

Peru's supreme court will resolve the case of Shipibo community vs the Peruvian government for restitution of their ancestral lands grabbed for palm oil

A preliminary legal analysis

On the 20th August, Peru's highest court, the Constitutional tribunal (TC) formally admitted the lawsuit filed by the Shipibo-Conibo community of Santa Clara de Uchunya against agencies of the Regional Government of Ucayali and the palm oil company **Ocho Sur P SAC** (formerly Plantaciones de Pucallpa SAC) for the unlawful dispossession, destruction and conversion of almost 7000 hectares of their ancestral forest lands. A final resolution of the case is now expected before the end of 2018. Lawyers representing the community from the Peruvian human rights organisation, the Institute of Legal Defence (IDL) have highlighted 4 groundbreaking aspects of the decision which could lead to major reforms affecting indigenous land rights and forest protection in the Peruvian Amazon.¹

Santa Clara de Uchunya versus big palm oil: The case in question

The community filed the lawsuit in May 2016 as a result of the land grab of their ancestral territory and the loss of 6,824,39 hectares of old growth forest. This occurred after the Ucayali Regional Government's Agrarian Agency (DRAU) issued 222 'possession certificates' within the community's untitled traditional lands to settlers – apparently associated with land trafficking mafia in the region. These certificates were subsequently converted to land titles by the DRAU and inscribed in the public land registry (SUNARP) before being sold to the palm oil company, Plantaciones de Pucallpa (now Ocho Sur P), and aggregated to form an estate extending to 6,845.43 hectares. These actions violated numerous fundamental rights of the community, including their rights to land and a healthy environment, rights which are protected by Peru's Constitution and the international human rights conventions in force in Peru. At the time the lawsuit was filed,

¹ <http://www.enfoquederecho.com/2018/09/21/tc-reconoce-idoneidad-del-amparo-para-tutelar-el-derecho-a-la-propiedad-indigena/>

the company had cleared 99.6% of this area (6,824.39 hectares), in which it had planted oil palm plantations.

The community's demands include:

- full legal recognition of their ancestral lands and forests, which includes restitution of the area currently occupied by the palm oil company as well as lands currently classified as State forests.
- the environmental remediation and restoration of the area cleared for oil palm, which has included wholesale forest and ecological destruction including drainage and diversion of rivers and streams.

The case highlights the urgent need in Peru for mechanisms to safeguard and protect the untitled traditional lands of indigenous peoples while legal loopholes continue to facilitate land grabbing and deforestation and land titling processes remain bogged down in red tape and a lack of funding. According to current figures, throughout the Peruvian Amazon the land claims of over 1,300 indigenous communities which extend to approximately 20 million hectares of forest remain unresolved, exposing them to the same risks of dispossession and forest destruction that has afflicted the community of Santa Clara. Peru's national deforestation strategies, commitments and agreements with donors including the World Bank and Norwegian government all agree that forests which have not been titled or categorized are the most vulnerable to deforestation. At the same time, they also acknowledge that recognising indigenous land rights is an essential enabling condition of any effective anti-deforestation strategy. [Despite these commitments, progress remains slow.](#) A favourable decision in this case could leverage and accelerate the promised reforms to benefit forests, indigenous peoples and wider Peruvian society by securing the protection of over 20 million hectares of untitled indigenous lands.

The legal story so far

The lawsuit was filed in May 2016, but it was not even admitted by the lower courts as it was rejected by the courts of first and second instance on the basis that a 'Constitutional process' was not considered the appropriate legal channel to address the problem. The case was appealed by the community to the Constitutional Tribunal.

What did the Constitutional Court determine?

The Court assessed the case, revoked the resolutions issued by the lower courts and admitted the case thereby setting important legal precedent in Peru. In doing so, it used two principal arguments: a) the alleged violations are consistent with the rights to territory and environment of indigenous peoples which are protected by the Constitution and b) the special urgency of the case. In addition, the court chose - in an almost unprecedented step - to resolve the case itself, rather than sending it back to the court of first instance. In the view of IDL, this decision in itself makes four key contributions to the jurisprudence of Peru's Constitutional Court.

1. The titling of ancestral territories is consistent with the property rights of indigenous peoples.

To date, those constitutional appeals filed by indigenous communities in Peru to secure the titling of their ancestral lands have been rejected by the courts using the argument that 'they do not make up the fundamental rights protected by the Constitution'. The Constitutional Court has now corrected this interpretation, which it has indicated was flawed.

" what the plaintiff alleges is extremely closely related with the constitutionally protected content of the rights to property and environment of indigenous peoples, aspects that, in principle, merit an analysis regarding the merits of the controversy and, therefore, from no point of view, merit a preliminary rejection of the claim "[fourth argument, unofficial translation2].

² Original text: "lo alegado por la parte demandante tiene estrecha relación con el contenido constitucionalmente protegido de los derechos a la propiedad y medio ambiente de los pueblos indígenas, aspectos que, en principio, ameritan un análisis respecto del fondo de la controversia y que, por ello, desde ningún punto de vista ameritan un rechazo liminar de la demanda" [fundamento cuarto].

From this it is possible to infer that: a) the titling of the ancestral territories of indigenous peoples, especially in the case of dispossession, forms part of their constitutionally protected right to property and b) the conservation of natural resources within indigenous territories, including forests, forms part of the constitutional content of their rights to the environment.

2. A constitutional appeal (*amparo*) is the appropriate mechanism to protect the property rights of indigenous peoples.

One consequence of the recognition of their ancestral territory as part of the bundle of rights to property of indigenous peoples protected by the Constitution is the recognition of the legitimacy of using constitutional procedures, such as the *amparo* mechanism (constitutional appeal), as a legitimate means to determine the recognition of indigenous property rights relative to other procedures including civil or administrative processes.

3. Access to natural resources affects the subsistence of indigenous peoples and reflects the special urgency of the case.

At the same time, the Constitutional Court signalled that the protection of the property rights of an indigenous people over its territory is a matter of 'special urgency', because it is from this territory that indigenous peoples secure the natural resources which are indispensable for their subsistence:

"in the particular case of claims related to the right to property of indigenous, peasant or native communities, this has a special urgency as it is considered that, in many of these cases, the place where they live is particularly important for obtaining natural resources for the development of their own environment [fourth argument, unofficial translation]."

³ Original text: "En el caso particular de reclamos relacionados con el derecho a la propiedad de comunidades indígenas, campesinas o nativas, ello reviste un especial carácter de urgencia si es que se considera que, en muchas de ellas, el lugar en que habitan tiene una especial conexión con la obtención de recursos naturales para el desarrollo de su propio entorno [fundamento cuarto]"

Here the Constitutional Court highlights the intimate and vital relationship between indigenous peoples and their territories recognised by international human rights law, which allows them to guarantee their subsistence and survival – not only economic and physical, but also cultural and spiritual.⁴ As a result, the criteria of the court permits it to consider those cases which affect the survival of indigenous peoples as urgent and provide them with the priority and preferential treatment that is appropriate.

As the case concerns a Shipibo-Conibo indigenous community, any impacts on territorial and environmental rights also brings with it a violation of the right to cultural identity, given the enormous cultural and spiritual significance that the rivers and forests have in their cosmology.

In practical terms, due to the operations of the palm oil company and land traffickers, the community has seen huge swathes of their forest destroyed where previously they practiced hunting and fishing, rotational agriculture as well as the gathering of important fruits and medicinal plants, including areas used specifically for spiritual purposes. The impact on their fundamental rights is for this reason even more intense and urgent.

4. The Constitutional Court can resolve the merit of a case where constitutional appeals have been rejected by preliminary verdicts.

According to a general rule, where the Constitutional Court chooses to revoke the preliminary verdicts of lower courts, the file is normally returned to the judge in the court of first instance, who must then assess the merits of the case. However, in this case the Constitutional Court resolved to do something different and address the merits of the case itself. Ultimately, this will result in a definitive sentence after consideration of the arguments of both parties, including in a hearing:

"what would normally correspond in such cases is to declare the invalid nature of all the proceedings to date in the present constitutional process

⁴ IACHR. Saramaka vs Suriname. Sentence 28th November 2007. Preliminary objections, merits, reparations and costs, para. 91

and order the judge of first instance to admit the case in order to not affect the right to defence of the defendants; alternatively an immediate judgement on the merits could be issued in accordance with the principles of speed and procedural economy. These two options, as they are presented, are not appropriate for the singularities of the present case, which has a special urgency for the rights of those rightsholders who are involved. For this reason it is considered necessary to opt for an alternative and exceptional measure [...] In this way, in order to avoid possible irreparable harm, and without generating a state of defenselessness with respect to the defendant entities, this Chamber chooses to admit the amparo and, subsequently, issue a ruling on the merits of the matter in dispute...] [fifth and sixth arguments, unofficial translation⁵].

As the Constitutional Court states, this is an alternative and exceptional measure drawing from the principles of procedural speed and efficiency, which they can resort to in order to ensure an effective protection of rights in urgent situations. In this way, they provide a solution to the risks generated by inflexible procedures.

Final observations

The main contribution of this resolution lies in the access to justice provided to indigenous peoples who seek the protection of their territorial rights protected by the Constitution. The consideration that a constitutional appeal is appropriate in cases such as these, where urgent protection is required, improves indigenous peoples' access to justice. It also consolidates a democratic State governed by the rule of law and in the interests of some of the most vulnerable populations of the country. As such, it represents a significant precedent for the protection of the ancestral land rights of

⁵ Original text: *lo que correspondería es declarar la nulidad de todo lo actuado en el presente proceso constitucional y ordenar al juez de primera instancia que admita a trámite la demanda, con el fin de no afectar el derecho de defensa de las demandadas; o también cabría ingresar de inmediato a expedir una sentencia de fondo, atendiendo a los principios de celeridad y economía procesal. Estos dos extremos, tal y como se presentan, no se adecuan a las singularidades del presente caso, el cual reviste una especial urgencia por los derechos y los presuntos titulares de los mismos que se encuentran involucrados, por lo que se considera necesario optar por una medida alternativa y excepcional [...] De este modo, con la finalidad de evitar un posible daño irreparable, y sin que ello implique generar un estado de indefensión respecto de las entidades demandadas, esta Sala opta por admitir a trámite la demanda de amparo y, posteriormente, emitir pronunciamiento sobre el fondo del asunto controvertido, previa notificación de la demanda [...] [fundamentos quinto y sexto].*

indigenous peoples in Peru. The right to equality before the law means that similar situations should be processed in the same manner.

In this way, the case of Santa Clara de Uchunya and their territorial rights will be resolved by the Constitutional Court, making them the first native community in Peru to do so. This must in turn constitute the starting point for a jurisprudence that is sensitive to the enormous problems faced by indigenous peoples including land trafficking, deforestation and food insecurity.