that are off-limits to the authorities, nor zones of absolute influence and control for the insurgency.

Public policies must be designed, promoted and implemented for the correct management of the powers available to the State that allow for the proper exercise of authority, accompanied by effective assistance measures that contain prioritization criteria for the victims of the conflict, whose coverage, effectiveness and results can be measured with management and evolution indicators, guaranteeing the material application of the norms that recognize their rights, which in many cases, due to the lack of execution and State interest, become or are only mere lyric.

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Conflict of interest

There are no conflicts of interest.

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