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LATIN AMERICAN INTERNATIONAL LAW AND AFRO-DESCENDANT PEOPLES

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After the Third World Conference Against Racism, Racial Discrimination, Xenophobia, and Related Intolerance, held by the United Nations in Durban, South Africa, in 2001, an important movement emerged. The African diaspora communities in the Americas, or "Afro-descendants," as they prefer to self-identify, began to seek legal recognition in the context of international human rights law, and especially within the inter-American human rights system. Progress has been remarkable, including the rulings of the Inter-American Court of Human Rights, changes in the constitutional and legal systems of Latin American countries, and a UN draft of a Declaration of the Rights of People of African Descent, as part of the International Decade for People of African Descent (2015–2024). However, conceptual, technical, and doctrinal issues still exist in defining the legal agency of people of African descent under international law. Who are Afro-descendants in legal terms, and how do we understand "Afro-descendance" within the context of Indigenous and tribal peoples? In this essay, I explain how different regional bodies in Latin America have interpreted Indigenous rights progressively to overcome the marginalization of Afro-descendants, and address some important questions that remain unclear despite this welcome evolution.

Afro-descendants in Latin America

Recent scholarship has attempted to clarify the concept of "Afro-descendance" in the Americas and has undertaken in-depth analyses of the economic, social, and political reality of people of African descent.[1] The more than 133 million citizens that make up the African diaspora in the Americas, known as "Afro-descendants" or "Black communities,"[2] are culturally distinct. From an ontological perspective, "Afro-descendance" resulted from the trade of enslaved African people that took place between the sixteenth and nineteenth centuries.[3] A particular Afro-descendant culture in Latin America developed through a *sui generis* process of acculturation and deculturation shaped by numerous worldviews and through long-term conditions that were very different from those experienced by Indigenous and mestizo groups.[4] To be specific, Afro-descendant culture in the Americas follows a long-term, distinct, historical process mediated by the circumstances of slavery, colonization, and exclusion, which is ongoing and has already lasted half a millennium. During this extended period, people of African descent

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[1] Marcia Santacruz, John Antón, Silvia Savino & Carlos Viáfara, Pueblos Afrodescendientes: Realidades y Desafíos (2019).

[2] Agustín Lao Montes, Contrapunteos diaspóricos. Cartografías políticas de nuestra Afroamérica (2021).

[3] Roger Bastide, Las Américas negras: Las civilizaciones africanas en el Nuevo Mundo (1969).

[4] Manuel Zapata Olivella, La Rebelión de los genes. El mestizaje americano en la sociedad futura (1997).

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have been subjected to violence and intolerant attitudes, and have encountered barriers related to structural racism, inequality, and poverty that obstruct their collective development and fulfillment as citizens.

The category of Afro-descendant has been used in the twenty-first century to count and politically identify the individuals, communities, and peoples throughout the Americas whose ancestors experienced enslavement perpetrated by Europe on African nations. With the incorporation of racial and ethnic self-identification questions in the population censuses in the region, we now have approximate sociodemographic and socioeconomic data on Afro-descendants in Latin America.[5] According to a recent report by the Economic Commission for Latin America and the Caribbean, due to various factors associated with structural racism and systematic institutional discrimination, Afro-descendants in the region have benefitted little from attempts to reduce poverty and inequality. Afro-descendant persons continue to lag behind the majority in socioeconomic indicators and continue being, together with Indigenous Peoples, the region's most persistent segment of the population living in poverty, the result of a history of endemic and structural subjugation, marginalization, discrimination, and structural racism.[6]

International Human Rights Instruments and Afro-descendants

Not only the UN human rights system but also the Organization of American States (OAS) and the Andean Community of Nations have issued legal instruments protecting both individual and collective rights that specifically mention Afro-descendants in the region.[7] Although designed to apply to Indigenous peoples, these instruments allow for legal interpretations that include people of African descent. Other instruments also cover the rights of cultural minorities without distinction between specific ethnic or cultural groups. Furthermore, there are many norms that prohibit discrimination on the basis of race, and in this field the reference to Afro-descendants as historical victims of racial discrimination is common.

International instruments have inspired domestic legal and constitutional reforms in Latin America. For example, the Constitutions of Ecuador, Bolivia, and Mexico have granted to Afro-descendants the status of "peoples." Chile and Costa Rica also recognize Afro-descendant peoples as tribal peoples, including in Chile's constitutional draft, rejected in September 2022. Further, some domestic courts have followed suit. Notably, the Constitutional Court of Colombia has recognized Afro-Colombians, in particular the Black communities that live in the Colombian Pacific basin, including the area of the Atrato River which flows into the Caribbean Sea, as tribal peoples.[8]

Despite these advances, and in contrast to the case of Indigenous peoples, Afro-descendant peoples lack explicit recognition as a distinct legal category within the frameworks of international human rights law. Therefore, the rights of Afro-descendant people are analogized to the rights of Indigenous peoples, leading to assertions that the rights of Indigenous peoples are only applicable to Afro-descendants to the extent that they are comparable. This situation tends to ignore that the goal in framing Afro-descendants as distinct rightholders has been a mechanism for the creation of a similar, but distinct set of protections. For Afro-Bolivian activist Paola Yánez Inofuentes, this deep-rooted assumption subjects the legal nature of the Afro-descendant people

[5] John Antón & Shari García, Censos, identidad, nación y afrodescendencia: Análisis comparativo de metodologías y preguntas de autoidentificación étnica racial en rondas censales 2010–2020 (2019).

[6] CEPAL-Fondo de Población de las Naciones Unidas, *Afrodescendientes y la matriz de la desigualdad social en América Latina* (2020).

[7] Organización de los Estados Americanos, Departamento de Derecho Internacional, Afrodescendientes en las Américas y el Derecho Internacional. El aporte del Departamento de Derecho Internacional de la OEA al desarrollo de la temática Afrodescendiente, Presentación en el Congreso Internacional: África y Pueblos de Ascendencia Africana: Problemáticas Actuales y Acciones para (Re)negociar el Futuro, Howard University, Washington D.C. (Sept. 16, 2011).

[8] Constitutional Court [C.C.] [Constitutional Court], Auto 004/09 (Jan. 26, 2009) (Colom.).

to that of Indigenous people.[9] Thus, one of the demands of Afro-descendant social movements in the Americas is the recognition as collective subjects of their own rights by international law as separate from Indigenous peoples' rights.

Afro-descendants as Subjects of International Law

The legal status of people of African descent in the Americas is key for the vindication of their individual and collective human rights. From the perspective of legal anthropology, for a group to be interpreted as a "people" within their society, they must consider themselves as belonging to a common culture or having a common ancestry.[10] This shared sense of identity might lead to cultural demands as a group. But this identity as a people also has to be determined by objective features that unite the group: languages (in some cases), customs and practices, history, territory, folklore, among others. In the Afro-descendant case, the political debate on recognition turns on whether these aspects are those of national, ethnic, or cultural minorities.

This debate has been informed by the contributions of liberal theorists, such as Will Kymlicka, who distinguishes between "national minorities" and "ethnic groups".[11]A national minority seeks to separate itself from the majoritarian political community. These minorities, as in the case of Indigenous peoples, hope to attain a self-governing status and various forms of self-determination. Conversely, there are other minorities who do not have that aim, and thus claim their ethnicity within a multicultural configuration of society. Their demands pertain to equal status within diversity, maintaining their culture, and guaranteeing their collective rights as a group.

These perspectives of differentiated demands between Indigenous and Afro-descendant peoples have been often ignored. For example, the Inter-American Court of Human Rights recognizes Afro-descendants as a group of right holders as Indigenous peoples within the context of the Americas. In the *Saramaka v. Suriname* case, the Court determined that Afro-descendants have cultural characteristics similar to tribal peoples and could be recognized as such.[12] Other cases have complemented the recognition of rights to Afro-descendants as tribal peoples.[13]

One problem of this sort of recognition is the confluence of claims. Some liberal theories hold that Afro-descendants attained full equality with the abolition of slavery in the second half of the nineteenth century, creating a "racial democracy" or "pigmentocracy."[14] This theory does not account for the framework of structural and doctrinal racism underlying the projects of national identity of the new states. The demands for recognition of Afro-

[9] Paola Yáñez, La experiencia constituyente afroboliviana, Ponencia oral en Cátedra itinerante de estudios afrodescendientes (2002).

[10] Gabriela R. Salas, *El concepto de pueblo*, 4 Revista de la Facultad de Derecho 1 (2013).

[11] *See* Will Kymlicka, Multicultural Citizenship: A Liberal Theory of Minority Rights (1996).

[12] Saramaka People v. Suriname, Judgment, Preliminary Objections, Merits, Reparations, and Costs, Inter-Am. Ct. H.R. (ser. C) No. 172 (Nov. 28, 2007).

[13] Garífuna Triunfo de la Cruz Community v. Honduras, Judgement, Merits, Reparations and Costs, Inter-Am. Ct. H.R. (ser. C) No.; Garífuna Punta Piedra Community and its members v. Honduras, Preliminary Objections, Merits, Reparations and Costs. Judgment (ser. C) No. 304 (Oct. 8, 2015); Afro-descendant Communities displaced from the Cacarica River Basin (Operation Genesis) v. Colombia, Preliminary Objections, Merits, Reparations and Costs (ser. C) No. 270 (Nov. 20, 2013); Moiwana v. Suriname, Sentencia, Excepciones Preliminares, Fondo, Reparaciones y Costas (Inter.-Am. Ct. H.R. June 15, 2005); Aloeboetoe et al. v. Suriname, Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 305 (Oct. 8, 1991. Aloeboetoe et al. v. Suriname, Reparations and Costs, Inter.-Am. Ct. H.R. (ser. C) No. 15 (Sept. 10, 1993); Aloeboetoe et al. v. Suriname, Merits, Inter.-Am. Ct. H.R. (ser. C) No. 11 (Dec. 4, 1991).

[14] Jim Sidanius, Yesilernis Pena & Mark Sawyer, *Inclusionary Discrimination: Pigmentocracy and Patriotism in the Dominican Republic*, 22 J. Pol. Psych. 827 (2002).

descendants are more consistent with the demands of politically relegated ethnic minorities. Therefore, the trajectories of Afro-descendants and Indigenous groups have different nature. Yet, by intermingling the concept "peoples," of international law continues to deny the specific status of ethnic or cultural minority to Afro-descendants, adding to other barriers affecting their civil rights. In other words, international law fails to recognize Afro-descendants in Latin America and their collective rights. If Afro-descendants are unable to assert their status as "tribal peoples," then Afro-descendants cannot exercise their rights to autonomy and self-determination. A similar problematic confluence remains visible in the scope of the International Labor Organization (ILO) Convention No. 169, as I now explain.

ILO Convention No. 169 and the Tribal Peoples Status of Afro-descendants

ILO Convention No. 169 on Indigenous and tribal peoples went into effect in 1991. At first, this Convention was not extensively interpreted to include Afro-descendant peoples and communities, but later, with the development of national legislation on territorial rights and the right to prior consultation of peasant and Indigenous communities, this instrument became an important legal tool for protecting the collective rights of Afro-descendants —at least in the Americas.

Today, under ILO Convention No. 169, Afro-descendant communities have a similar status to that of pre-Hispanic Indigenous populations. The Convention applies to populations considered "Indigenous" or "tribal," regarded as such on account of their "descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonization or the establishment of present state boundaries and who, irrespective of their legal status, retain some or all of their own social, economic, cultural and political institutions;"[15] or, those peoples who still maintain self-identification and recognition as Indigenous and tribal peoples.

In the case of Afro-descendants, their status as an native people of the Americas—i.e., preexisting present states' boundaries—is clearly comprehended by the subjective and objective elements relevant under ILO Convention No. 169. For example, referring to tribal peoples in independent countries, the Convention establishes the status of "peoples" through political characteristics that intrinsically apply to Afro-descendants:

(1) Peoples that are governed in whole or in part by their own customs or traditions: although Afro-descendants do not pre-date European colonization, they do possess the characteristics of pre-colonization assigned by Convention No. 169, since they possess an ancestral origin inherited from Africa, which they developed for more than five centuries in the Americas.[16]
(2) Peoples that inhabited a territory at the time of conquest, or colonization do not include Afro-descendants. However, by the time the present national boundaries were delineated by the emerging sovereign countries, in the 1820s, the descendants of Africans, with a particular cultural reality, already existed with their own self-identification.

[15] Indigenous and Tribal Peoples Convention (No. 169), June 27, 1989, Art. 1.

[16] This origin allows them to be distinguished from other groups, and characterizes them, in some cases, by expressions of their own customs or traditions. This occurs with rural communities on the Ecuadorian and Colombian Pacific coast; the communities of San Basilio de Palenque; the raizales of the islands of San Andrés and Providencia, in Colombia; the Garífuna peoples of Honduras, Belize, Guatemala, and Nicaragua; the communities of Valle del Chota in Ecuador; and the Afro-Bolivians of the municipalities of Coroico and Coripata in the Nor Yungas province in the Bolivian state of La Paz. Other examples include the communities of the Maroons of Suriname and the Quilombola in Brazil; the communities of the Azapa Valley in Arica, Chile; of the Chincha province in Peru, and the Afro-Mexicans in the states of Oaxaca, Guerrero, or Coahuila (Mascogos) in Mexico. The same could be said of the Black communities of Haiti and the Afro-Caribbeans of Cahuita in Costa Rica.

(3) The descendants of enslaved people of the African diaspora in the Americas have a different self-identification than that of the Indigenous population. They sustained an awareness of identity despite the ravages of colonization, racism, and racial discrimination, which generated processes of alienation in the identities of Afro-descendants.

Yet, all these elements point in one direction: Afro-descendants are distinct in core elements that determine the applicability of Indigenous rights.

A Way Forward

In future international instruments, Afro-descendants in Latin America should be identified as an native "people" made up of communities that share common ethnic and cultural characteristics, but distinct from Indigenous peoples of the Americas. This political and sociological status might allow them to win collective claims legally supported by ILO Convention No. 169 and other international legal instruments concerning minorities too. This definition would be in line with the plurinational and intercultural realities of Latin American states. More importantly, Latin American countries could continue to advance Afro-descendant rights multilaterally, as called for by the UN Plan of Action for the Implementation of the International Decade for People of African Descent (2015–2024). This would be a groundbreaking step, based upon the jurisprudence of the Inter-American Court of Human Rights.

According to Pastor Murillo, member of the UN Permanent Forum of People of African Descent, the Draft Declaration of Rights is underpinned by General Recommendation No. 4 of the UN Committee on the Elimination of Racial Discrimination, which states:

> People of African descent live in many countries of the world, either dispersed among the local population or in communities, where they are entitled to exercise, without discrimination, individually or in community with other members of their group, as appropriate, the following specific rights:
>
> (a) The right to property and to the use, conservation and protection of lands traditionally occupied by them and to natural resources in cases where their ways of life and culture are linked to their utilization of lands and resources;
> (b) The right to their cultural identity, to keep, maintain and foster their mode of life and forms of organization, culture, languages and religious expressions;
> (c) The right to the protection of their traditional knowledge and their cultural and artistic heritage; and
> (d) The right to prior consultation with respect to decisions which may affect their rights, in accordance with international standards.[17]

However, reaching an international declaration of the rights of (tribal) peoples of African descent will require overcoming arguments opposing it, especially those that limit the interpretation of collective rights only to ethnic Indigenous groups. The definition of "peoples" for Afro-descendants in Latin America and the Caribbean proposed here invites consideration of the fact that Afro-descendants are in a situation of exclusion and vulnerability and should enjoy the protection of international law. Such recognition implies an evolution in the doctrines of public international law and a consolidation of the New Latin American Constitutionalism. Perhaps we would witness the birth of new rights, related to restorative justice for those enslaved subjects, which, in the framework of racialized states, were denied equal rights. Such victims of injustice were not compensated or redressed. With

[17] John Antón Sánchez, Palmira N. Ríos González, Pastor Elías Murillo Martínez & Ana Irma Rivera Lassén, Miradas (propias) sobre el decenio internacional de los afrodescendientes, 2015–2024 (2022).

the recognition of Afro-descendants as peoples, what comes into play is the recognition of the rights to autonomy and self-determination and reparations for slavery. It also increases attention to dignify the life of Afro-descendants. This scenario of course challenges liberal models of racialized democracy and privileged whiteness, which translates into a more inclusive and intercultural democracy. Nevertheless, Afro-descendants have characteristics that, under international law, are (or should be treated as) like those of Indigenous peoples. Yet, the differences are relevant enough to recognize their distinct protections.