The right to Prior Consultation in Mexico: its shortfalls and limitations

While we now have a government that has promised to be democratic and to govern for the masses of people, under its rule the same old colonial and hegemonic relations towards the indigenous peoples are being replicated. Far from implementing the international recommendations concerning indigenous peoples’ right to prior consultation, the current government is carrying out fraudulent consultative processes to approve infrastructure projects that hamper indigenous communities.

By Elisa Cruz Rueda - October 1st, 2020

According to the Indigenous and Tribal Peoples Convention (also known as ILO Convention No. 169), it is a duty of states to guarantee the right of indigenous peoples to prior consultation. This state obligation is also established in the reports and recommendations of the United Nation’s (UN) Special Rapporteurs on the Situation of Human Rights and Fundamental Freedoms of Indigenous People. In the Mexican case, the state is obliged to provide the necessary conditions for the right to prior consultation of indigenous people to be safeguarded in line with international standards. Similarly, the state is also compelled to guarantee that within each consultation, there is a clear and thorough communicative process which informs the interested peoples and communities of how a given project could affect their territories. Only with such conditions being met, can indigenous communities freely deliberate in their best interest, without falling prey to deceit, bad faith or innocent mistakes. That is why, by safeguarding the right to adequate information, a series of other fundamental rights of indigenous peoples are also advanced: the right to free determination as an expression of their autonomy, the right to the integrity of their lands and territories, and the right to the totality of their habitat.

Unlike the indigenous peoples from other regions of the Americas, or Abya Yala, the indigenous peoples of Mexico have no autonomic protocols establishing the appropriate mechanisms for internal consultations or for interactions with external actors. Surely, this has to do with the different ways in which the nation-state has been historically constructed
in each region of Latin America, with profound roots in each nation's processes of colonial invasion and of struggles for independence. In the Mexican case, the nation-state has been grounded, since its inception, on the institutionalization of effective and widespread mechanisms of patronage (or “clientelism”) and control, to the point where it’s hard to think of a corner of the Mexican Republic where such social institutions are absent. Indeed, their reach cuts across the territory, through agents as varied as rural teachers, originally introduced by the Mexican government to implement Spanish literacy campaigns, to public servants initially charged with the implementation of agrarian reform.

Regional cacicazgos

Simultaneous to this process of state permeation at the national level, there has been a sort of regionally differentiated construction of the Mexican state, in which the state’s manifestations vary according to each federative entity. Nevertheless, in all cases, the power of local cacicazgos personified in individuals which belong either to the same indigenous peoples (as in the mixe zone of the state of Oaxaca) or to other peoples (as in the case of the state of Chiapas), has been a fundamental element for the consolidation of the Mexican nation-state.

The emergence of cacicazgos in the Mexican rural areas is a defining trait of our history. First, during the War of Independence from the Spanish Crown of 1810, and then in the Democratic Civil War of 1910, rural warlords and armed leaders hoisted the banner for the struggle for land under the slogan of “Land and Freedom” or “The land belongs to those who work it with their hands”: the phrases of Emiliano Zapata and Ricardo Flores Magón that marked the Latin American XXth century.

It was through this complex processes and events, that the relationship of the Mexican state with the indigenous peoples was built and shaped. We refer to this specific relationship as indigenismo, which in its origins was grounded in an evolutionary conception that advocated for the disappearance of indigenous individuals (due to their belonging to primitive societies) and their absorption into a national society. All this, in combination with a distinctive agrarian history, is what gives the situation of indigenous peoples in Mexico its very particular characteristics.
The agrarian sphere

On the agrarian sphere, we find ourselves with an internal regimentation and a set of communal statutes that can be traced all the way back to 1920, when they were first introduced by the promoters of the Ministry of Agrarian Reform, in keeping with the Agrarian Laws and Codes and the Federal Land Reform Act (FLRA). Later would come the Constitutional and Legal Amendments of 1992, which cancelled agrarian redistribution in Mexico, opening the door to the so-called new Article 27 of the Constitution and to the New Agrarian Law.

In recent times, this last ordinance has been re-appropriated by indigenous individuals and their peoples as a mechanism to push for a set of minimum norms regarding land that ought to be unequivocally respected, and which they frequently invoke when confronting the Mexican state. In this way, communities seek to limit the states’ interference in indigenous territories by summoning the rights conferred to them by legal entities such as ejidos or agrarian communities. Despite all this, in the majority of instances where these strategies have been utilized by indigenous peoples, they have only been effective for autonomic and communitarian exercises to either regulate internal life or to fend off outside interferences in internal processes.

We know directly from at least three states, Oaxaca, Chiapas and Campeche, and indirectly from a few other states, such as Guerrero and Michoacán, that no local government has yet committed to regulating and establishing clear mechanisms for prior consultation that should be respected by the Mexican state. The head of the Tlachinollan Human Rights Center, Abel Barrera, finds a single exception in Tierra Colorada (municipality of Malinaltepec, Guerrero) which is made up of tlapaneco and mixteco-speaking populations, where there is an actual legal outline establishing certain key requirements that must be met to execute legal acts that affect the lands and territories of the community, which as a whole fall under the legal entity of communal properties or bienes comunales.

In this way, the defense mechanism that has been more profusely utilized by indigenous individuals and their peoples is the Mexican Agrarian Law, which safeguards those agrarian units whose tenure of the land is social and collective, such as ejidos and agrarian
communities, in contradistinction to small and big agrarian private properties. Thereby, the indigenous communities that are organized under these legal entities, utilize and invoke them to demand rights and to confront the state to guarantee them. This is why it is not difficult to find cases such as the attempt to establish La Parota dam in the state of Guerrero, where the local population has grounded its struggle and organization on these legal institutions, and has used them to confront the fraudulent consultation with which the Federal Government attempts to carry the project forward.

On the other hand, the Mexican government has put together consultative protocols to regulate the fulfillment of this particular state duty. In this sense, it is important to highlight the work of the National Commission for the Development of Indigenous Peoples, created in 2003 by the then president of the Republic, Vicente Fox Quesada, and which, under the current administration of Andrés Manuel López Obrador, has been substituted by the National Institute of Indigenous Peoples (INPI). This latter entity has adopted a document called “The right to free, prior and informed consultation of indigenous peoples. Foundations, principles and methodologies for its implementation by the federal public administration” (Derecho a la consulta libre, previa e informada de los pueblos indígenas. Bases, principios y metodología para su implementación por la administración pública federal), but has not promoted the involvement of indigenous communities and peoples in the crafting of their own statutes, regulations or protocols, which is what would allow government consultative processes to finally align with the adequate international standards.

Laws for prior consultation without an actual consultative process: the Oaxaqueño case

The indigenous movement of the state of Oaxaca is both iconic and particularly combative, and the dynamic that it has established with the state cannot be found in other indigenous peoples and communities of Mexico. That is why it is significant to bring up the law known as “Law for free, prior and informed consultation of indigenous and african-mexican peoples and communities for the state of Oaxaca” (Ley de consulta previa, libre e informada de los pueblos y comunidades indígenas y afro-mexicanas para el estado de Oaxaca), which was approved on the 22nd of February, 2020. This law was passed in a context in which international human rights entities pronounced themselves critically towards the processes
of prior consultation in Mexico. Remaining loyal to that pattern, this 2020 law does not meet the recommendations handed by the UN’s Special Rapporteur for the Rights of Indigenous Peoples, nor those of the UN’s High Commissioner for Human Rights. On that same note and as highlighted by specialist Naayeli Ramírez-Espinosa, it is important to signal that while this law is certainly progressive in its citing of international instruments related to the rights of indigenous peoples, the process of its crafting was not open nor participatory, and it did not engage many indigenous communities from Oaxaca.

This discussion arises today in the context of the wrongly called consultation for the “Maya Train” territorial reorganization project. The latter has been described by the president of Mexico, Andrés Manuel López Obrador, as the most important infrastructure project of his term. Since the beginning of his mandate, the president established that “the train project will go, yes or yes”, thus violating the principles of a free and prior consultation process, which, according to the ILO’s Convention No. 169, ought to be organized in terms of good faith, with culturally appropriate mechanisms, and with a thorough and adequate communicative process. In this case, the violation of these principles is all the more blatant, as the project is not only about the establishment of a train, its rehabilitation or the installment of new railways, but it is a project of territorial reorganization which advances the real-estate market and displaces the current land-use practices, promoting the abandonment of the current productive agricultural uses of land and territory.

**Some important conclusions**

Faced with such a social landscape, it is clear that the future of the indigenous peoples in Mexico will require them to keep struggling while strengthening their internal mechanisms for organization to combat attempts to dispossess their territories, their self determination, and the tangible and intangible resources of their communities.

A way of doing this can be through consolidating the exercise of their autonomy, by pushing for the design of culturally appropriate mechanisms for prior consultation that are crafted by the indigenous peoples themselves. In other words, by making their own regulations that are both enforceable and legally binding in the face of the state. This task could take the concrete form of what we know as “protocols for communitarian prior consultation”
(Protocolos de Consulta Previa Comunitaria), a type of document which outlines in detail the steps, prerequisites and procedures that the Mexican state must meet in every consultative process, and which can take the forms of both an attached instrument or an appendix of local statutes and regimentation.

Posdata

On the 28th of August, 2020, the president of Mexico, Andrés Manuel López Obrador, during his daily press conference known as la Mañanera, decided to spearhead a campaign of stigmatization and intimidation against the Civil Society Organizations (CSO) that are questioning or opposing the “Mayan Train” mega-project of territorial reorganization. This campaign has as its core the purpose of delegitimizing the work that we do in defense of the human rights of people, communities and indigenous and peasant peoples, while simultaneously infringing on the freedoms of expression and association, and threatening the lives and integrity of some of the members of our organizations.

Otherwise, it’s worth noticing that the Mexican president does not seem to realize that a lot of the public financing received by NGOs and CSOs in the country, which he tried to present as “uncomfortable revelations” to the Mexican public, actually originate in international solidarity from the last 30 years. Indeed, many of those who are now working in his administration come from these same organizations. Does the president not realize that by launching this campaign he is literally shooting himself in the foot? Because if what he wants is truly to have transparency, then he should task a team to go over the records and tax declarations that have been turned in to the government by every organization. Many of the public officials in his administration have also received these types of financing in the past, and they did so in order to achieve the democratization of Mexico and a more just and fairer society: a struggle to which he owes the fact that he is now the president of this country.

Elisa Cruz Rueda is a lawyer, anthropologist, and professor at the Escuela de Gestión y Autodesarrollo Indígena de la Universidad Autónoma de Chiapas.