

Basic Information	Jurisdiction	Constitutional Court
	Type of decision	<i>Tutela</i> (Writ of protection for fundamental constitutional rights)
	Decision number	T-769 of 2009
	File number	T-2315944
	Date	October 29, 2009
	Presiding Judge	Nilson Pinilla Pinilla
	Plaintiff(s)	Álvaro Balarín, et al
	Defendant(s)	Ministry of the Interior and Justice, Ministry of Housing and Territorial Development, Ministry of Defense, Ministry of Social Protection, Ministry of Mines and Energy, Ingeominas (Colombian Institute of Geology and Mining) and Muriel Mining Corporation
Rights analyzed: Rights to life, personal security, prior consultation, cultural existence, cultural and social integrity, cultural identity, autonomy of cultural communities, protection of the Nation's natural wealth, and due process.		
Legal problem(s):		
<ol style="list-style-type: none"> 1. A mining company was granted an exploration concession, without undertaking a proper process of prior consultation, given that the directly affected communities were not informed nor consulted in a correct manner. 2. The mining project could generate environmental and social impacts for the communities, affecting a sacred site (the "Careperro" mountain), subsistence crops, animals, human health, biodiversity, and river sources, causing the loss of traditional economic activities, the basis of the survival for tribal and indigenous peoples. 		
Facts¹:		
<ol style="list-style-type: none"> 1. On April 14, 2004, the Muriel Mining Corporation presented a draft mining concession contract for the Mandé Norte project for the exploration and exploitation of copper, gold, molybdenum, and other exploitable minerals in the Antioquia and Chocó departments. 2. On February 4, 2005, the Governor of Antioquia signed a 'Mining Concession Contract,' with a limit of 30 years, extendable for the same period. 3. On March 27, 2006, the company started a series of 'informational meetings for the prior consultation. However, the company did not invite several of the communities affected by the Mandé Norte project and several individuals that were invited were not legitimately authorized to represent the communities' interests (e.g., CAMICAD, CAMIZBA, people from the Curvaradó river basin, etc.) 4. On several occasions, the indigenous, Afro-Colombian, and <i>mestiza</i> communities emphasized their objection to the process of prior consultation that the company was conducting. Notwithstanding their objection, the Ministry of Justice allowed the process to continue until it was concluded in a meeting on August 7, 2008. 		

¹ See Constitutional Court, T-769 of October 29, 2009, M.P. Nilson Pinilla Pinilla, pp. 2-6.



5. At the end of December 2008, members of the 15th and 17th Brigades of the Colombian National Army occupied the area around the Coredocito, a village in the Urada Jiguamiandó reservation and Careperro, the Emberá's sacred mountain. On January 3, 2009, officials of the Muriel Mining Corporation occupied the site to begin exploration activities on the mountain and clear-cut several hectares of rain forest.
6. Members of the indigenous communities of the Urada Jiguamiandó, and the Chageradó and Turriquitadó Rivers Reservations converged on the exploration site demanding that the company and military leave for failing to consult them.
7. Feeling that their rights had been violated, the plaintiffs filed a *tutela* lawsuit (writ of protection of fundamental constitutional rights) on January 19, 2009.
8. Between February 24 and 28, 2009, the affected communities held an Internal Peoples' Consultation, according to their own customs and procedures, in which more than 75% of the affected population in the reservations and Afro-Colombian communities participated. International observers and staff from the local mayor's office observed the process, which ended in a unanimous vote against the project.

PROCEDURAL HISTORY OF THE *TUTELA* ACTION

On January 27, 2009, the Civil Chamber of the Superior Tribunal of Bogotá admitted the complaint and requested that the defendants exercise their right to respond, by submitting arguments regarding the lawsuit and providing "*evidence that they consider pertinent.*"²

However, the Civil Cassation Chamber of the Supreme Court of Justice, by an order dated March 19, 2009, annulled the trial court's decision arguing that some interested parties had not been notified. The Supreme Court therefore ordered that "*the case file be returned to the Tribunal of origin, so that appearances could be made again, procuring the opportune notification of Muriel Mining Company, Carboloma S.A., Cordillera Exploraciones Mineros S.A. and Geología Regional y Proactiva.*"³

JUDGMENT OF THE TRIAL COURT:

By a judgment of April 23, 2009, the Civil Chamber of the Superior Tribunal of Bogotá dismissed the complaint filed by the plaintiffs. It argued that the Ministry of the Interior and Justice "*clearly linked the notifications, meetings and agreements, carried out with the different indigenous authorities within the prior consultation process, with the communities that are found in the area of influence of the Mandé Norte Mining Exploration Project.*"⁴ The court also noted that several of these meetings were described by the "*very plaintiffs in the tutela lawsuit.*"⁵ The court concluded that there had been no "*lack of prior consultation*"

² *Id.* at 8.

³ *Id.*

⁴ Civil Chamber of the Superior Tribunal of Bogotá, Judgment of April 23, 2009, M.P. Humberto Alfonso Niño Ortega, p. 12.

⁵ *Id.* at 13.

as the plaintiffs alleged, given that “*expressions of concurrence or agreements with the communities were presented, which confirmed their consent or lack thereof with the project, by and through their representatives, and specified ways to compensate the probable damages that would be caused during the exploration phase.*”⁶

APPEAL BEFORE THE SUPREME COURT OF JUSTICE:

- On May 27, 2009, the Civil Cassation Chamber of the Supreme Court of Justice confirmed the judgment of the trial court, arguing that as the case involved administrative agencies, there was another, more appropriate lawsuit that the plaintiffs could file. The lawsuit would be to “*contest the legality of the acts preferred by an administrative authority, amongst those, the nullification suit ... and the nullification and reestablishment of rights suit of the Public Administrative Code (Código Contencioso Administrativo), with the end of resolving . . . the legality of the actions affected by the public authority.*”⁷

Additionally, “*if the ancestral communities’ territory is the fundamental basis of their culture and their survival as a people, it must be so that the constitutional protection has legal development and makes sites considered sacred, such as the Careperro mountain, untouchable; and, given that the indigenous authority will exercise an oversight function over, among others, environmental concerns, it can maintain, by its representatives, control over the activities that the project requires.*”⁸

The order ended by noting that if the plaintiffs sought the use of a *tutela* suit as a temporary injunction mechanism to avoid irreversible damage, “*the Chamber reiterates that it is not sufficient to allege the existence of inexorable damage, rather this must be certain, determined, and duly confirmed by the Judge in the tutela action, a theory which was not presented in this case; rather, as the plaintiffs have affirmed, they seek to attack a contract signed several years ago.*”⁹

Ratio decidendi/Reasons for the Constitutional Court decision:

- “Although pre-consultation meetings were held with some local *Cabildos* [indigenous government], it does not appear that this had been extended to other communities, indicating that there was an inadequate coverage and meetings were not held with each one of the communities found in the area that could suffer repercussions from the concession’s mining exploration and exploitation. For that reason, . . . the right to participation of the Afro-Colombian communities of the Jiguamiandó River basin, the indigenous communities of the Uradá-Jiguamiandó reservation of the municipality of Carmen Darién and of the Chageradó Turriquitadó reservations of the municipality of Murindó, represented by their traditional authorities and their Minor Councils, all in the Departments of Chocó

⁶ *Id.* at 15.

⁷ Civil Cassation Chamber of the Supreme Court of Justice, Judgment of May 27, 2009, M.P. Jaime Alberto Arrubla Paucar, p. 15.

⁸ *Id.* at 16.

⁹ *Id.* at 16-17.

and Antioquia, was violated, since these communities were not taken into account nor was a consultation held with them.”¹⁰

- The Court considered “that the prior consultation process overseen by the Ministry of the Interior and Justice did not take into account all of the representative authorities and institutions of the respective communities,” stating that “some of the participants in the adoption of the project in question were not duly accredited nor authorized.”¹¹
- “The consultation was not conducted in such a way as to allow the community to understand fully the content of the Mandé Norte project and, subsequently, knowing the cause, to be able to make a decision with sufficient enlightenment and based on an analysis from their own perspectives and priorities. In the same vein, the native population was not aware that this project would affect the Careperro mountain, which is sacred for the ancestral habitants of the region.”¹²
- Viability of the *tutela* suit: “The object of debate in this case is prior consultation, which was not carried out in a complete nor adequate manner, and for that reason, it affected the fundamental rights of those who brought the *tutela* suit and their communities, in addition to the possibility for irreversible damages to a fragile habitat of immense biological value, demanding immediate protection, from which it is evident that this is the only suitable and expedient legal action.”¹³
- “Additionally, these territories have been endangered because the Mandé Norte project, which has an anticipated duration of 30 years with an option to extend for another 30, will generate environmental damage due to the effects to the headwaters of the rivers, the contamination of the air with acidic gases, the production of solid wastes, and deforestation, among others, which carries repercussions for the delicate ecological equilibrium of one of the most biodiverse zones in the world, subsistence crops, animals, health and in general, the basis of the economy of various native communities.”¹⁴
- The studies and investigations that the Ministry of Housing and Territorial Development “should carry out regarding environmental impacts were not conducted over all of the affected territories, and still require revisions and adjustments. For this reason, the execution of the mining project should be postponed and even cancelled, as this must be based in serious and objective environmental evaluations carried out in the name of the protection of nature.”¹⁵
- It is important to specify that before carrying out the prior consultation, “the Ministry of the Environment must conduct a detailed study regarding the exploitation and exploration of the environment in native territories, verifying two aspects: i) if it will affect the rights of the indigenous and Afro-Colombian people in their territory; and ii) to determine the environmental impact that would be generated in those zones. Therefore, if that Ministry informs the Ministry of the Interior and Justice that either of these two requirements are not complied with, it

¹⁰ *Id.* at 37.

¹¹ *Id.* at 36.

¹² *Id.* at 38.

¹³ *Id.* at 39.

¹⁴ *Id.* at 40.

¹⁵ *Id.* at 41.

will be binding and the Ministry of the Interior and Justice cannot initiate prior consultation.”¹⁶

- Equally, it is necessary to review the reasons why the aboriginal communities of the region “do not view the entrance of the State Security Forces into their territories as a guarantee of security. The Constitutional Court has been clear in signaling that, independently of whether the direct effect on the communities is deemed to be positive or negative, any action that could directly affect them must be subject to a consultation.”¹⁷

Laws analyzed:

Law 21 of 1991, approving Convention 169 concerning Indigenous and Tribal Peoples in Independent Countries (approved by the 76th meeting of the General Conference of the ILO, Geneva, 1989).

Law 99 of 1993.

Decree 1397 of 1996.

Decree 1320 of 1998.

Jurisprudence referenced:

COLOMBIAN CONSTITUTIONAL COURT

T-254 of May 30, 1994, M.P. Eduardo Cifuentes Muñoz.

SU-039 of February 3, 1997, M.P. Antonio Barrera Carbonell.

T-380 of September 13, 1993, M.P. Eduardo Cifuentes Muñoz.

C-169 of February 14, 2001, M.P. Carlos Gaviria Díaz.

SU-383 of May 13, 2003, M.P. Álvaro Tafur Galvis.

C-620 of July 29, 2003, M.P. Marco Gerardo Monroy Cabra.

C-208 of March 21, 2007, M.P. Rodrigo Escobar Gil.

C-030 of January 23, 2008, M.P. Rodrigo Escobar Gil.

C-461 of May 14, 2008, M.P. Manuel José Cepeda Espinosa.

C-418 of May 28, 2002, M.P. Álvaro Tafur Galvis.

T-188 of May 12, 1993, M.P. Eduardo Cifuentes Muñoz.

T-342 of July 27, 1994, M.P. Antonio Barrera Carbonell.

C-616 of June 13, 2001, M.P. Rodrigo Escobar Gil.

T-880 of February 13, 2009, M.P. Clara Elena Reales Gutiérrez.

INTER-AMERICAN COURT OF HUMAN RIGHTS

Judgment of November 28, 2007, *Case of the Saramaka People v. Suriname*.

Doctrine referenced:

UN, Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people.

¹⁶ *Id.* at 42.

¹⁷ *Id.* at 33.



UN, Committee on the Elimination of All Forms of Racial Discrimination, Consideration of Reports Submitted by States Parties under Article 9 of the Convention, Concluding observations regarding Ecuador (62nd session, 2003), U.N. Doc. CERD/C/62/CO/2, June 2, 2003.

Decision:

First: VACATE the May 27, 2009 judgment of the Civil Cassation Chamber of the Supreme Court of Justice, which upheld the May 23, 2009 judgment of the Civil Chamber of the Superior Tribunal of Bogotá, dismissing the *tutela* brought by Álvaro Balarín, Benerito Domico (who withdrew), Hugo Rentería Durán, Germán Pernía, Argemiro Balarín Balarín, José Miguel Majore Balarín, Zaginimbi Balarín, Macario Cuñapa Balarín, Andrés Domico y Javier Balarín Carupia, against the Ministry of the Interior and Justice, the Ministry of the Environment, the Ministry of Housing and Territorial Development, the Ministry of Defense, the Ministry of Mines and Energy, and the Ministry of Social Protection.

Second: In its place, it is resolved to GRANT the protection of the rights to due process, to prior consultation with native communities, and to cultural existence, autonomy, cultural and social integrity and identity of those communities, as well as to the Nation's natural wealth.

Third: Consequentially, ORDER that all of the defendant authorities, in the areas of their respective functions, immediately SUSPEND the exploration and exploitation activities that are taking place or that will take place in furtherance of the Mandé Norte concession contract, in the Departments of Antioquia and Chocó, for the exploration and exploitation of copper, gold, molybdenum, and other exploitable minerals.

Fourth: ORDER the Ministry of the Interior and Justice to redo the procedures that led up to the document formalizing the prior consultation, which should be carried out in proper form and extend to all of the communities that could be affected in the development of the Mandé Norte mining exploration and exploitation project.

Fifth: ORDER the Ministry of Environment, Housing, and Territorial Development, that, before the prior consultation process is redone and extended to all of the interested communities in the development of the Mandé Norte mining exploration and exploitation project, it finish integral and long-term scientific studies regarding the environmental impacts that the development of the project could produce, broadly disseminating the results to the indigenous and Afro-Colombian communities that could be affected and ensuring that environmental licenses for exploration and exploitation projects that affect biodiversity and the environment are not granted until having done so.

Sixth: ORDER the Ministry of National Defense to objectively analyze and rectify the reasons that the indigenous and Afro-Colombian communities that ancestrally inhabit the Jiguamiandó, Uradá and Murindó Rivers region do not consider the entrance of the State Security Forces as a guarantee of their security.



Seventh: ORDER INGEOMINAS, through its legal representative or the person who acts for it, to abstain from granting or suspend, depending on the case, mining exploration and exploitation licenses in the Mandé Norte project, until the environmental impact studies are successful accomplished and the prior consultation is carried out in a proper manner.

Eight: ORDER the Human Rights Ombudsman (*Defensoría del Pueblo*) to support, accompany and monitor full compliance with this judgment, with the ends of guaranteeing in an effective manner the rights protected here. The Secretary General of that corporation will act with the Ombudsman to coordinate and create the pertinent commission for that end.

Ninth: Through the Secretary General, ISSUE the communication referred to in Article 36 of Decree 2591 of 1991.

Dissenting or concurring opinions: NO DISSENTING OR CONCURRING OPINIONS.