The Intercultural Key in the Recognition of the Electoral Pluralism in Mexico

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I. Introduction: from the Encounter with to the Recognition of the Other

As Tzvetan Todorov said the encounter between the European and the Mesoamerican cultures was “the most astonishing encounter in our history” not only because no other encounter between cultures will ever achieve such intensity but also because, among other things, “the sixteenth century perpetrated the greatest genocide in human history”.¹

Confronted by this “extreme and exemplary” encounter and by what would come to happen in the centuries that followed it, the words that best define the situation of the indigenous peoples in Latin America are resistance and adaptation. A particular form of resistance was, and still is, the strategic usage of the law: first, the colonial law, then, the national law, and, more recently, the international law.

There are different versions and interpretations of the aforementioned situation.² It is generally acknowledged that the notion of the indigenous, as a conceptual category, is a product of the process of colonization and domination, and that it is immersed in processes of social stigmatization. It was not until recently, and mainly due to what has been called “the emergence

¹ Todorov (2010:12-15).
of indigenous peoples” in the late twentieth century, that the indigenous condition began to be emphasised as an element of identity and recognition of individual and collective rights which are marked by indigenous perspectives and community realities.³

Nonetheless, and despite the contemporary consensus on the recognition of the indigenous rights, the discussion about the configuration and structuration of the indigenous communities and the scope of their claims against the ideological postulates of the constitutional state is still open. This is particularly true when it deals with the struggle between individual and collective rights.⁴

The complexity of the issue is made clear by the difficulties the judges face when they attempt to identify and value the relevant features of a specific community practice that will allow them to judge it based on the context of the practice itself. In some cases, the community organization is idealized as if it were an alternative form of government with ancestral roots; in other cases, the cacique-like and authoritarian practices are regarded as a legacy of the colonial past that should be obliterated. In some cases, the excesses of the community as a whole committed against its individual members on behalf of the autonomic rule are denounced. In other cases, there is an emphasis on the limitations of the state against the indigenous self-determination and self-government.⁵ To all of this, one should add the fact that the indigenous communities are, in an overwhelming majority of cases, populations in conditions of structural marginalization and, therefore, it is not easy to chart one unique route to analyse or to explain the complex and diverse realities of the indigenous peoples in Latin America, in general, or in Mexico, in particular.

The emergence of the indigenous question has had a particular relevant impact on the judicial forum, both nationally and internationally. This has helped to develop new hypotheses in

³ Bengoa (2016) and Ingrid de Jong and Antonio Escobar (2016).
an unprecedented exercise of interplay between memory, history and justice. In this context, the complex reality of the indigenous communities is interpreted from different perspectives by the judges. The panoply is wide: it ranges from the denial of and the sanction against the cultural practices that are different to the full recognition of the autonomous rights and the self-determination of the indigenous peoples; from paternalistic stances and policies of partial recognition to rulings that balance, from an intercultural perspective, the consequences of the judicial recognition of the cultural diversity.6

As the Mexican Supreme Court of Justice of the Nation has stated on its Action Protocol for Judges Who Judge Cases Involving Indigenous Persons, Communities or Peoples [Protocolo de Actuación para quienes imparten justicia en casos que involucren derechos de personas, comunidades y pueblos indígenas]: “it is evident that some of the indigenous institutions and rules may, apparently or in fact, contravene constitutional principles or human rights, specially individual rights. In those cases, it will be necessary to balance the rights based on an exhaustive cultural analysis of the values protected by the indigenous rule, the possible consequences on the context of cultural preservation and the ways in which the indigenous culture can incorporate rights to its local rules without jeopardizing its continuity as a people”.7

In Mexico, during the last decades, there has been a considerable increase in the number of electoral lawsuits that the indigenous communities have filed.8 The Electoral Tribunal of the Federal Judicial Branch (TEPJF) has developed a broad case law corpus on the subject that deals with both substantive and procedural aspects of the law. However, a unified juridical criterion has not been reached yet and there are evident tensions concerning the scope of the collective rights.

7 SCJN (2013). In this sense, see TEPJF (2014).
8 The number of lawsuits went from 13 in 2006 to 406 in 2016. Source: TEPJF.
The aim of this text is to analyse how the indigenous rules are integrated into the Mexican constitutional model by explaining some of the TEPJF criteria oriented towards an “intercultural perspective”. I will analyse the electoral regime of the municipio (municipality) of Santiago Yaveo in Oaxaca to illustrate the complexity of the electoral disputes, particularly regarding the tension between the principle of universal suffrage and the autonomy of the indigenous communities.

From my point of view, the constitutional recognition of the cultural pluralism in the defence of the human rights, as a part of the integral model of constitutional protection, is compatible with the premises of egalitarian liberalism and democratic constitutionalism. However, it is necessary to understand the relationship between individual and collective rights from the historical, social and political contexts of the indigenous communities. This provides a better understanding of the indigenous systems and fosters routes for the harmonization of rules based on a logic of an egalitarian recognition of the diversity that takes into account both the dynamics of the legal pluralism and the needs and expectations of the indigenous communities –as creators and subjects of their own destinies– within the frame of intercultural dialogues.

II. Historical Note on the Indigenous Resistance in the Judicial Forum

The history of the encounter with the indigenous other has been marked by the paradox of the recognition from above. During the Colony, the conquistadors tried to recognize some traditional rights and forms of government of the indigenous population so that they could ensure the survival of the subjugated indigenous peoples in order to secure tax payments and forced labour which would become the main engines of the colonial economy, an economy that was always based on
the exploitation of the Indians. This model aimed more at the subordination of the Indians rather than at their preservation.

On the other hand, the indigenous populations many times accepted and negotiated the conditions of vassalage, based on the legality of the Colony, to preserve—as far as possible— their lands and to obtain better living conditions. There are evidences that attest the broad strategic usage of the law and the courts by the indigenous peoples. As Arturo Warman expresses the courts played a central part in the preservation of peace and they “acquired legitimacy enough among the Mesoamerican Indians, despite the corruption, bureaucracy and lack of empathy of many judges.”

In this sense, for the Indians “the courts of justice constituted a space of dialogue and discussion that served them to vent many social tensions between Indian themselves and between they and the Spaniards”. The General Indian Court (Juzgado General de Indios), which worked from 1592 to 1820, was particularly devoted to solve conflicts between Indians themselves and between Indians and Spaniards. The Court, alongside the agents, advisors and the public prosecutors of Indians, constituted the body in charge of defending the indigenous causes and resolving the indigenous conflicts in matters such as the election of their own authorities and the resolution of inter-community conflicts.

Although the colonial judicial system took into account the indigenous cultural characteristics and customs, it did it by assimilating the Indians to the legal status of miserables (paupers) which meant that they were entitled to a special protection (such as abridged judicial proceedings, summary proceedings, reduced court costs or free access to justice) but in a situation

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of subordination. This assimilation had, in a legal sense, a double effect: one symbolic, which regarded the Indians as “unable to govern and defend themselves”, and other practical, which recognized the situation of poverty of the majority of them and their need for special treatment. Beyond the formal notion of the existence of two republics, one for the Spaniards and another one for the Indians, the indigenous peoples were incorporated into the judicial system in accordance to the aforementioned terms.

There are several episodes that show the indigenous presence before the colonial justice courts since the first years that followed the Conquest, their usage of their own means of proof and the difficulty to reconcile different points of view. However, all of the aforementioned situations were done on the basis of the subordination of the indigenous peoples to the colonialist other: the threat of using the law or the force as a final resource that the colonialist powers had to enforce the order imposed by the dominant culture was always looming –and still is up to now–, one way or another.  

In this context, the political and social usage of the law served both as an instrument of the colonial government and powers and as a means of defence and resistance of the indigenous populations. Hence, “the relationship between the Spanish judges as mediators and the usage of the Spanish legal system by the Indians helped to consolidate the colonial system and to maintain its viability for three centuries.” Thus, the indigenous peoples resisted the Spanish presence as well as the dominant local groups of power.

This instrumental usage of the legality is not uncommon in processes of colonization or interrelation between different communities; in New Spain it had special relevance since it allowed the indigenous peoples to maintain some of their pre-colonial institutions and to reconfigure the

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social, political and territorial indigenous organization from a double perspective: the one imposed by the colonial law and another one that was—and still is—reconstructed as a historical process marked by processes of resistance, recognition and vindication.

III. The Memory of the Recognition: the Altepletl as a Model of Political Organization.

As James Lockhart reminds us, “At the heart of the organization of the Nahua world, both before the Spaniards came and long after, lay the altepetl or ethnic state”.15 Everything the Spaniards organized during the colony was built upon this model of political and territorial indigenous organization and this model continues to be, after a long process of adaptation, a relevant model for understanding the current political organization of many indigenous peoples and communities.16

These political units are formed as confederacies or complex units in which the interrelation between communities depended on different circumstances. In general, the constituent parts of the altepetl were equal and separate constituents although they constituted parts of the hierarchical whole, with an orderly, cyclical rotation. These units did not operate under the scheme of subordination that characterized the Spanish governmental entities.17

Between the sixteenth and the eighteenth centuries, as Bernal and García point out, the conquistadors of Central Mexico fragmented the altepetl to create pueblos cabecera (municipal seats or municipal head towns) and pueblos sujetos (subject towns) in accordance with the socio-

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15 Lockhart (2013: 28).
17 Lockhart (2013: 28 y 29).
political and territorial hierarchy of their own Spanish model. In this model of organization the norm was the subjection of one group to another and the internal conflicts and tensions were common. As Charles Gibson refers, the Spanish institution of the cabecera (plural, cabeceras) was used to denominate the main political unit under which the other towns or municipal entities, called pueblos sujetos (singular, sujeto), were subordinated. Other minor entities such as estancias and barrios (named in Nahuatl calpulli or tlaxilacalli) were also subordinated to the cabecera. However, the Spaniards called the cabecera and the altepeme (plural of altepetl) towns (pueblos) without necessarily acknowledging the previous lineages of the indigenous lordships (tlatoque) and therefore some of the sujetos claimed for themselves (through their own caciques or Indian chieftains) the title of cabecera and thus this last concept was not always absolute.

Eventually, as from the eighteenth century in particular, different estancias and sujetos, despite having their own authorities, pressured to obtain their independence from their cabeceras, among other things, because of the identification of the cabeceras with the Spanish notion of “town” (pueblo) or “republic” and because of the political and economical implications that being a cabecera entailed.

Many sujetos claimed before the Spanish courts, truthfully or not, that their condition before the Spaniards came had been that of cabecera –or “pueblo en sí” – (city in itself), an independent town with self-government for “as long as the memory of man”. As a matter of fact, as Gibson indicates, “A class of Spanish lawyers made its living by encouraging or provoking Indian litigation” between cabeceras and sujetos which resulted in the progressive transformation of sujetos into cabeceras by the end of the sixteenth and seventeenth centuries. The tense

19 Gibson (2012: 35) and Lockhart (2013: 37).
relationships between *cabeceras* and *sujetos* (which included *agencias* (towns which were smaller than a *sujeto*), *rancherias*, *barrios* (districts of towns), etc.) still continue up until today although in very different contexts.\(^{22}\)

From this historical process, and for the purposes of this text, it is convenient to underline that the Spanish structure of the *cabildo* (town council) followed the design of the former *altepetl*, which was constituted by social units with strong autonomy (*calpolli*), consolidating thus the local identity; the *altepetl* underwent processes of resistance and adaptation and it survived to the demands that would arise with the Bourbon Reforms, Mexico’s Independence and the subsequent constitutional reforms.\(^{23}\)

In this context of diversity, the appointment of officials and the corresponding elections of authorities of the *sujetos* and the *cabeceras* since colonial times produced their share of “embroiled disputes”, situations that were not without abuses against the indigenous populations by the judicial authorities.\(^{24}\) In this regard, Gibson states: “We have an enormous number of colonial notices on the varieties of electoral procedure. It was a procedure that differed substantially from cabecera to cabecera, but one that was strictly maintained in each by custom and precedent, for any innovation was liable to denunciation and disqualification as a local irregularity.”\(^{25}\) Woodrow Borah also refers several cases of electoral disputes before the General Indian Court between *cabeceras* and *sujetos*.\(^{26}\)

The political and territorial organizations of the indigenous peoples have also undergone changes from colonial times until now but there is common agreement in pointing out that the

\(^{22}\) Cf. Cruz Rueda (2014).


\(^{24}\) Lockhart, (2013: 54-56).


community process has been the historical process that has experienced the most notorious
development.27 It was within the sphere of the community (cabecera, agencia, barrio, etc.) that
the structures that now express themselves as distinct entities of the municipalities became
strengthened. These are the entities that now claim for themselves rights to self-determination and
self-government.

The Bourbon Reform of the eighteenth century, also known as the Second Conquest, –with
its intentions of “civilizing” the indigenous peoples based on a model of a more equalitarian
integration– did not bring about the sought-after equality but rather new forms of inequality, which
were generated by the loss of Indian autonomy and territories. This caused an increase in the
confrontations and the collective violence and the “deterioration of the communal, intra-communal
and inter-communal solidarity.”28 Nonetheless, as Rodrigo Martínez Baracs points out, in 1810
“the peoples heirs of the ancient pre-Hispanic altepetl, the Indian kingdoms and lordships, were
still there, despite being altered, removed from the register, classified as macehuales (commoners)
or proletarians by the authorities, [because] notwithstanding the individualistic and equalizing
intentions of the Bourbon Reforms, these could not alter the distinct corporate order of the Indian
peoples […] and, even with their localism and ‘local-centralism’, the Indian peoples were present
throughout the Mexican Independence War, they transform it and were transformed by it, and they
remained after it.”29

Thus, during the nineteenth century, the clash of mentalities between tradition and
modernity deepened even more the divide between Indian peoples and the Spanish and creole
minorities.30 With the Cadiz Constitution of 1812, the supposed “common citizenship” put an end

29 Martínez Baracs (2010: 75 y 81).
to the whole system of special protections for the Indians, particularly the special judicial
guardianship, which meant “to leave the Indians exposed to a higher degree of exploitation and
open depredation” of their lands and communal resources.31

As for the organization of the Indian peoples, the Cadiz Constitution imposed the municipio
liberal (municipality) –a structure product of the classical liberalism, which demanded the election
of alcaldes (mayors) and the creation of ayuntamientos constitucionales (constitutional municipal
councils)–, over the Indian cabildo. The municipio allowed the Indian towns to become
ayuntamientos (municipal councils) and to maintain within the communities, to some degree, their
right to elect their own authorities, to impart justice and to have formal authority and control over
their economic and territorial resources. However, the creation of the municipio also resulted in
centralization and loss of autonomy for many communities since its impact varied depending on
the region and on the specific community.32

In the nineteenth century, the paradox of the recognition –the struggle between subjection
and autonomy– continued to be an issue after the Mexican War of Independence, the Second
Mexican Empire and the Liberal Reform. This situation dragged on during the first half of the
twentieth century, after the Mexican Revolution and during the period of institutionalization of
Mexican politics, when indigenist policies of integration or assimilation were put into practice. It
also continued in 1992, with the constitutional recognition of the cultural pluralism, and well into
the twenty-first century, with the constitutional reform in 2001, which recognized the right to the
autonomy and self-determination of the indigenous peoples.

The configuration of the municipios, first according to the law and then according to the
constitution, defined the political space where the autonomy has been exercised and where the

political practices of the Indian communities and towns have been developed. Having in mind that “the Mexican state has agreed to municipalize the indigenous territories, not as a form of recognition but rather as a policy of integration”, the municipal sphere represents the social field where the tensions, the intra-community disputes and the disputes over autonomy take place.

Given this situation, the indigenous governments “have sought realignments in order to survive” both at the municipal and sub-municipal levels. The municipios are generally situated in an area of “inter-legality” between the municipal level and the community level, since, frequently, the localities which were unable to become municipios themselves –because they did not comply with the number of inhabitants required by the law to do it– were attached to another municipio as agencias or comisarias, but maintaining their own authorities, thus “amalgamating [their own authorities] with the religious, agrarian and public authorities of the ayuntamiento”. In such cases, and due to the fact that the community is the main criterion of indigenous identification –since it is there where the socialization, the community work, the community obligations, the fiestas, the religious ceremonies and the community life take place–, the municipios have become multi-community entities, where each locality identifies itself as a distinct community from the other neighbouring localities of the ayuntamiento, and very often they are in dispute with the cabecera, irrespective of the fact that this last one may or may not be indigenous as well.


The formal recognition of the cultural diversity in Mexico has been an unstable process that has undergone different stages. The Constitution of 1917 –heir of the classical liberal constitutional

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33 Burguete Cal y Mayor (2008: 77).
34 Id.
texts of 1824 and 1857-- did not recognize the multicultural character of the Mexican nation. In fact, for a long period of the twentieth century, the indigenist policies of the state had, in the best-case scenario, an integrationist or assimilationist intention and, in the worst, a paternalistic and restrictive view of the multicultural pluralism, until finally, a stage of partial recognition of the diversity was reached.  

The legal and constitutional recognition of the indigenous rights –both individual and collective– (the legal recognition in 1992 and the constitutional one in 2001) made possible to move the discussion towards new paradigms that had as a transformational background the following: the emergence of the indigenous movements in Latin America because of the 500th anniversary of the so-called “encounter of cultures” (or, alternatively, from a different perspective, “500 years of indigenous resistance”), the uprising of the Zapatista Army of National Liberation (EZLN) (1994) and the strong influence of the international law.

In general, the recognition (from above) of the rights of the indigenous peoples, communities and persons has been marked by the paradox between autonomy from and subjection to the dominant culture based on ideological differences that confront the notion of the individual with the notion of the community. As a matter of fact, the conditioned recognition of the diversity has continually characterized the negotiations, the confrontations and the recognition of rights.


Both the colonial model –based on a recognition intended as subordination– and the classical liberal model –based on equality as a model of integration– fostered discrimination and legal or economical exclusion, although they also allowed, somehow, the preservation of the collective identity of the communities. In both models, the indigenous populations had to adapt themselves and to resist so that they could keep some of their traditional and collective lifestyles. This also entailed the defence of their systems of government (that were not free from inequalities, cacique-like conducts and privileges for some of their members). This paradox still persists today, five centuries after the first contact. On the one hand, we have the partial recognition of the cultural difference, zealously guarded and supervised by the state authorities, but on the other hand we have the strategic usage of the law by the indigenous communities as a form of resistance, adaptation and, sometimes, manipulation of the official discourse.

Hence, the Article 2 of the Mexican Constitution states that the Mexican Nation “has a multicultural composition, originally sustained on its indigenous peoples”, but previously it declares that “The Mexican Nation is one and indivisible”, as if the recognition of the cultural plurality would entail a risk of a social breakup. Likewise, the article acknowledges the indigenous peoples’ right to self-determination, but it states that this right shall be exercised “within a framework of constitutional autonomy subjected to the Constitution in order to guarantee national unity.”

The Constitution also recognizes the indigenous peoples’ right to autonomy so that they can “Apply their own legal systems to regulate and solve their internal conflicts” but “subjected to the general principles of this Constitution, respecting the fundamental rights, the human rights and, above all, the dignity and safety of women.” The law shall establish the way in which judges and courts will validate the aforementioned regulations.
The Article 2 of the Constitution also grants the indigenous peoples’ right to elect, in accordance with their traditional rules, procedures and customs, their authorities or representatives to exercise their own forms of internal government “guaranteeing the right to vote and being voted of indigenous women and men under equitable conditions; as well as to guarantee the access to public office or elected positions to chosen citizens that have been elected or designated within a framework that respects the federal pact and the sovereignty of the states and the autonomy of Mexico City.” It also emphasizes that “In no case the communitarian practices shall limit the electoral or political rights of the citizens in the election of their municipal authorities.”

These clauses –on the one hand, permissive, but on the other, restrictive– define the juridical relationship between the indigenous normative systems and the law of the state and they are the foundation to interpret the reach of the recognition of the cultural diversity and to define the judicial policies to protect, defend or limit the indigenous normative systems. In this sense, without denying the existence of practices or cases of discrimination and political violence in many communities, it is necessary to underline the ideological aspect of the double dimension – permissive and restrictive– of the recognition from above of the cultural plurality as a common state practice, specially given the tensions that are generated between collective and individual rights.38

One or another type of rights will prevail depending on the chosen perspective: either a classical liberal one or one that favours the community approach. From an intercultural perspective, the circumstances and the particular context of the cases should be analysed and the dialogue and the community mechanisms of conflict resolutions should be favoured; the situation

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38 This also reflects what Boaventura de Sousa Santos calls the regulatory and emancipatory dimensions of law (2009) and the need for an intercultural perspective of human rights that acknowledges the incompleteness of all cultures and the necessity of a dialogue among them.
should be analysed through direct or specialized sources that allow the judge to become better acquainted with the reasons of a certain indigenous measure or practice that, although may limit individual rights, may be justified from the perspective of the community as long as the practice does not seem disproportionate after a contextual and reflexive analysis of the local normativity.

V. The Judicial Recognition: the TEPJF Experience.

The state legislation over and the judicialization of the community life have considerably increased the strategic litigation on electoral issues (specially in the state of Oaxaca, where elections held through indigenous normative systems are recognized). The electoral litigiousness has brought into the spotlight the complexity of the constitutional recognition of the cultural diversity as well as the difficulties that the electoral authorities face to understand and judge realities that have been out of the judicial fore for so long –whether because they were made invisible or because there were other mechanisms of resolution and political negotiation to solve them; realities that now are calling for a debate over the paradoxes, limitations and difficulties of the constitutional model.40

In this context, the TEPJF has developed a broad case law corpus that is related to the main tensions between individual and community rights.41 Sometimes the scales have tipped towards an understanding of the rights mainly based on classical liberalism42 and, sometimes, towards a

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42 This has been the criterion, for instance, in cases concerning: the guarantee of substantive equality before the law for women and men (case laws: 22/2016, 48/2014; judicial precedent XXXI/2015); the requirements to participate, such as tequio or collective work, shall not be disproportionate (judicial precedent XIII/2013); or restrictions to the decisions of the assembly based on the respect of the rights of its individual members (judicial precedent XXVIII/2015).
further protection and guarantee of the positions of the community.\textsuperscript{43} There has been criticism against the reversals of the Tribunal although sometimes these have been justified due to the context of the specific case.

In some cases, the TEPJF has defined the intercultural perspective as a contextual analysis methodology for disputes that arise during the election of traditional authorities that takes into account the particular situation of every one of them, to balance the claims of violations of political rights filed by the persons who belong to the indigenous peoples or who are only residents of the areas.\textsuperscript{44}

In general, the electoral disputes may arise in three fronts: intra-community, inter-community and extra-community. Most of the disputes are generally about the election of municipal authorities (\textit{ayuntamientos} or \textit{regidurías}) or the election of sub-municipal authorities (\textit{agencias municipales}, \textit{agencias de policía}, \textit{órganos municipales auxiliares} or traditional authorities). The typology of the electoral controversies related to autonomy and self-determination rights of the indigenous communities most commonly involve controversies about rules pertaining to: a) internal restrictions imposed by the communities upon some of their

\textsuperscript{43} Among the most outstanding issues are those related to: the right to self-determination (judicial precedents LXXXV/2015 and XXX/2015); the principle of maximization of autonomy (judicial precedents VIII/2015 and XXXIII/2014); self-government (case law 19/2014); the right to decide autonomously the applicable regulations germane to conflict resolution [\textit{autodisposición normativa}] (judicial precedent XXVII/2015); the right to prior consultation (case law 37/2015; judicial precedents XLVI/2016 and LIV/2015); the recognition of the legal pluralism as part of the legal system (case law 20/2014; judicial precedent LII/2016); guarantee of respect of the community assembly (judicial precedent XIII/2016); the obligations of the authorities involved in conflict resolutions in indigenous communities (case laws 10/2014, 9/2014 and 15/2008; judicial precedents LXV/2016, LXIV/2016, LXIII/2016, XLVIII/2016), and the duty to encourage indigenous participatory democracy (judicial precedent XLI/2015).

\textsuperscript{44} These reflections have their background in Del Toro and Santiago (2015). See also case law 9/2014 entitled INDIGENOUS COMMUNITIES. THE AUTHORITIES SHALL RESOLVE THE INTRA-COMMUNITY DISPUTES FROM AN INTEGRAL ANALYSIS OF THE CONTEXT (OAXACA LEGISLATION) [\textit{COMUNIDADES INDÍGENAS. LAS AUTORIDADES DEBEN RESOLVER LAS CONTROVERSIAS INTRACOMUNITARIAS A PARTIR DEL ANÁLISIS INTEGRAL DE SU CONTEXTO (LEGISLACIÓN DE OAXACA)}]; and the judicial precedent XLVIII/2016: JUDGING FROM AN INTERCULTURAL PERSPECTIVE. ELEMENTS FOR ITS IMPLEMENTATION ON ELECTORAL ISSUES. [\textit{JUZGAR CON PERSPECTIVA INTERCULTURAL. ELEMENTOS PARA SU APLICACIÓN EN MATERIA ELECTORAL}].
members or upon non-members of them; b) external protections. The communities use these last ones to deal with: disputes that arise from the non-recognition of its traditional authorities; the guarantee of their self-determination to change the electoral regime; the right to a prior and informed consultation; the right to budgetary allocation for the full exercise of their political autonomy; the recognition of their right to reserve for themselves a number of seats from the list of their representatives before the state legislature; or the full recognition of representatives before the municipal authorities.45

The main struggles between state legislation and intra-community and inter-community internal restrictions occur in cases that confront the right to autonomy with the principles of universal suffrage and gender equality on issues related to the requirements to be part of the assemblies or to participate in electoral processes. However, in cases that involve different communities of the same municipio, the distinction between internal restrictions and external protections becomes blurry many times and its analysis depends on the analytical perspective that the judge assumes. In the following section, I will discuss a case that involved the individual rights of the residents of certain agencias municipales and agencias de policía who were deprived of their right to vote and be voted in the municipal elections because, according to the indigenous normative, only the residents of the cabecera were entitled to those rights.46

45 Cf. Kymlicka (2000: 58 and ff.)
46 According to the Municipal Organic Statute of the State of Oaxaca [Ley Orgánica Municipal de Oaxaca] the cabecera municipal (municipal seat) is the main population centre where the municipal government has its seat; the agencias municipales (municipal agencies) are population centres with more than 10,000 inhabitants; and the agencias de policía (administration agencies [the name comes from the Latin politia, which in turn comes from the Greek polis]) are population centres with a population of at least 5,000 inhabitants (Articles 16 and 17).

I will now focus on the case of the municipio (municipality) of Santiago Yaveo, in Oaxaca, to illustrate the tensions between autonomy and universal suffrage. This case clearly shows the main tensions between individual and collective rights that arise from the establishment of internal restrictions that also work as external protections; they will be considered either internal restrictions or external protections depending on the perspective, classical liberal or intercultural, from which they are perceived. The case demonstrates the complexity of the topic as well as the different solutions that the communities themselves and the electoral authorities have implemented to solve a controversy that, at the bottom, is the result of complex political and social dynamics.

As I have already mentioned, the dispute between cabeceras and agencias municipales – or other types of sub-municipal entities – dates back many centuries and it has acquired specific characteristics contingent on the period and the cultural and political contexts in which it has occurred. Nowadays, this is one of the most controversial topics – particularly in the state of Oaxaca, which recognizes the election of municipal authorities by means of indigenous normative systems in 417 of its 570 municipios –, because in many cases only the residents of the cabecera are allowed to participate in the elections, and the authorities from the cabecera justify this situation by claiming that this has been the way the system has worked since “immemorial times” or that it has been decided so by the community assembly, even with the consent or the acquiescence (tacit or explicit) of the agencias that integrate the municipio.47

This tension between cabeceras and agencias generally has different reasons. One key reason is the budgetary allocation for the agencias, which causes political conflicts among the

communities who seek to obtain a more equitable distribution of resources (particularly because the budget items 28 and 33 of the federal contributions to the states have been decentralized since the last decades of the twentieth century). Other reasons for dispute are the territorial feuds and the payment of allowances to municipal authorities that did not receive payment previously.

However, this phenomenon of “exclusion” of the agencias is neither generalized nor homogenous and sometimes it is the product of historical agreements. In general, 130 of the 417 municipios in Oaxaca do not have agencias (31.17%); out of the 287 municipios that have agencias, in 179 of them (59.93%) the residents of the agencias can vote and in the remaining 115 (40.06%) they cannot. On the other hand, in 166 agencias their residents can be voted while in 116 (40.41%) they cannot. In two municipios, the residents of the agencias can be voted for any office up to the level of sindico. In one municipio, the assembly of the cabecera decides whether the residents of the agencia can be voted. In two other municipios it was decided that the residents of the agencias could be voted in subsequent elections.48

Broadly speaking, the tension between the principle of universal suffrage and the principles of autonomy and self-government is the result of the existing models of municipal integration in Oaxaca between the cabecera and the agencias municipales and the agencias de policía; models that give shape to the community as the axis of the community life.49

49 The Mexican Constitution states: “An indigenous community is defined as the community that constitutes a cultural, economic and social unit settled in a territory and that recognizes its own authorities, according to their practices and customs.” On the notion of community and communality (comunalidad), see Diaz, Floriberto (2007).
A) The Classical Liberal Perspective

In some cases, the TEPJF has considered that the exclusion of some individuals of the indigenous communities from the electoral process is against the principle of universal suffrage. The TEPJF has reached this conclusion by arguing that although the elections by means of “indigenous customs and practices” do not contravene per se the constitutional principle of equality, the elections shall be declared invalid “when the customs and practices entail activities that infringe the universal suffrage.” This conclusion draws on the general assertion that if during the election the universal suffrage principle was not respected “a transgression against the very essence of the democratic system has been committed.” This abstract criterion is based on a literal reading of the principle of universal suffrage (“one person, one vote”) and on a conception of the indigenous rights from the perspective of the municipio rather than from a community perspective.

From the former perspective, “if inside a indigenous community the residents who live outside the cabecera [residents of the agencias municipales or other municipal localities] were not allowed to vote, the aforementioned restriction would mean the denial of their fundamental right to vote and, therefore, a transgression against the principle of equality before the law,” consequently, “this situation is beyond the scope of recognition and guarantee of rights of the indigenous peoples and communities provided by the Federal Constitution” since it does not have a democratic character.50

In the case that gave rise to the previous criterion, the TEPJF affirmed the annulment of the election in the municipio of Santiago Yaveo declared by the Congress of the State of Oaxaca.

50 See case law 37/2014, entitled INDIGENOUS NORMATIVE SYSTEMS. THE ELECTIONS HELD UNDER THEM CAN BE MODIFIED IF THE SYSTEMS INFRINGE THE PRINCIPLE OF UNIVERSAL SUFFRAGE. [SISTEMAS NORMATIVOS INDÍGENAS. ELECCIONES EFECTUADAS BAJO ESTE RÉGIMEN PUEDEN SER AFECTADAS SI VULNERAN EL PRINCIPIO DE UNIVERSALIDAD DEL SUFRAGIO].
The ruling observed that in the renovation of the members of the *ayuntamiento* only the residents of the *cabecera* were allowed to participate and the residents of the *agencias municipales* and of the *agencias de policía* were excluded.⁵¹ According to the authorities of the *cabecera*, the exclusion was founded on an inveterate practice that, if eliminated, would cause social unrest, violence and the demise of the traditional law and the community identity. Notwithstanding, the ruling of the *TEPJF* considered that the custom was against the dignity of the residents of the *agencias*.

The sentence took into account that months before the election, the *agentes municipales* (municipal agents) and the *agentes de policía* (administration agents) of the *municipio* of Santiago Yaveo had proposed to the electoral authority, to consider the participation of all the citizens of the localities that integrated the *municipio* in the municipal elections of 2002—without disrupting the traditional exercise of practices and customs—because, so far, all the decisions had been made by “a minority.” The electoral authority considered unfounded the request to change the regime. Nonetheless, several reunions between electoral officials, municipal authorities and citizens of the *cabecera* were held to “discuss proposals for solution given the refusal of the members of the *ayuntamiento*, which was backed by the general consensus of the citizens of the *cabecera*, without reaching, in the end, a satisfactory agreement”.

In this sense, although the ruling of the *TEPJF* considered the claim of exclusion of the *agencias* and their efforts to change the electoral regime, it did not analyse other contextual elements to elucidate whether, as a matter of fact, there had been a violation to the right to political representation of those who do not reside in the *cabecera*, or whether the inter-community dispute

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had arisen from diverse situations that were projected to the electoral arena but that sprang from other circumstances.

After the electoral annulment, the problems in Santiago Yaveo increased and led to more electoral annulments and to the appointment of an administrador municipal (municipal administrator) by the Congress of Oaxaca.\(^{52}\) The rejection to this appointment brought about the integration of a Consejo de Administración Municipal (council of municipal administration) and an “unprecedented” solution –result of the agreement between the cabecera and the agencias– was reached in 2007: the cabecera would keep the presidencia municipal (municipal presidency) but it would only appoint three concejales (councilmen); two other concejales –the regidor de hacienda (councilman for budget) and the regidor de salud (councilman for health)– would be appointed by the two agencias municipales according to a rotational order.\(^{53}\)

This solution gave certain degree of stability to the municipio but it did not have the full consensus of the communities and the inhabitants. As a matter of fact, in 2010 the TEPJF Regional Courtroom in Xalapa affirmed the annulment of a new election in Santiago Yaveo decreed by the state courts, for restricting again the right to vote of the agencias.\(^{54}\) The ruling declared invalid the agreement reached in 2007 according to which the appointment of the regidor de hacienda and the regidor de salud were made in accordance with the rotational order between the agencias. The ruling considered that “the electoral rights are not subject to negotiations” and urged the municipal authorities to respect the right to universal suffrage in the following elections.

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\(^{52}\) The figure of the administrador municipal (municipal administrator) is alien to the communities and it has caused greater disputes. See the Constitutional Controversy Procedure 70/2009 brought by the municipio of Santiago Yaveo before the Mexican Supreme Court of Justice of the Nation.


\(^{54}\) SX-JDC-12/2011.
B) The Intercultural Perspective

Three years later, the TEPJF Regional Courtroom in Xalapa made a “hermeneutic turn” with its ruling on the file SX-JDC-94/2014 and joint cases affirming the 2013 election in Santiago Yaveo, which the state authorities had previously validated, because the alleged exclusion of women and agencias municipales had not been proved. The ruling considered that although there was a differentiated treatment between citizens from the cabecera and those from the agencias, such circumstance was justified.

This time, the Regional Courtroom validated the agreement of 2007 that had established a differentiated election and the rotational order between the cabecera and the agencias municipales. Nonetheless, the Courtroom “urged” again the local electoral authority to “take the necessary steps to solve the controversy” through extrajudicial mediation measures and amicable settlement measures. The members of the agencias appealed the ruling but the Superior Courtroom of the TEPJF affirmed it in the file SUP-REC-830/2014.

This last verdict shows a differentiated understanding of the principle of universal suffrage, which takes into account the effectiveness of the principle within the sphere of the community. According to the Superior Courtroom “the complaints about the violation of the principle of universal suffrage shall be analysed bearing in mind the intercultural context, respecting the right to self-determination of the [indigenous] peoples so as to determine, by balancing the principles and rights, what is best for the community, within the sphere of their internal normative systems

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55 March 20, 2014 Sentence.
56 Agreement CG-IEEPCO-SNI-147/2013.
57 June 18, 2014 Sentence. See also the October 19, 2015 Motion against the Non-compliance of the Sentence SUP-REC-830/2014 and joint case.
and without abruptly disrupting their ways of life, pacific coexistence and the inclusion agreement that is under way in the municipality.”

The ruling is based on how the *agencias municipales* are politically organized in relation to the *cabecera* and on how these communities have internally conceived their system of coexistence. For the Superior Courtroom –following the analysis and the reports of the local authorities–, the *agencias* and the *cabecera* “are organized in a relation of autonomy in which the substantial element –the recognition of the authority of the *cabecera* by the *agencias*– must be balanced according to a particular community context that, although it is not monolithic, comes from a legitimate agreement adopted by the representative authorities of the communities that constitute the *municipio*.“ It is important to point out that the own authorities of the *agencias* ratified the aforementioned agreement.

From this perspective, the basis of the political organization of the indigenous peoples is the community, not the *municipio*. This presupposes that each community has its own local government, which was elected according to the internal systems of the community itself, thus guaranteeing the principle of universal suffrage within each community. In the Santiago Yaveo Case “the *municipio*, administratively or artificially, joined together communities that did not have any other strong bond among themselves, communities with no ethnic, territorial, socio-political or cultural affinity.” Then, the government of the *cabecera* is not strictly speaking a representative authority for the residents of the *agencias* but rather an administrative link, whose relevance resides particularly on the correct allocation of the budgetary resources for public works, health or administrative services in the *agencias*. In this case, the *municipio* is not in the strict

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58 The sentence remembers: “the Municipio of Santiago Yaveo was historically occupied by the Zapotec indigenous population, whose two original communities from 1774 were Santiago Yaveo and San Juan Jaltepec […] Each of these communities elect separately and autonomously their own authorities because the original communities are located on distinct territories.”
sense a political unit, therefore, “it is reasonable that the citizens from the agencias municipales and from the agencias de policía do not vote in the election of the authorities of the ayuntamiento, since the principle of universal suffrage is recognized regarding the election of internal representative authorities.” By the same token, the residents of the cabecera do not participate in the election of the authorities of the agencias municipales and vice versa.

The Superior Courtroom of the TEPJF had already reached this conclusion in the case of the election of the municipio of Reyes Etna, also in Oaxaca, where it established that “the principle of universal suffrage is guaranteed when […] the members of the communities different from the cabecera municipal fully exercise their electoral rights by electing the internal authorities of their own locality, who in fact represent them –even before the authorities of the cabecera municipal–, just like the agentes municipales and the agentes de policía do.” The TEPJF balanced the issue and decided “if there were a strict application of the principle of universal suffrage, the right to self-determination as a mean to preserve the cultural identity of the municipio would be harm” since “the inhabitants of the agencias municipales do not recognize directly the cabecera municipal as a representative authority.” Thus, the community consensus was accepted as the legitimate criterion to interpret the extent of the principle of universal suffrage.59

Even tough the Superior Courtroom recognized the community organization in Santiago Yaveo, it also urged –just like the state authorities and the Regional Courtoom did– to promote the universal suffrage “in as much as it does not abruptly interfere with the decisions that the indigenous communities make in the exercise of their autonomy”, in order to “increase the

59 SUP-REC-19/2014. In this case, there was evidence of an inter-community agreement between cabecera and agencias and the people who were against the agreement were from the cabecera, not from the agencias. In the same sense, see the Case of the Ayuntamiento of Santiago Atitlán (SUP-REC-825/2014).
inclusion of the municipal communities of the many indigenous ayuntamientos in the national territory besides the cabeceras.”

The situation in Santiago Yaveo remained without change during the 2016 election, which was validated by the state authorities despite the claims of some of the members of the agencias concerning irregularities on the community assembly. Since 2013, the agencia of San Juan Jaltepec, which is one of the agencias of the municipio of Santiago Yaveo, did not recognize the agreement reached by the eleven peoples in 2007 and ratified in 2012. On this respect, the local electoral authority considered that the system was valid taking into account the right of the indigenous communities to self-determination, since “the indigenous autonomy can only be restricted when it poses a risk to the national unity, other than that, the indigenous peoples and communities have the fundamental right to self-determination.” The ruling reiterated that in Oaxaca “the indigenous peoples have historically regarded the community, not the municipio, as the basis of their political organization (regardless of the constitution of the former by one or many localities).” In fact, each community “has its own local government; the citizens of the community

60 In 2015, in the same proceeding, the TEPJF validated the election of a concejal sustituto (substitute councilman) due to the death of the concejal suplente (alternate councilman) who was going to assume the office of presidente municipal (municipal president). SX-JDC-813/2015.
61 The state electoral authority validated the elections by judging that these “followed the community norms and practices; the elected authorities got a majority of votes; the universal suffrage was guaranteed by the participation of male and female citizens and by the incorporation of 6 women into the structure of the ayuntamiento”. The electoral authority underlined that during the election “the incorporation and participation of female and male citizens into the decision making process related to the proper conformation of the ayuntamiento” was promoted “thus guaranteeing the full exercise of the universal suffrage”. 1,636 of the 3,547 assembly members were women and 1,911 were men. The ayuntamiento incorporated 6 women into the ayuntamiento as concejales propietarias (regular councilwomen) and concejales suplentes (alternate councilwomen) into three regidurías: health, education and gender equality, respectively. Despite this, the state electoral authority urged the community and the elected authorities “to apply, respect and guarantee the gender perspective in the renovation of their next municipal authorities, to ensure the right to be elected to any public office under equalitarian conditions, thus fulfilling what is established by the Constitution […] and the international treaties […] and, by doing so, avoiding any possible grounds of annulment of their respective election of concejales of the ayuntamiento.” Agreement IEEPCO-CG-SNI-240/2016.
elect their authorities in accordance with the internal normative systems, through a complex normative framework that guarantees their right to political representation.”

The electoral authority referred that in the municipios where the agencias do not participate “their integration [into the electoral process] supposes a deep structural change in the traditional local rule system because –up until the moment when the controversies arise– their integration was not considered part of the organic life of the community in question”, consequently, “it is necessary to clarify that the issue is not whether a cabecera excludes its agencias [from the election] and due to that exclusion they [afterwards] claim their right to participate, but rather whether the exclusion (of rights) as such appear from the moment of the demand to participate in the election and not before, since, as a matter of fact, it is a reaction of the cabecera in response to the treat that poses the participation of the agencias in a system that did not contemplate them before.”

VII. Conclusion. Towards an Intercultural Reflexivity.

The indigenous presence in the electoral judicial forum becomes more notorious because of the strategic usage of the law and the courts by the indigenous communities and interest groups who see in the electoral law mechanisms to solve conflicts or to pressure to achieve changes or transformations in the indigenous normative systems. Considering that the electoral disputes are preceded by and mixed with other issues (structural or circumstantial ones) that sometimes explain or aggravate the dispute (such as poverty; migration; education level; territorial boundary feuds; cacique-like local regimes; tensions between internal groups; interventions from political actors,
religious actors or unions; or the influence of groups alien to the community), it is paramount that the electoral authorities become acquainted with the context of every specific community.

In such circumstances, the intercultural perspective is a tool necessary to interpret human rights in multicultural societies and it becomes indispensable to understand and to judge the complexity of the electoral disputes of the indigenous communities. It is also a balancing method that provides broader guarantees and a more reflexive protection on the scope of the constitutional and international rules that recognize the individual and collective rights of the indigenous people and a hermeneutic key to face the tensions at play based on dialogues that lead to a better solution route. In order to do this, the judicial process –which is traditionally close– must be opened up and a new procedural strategy must be developed: a type of justice open to the cultural pluralism. Otherwise, it is highly unlikely that electoral judges sitting on their city offices, oblivious to the interdisciplinary solutions and uninvolved with the realities of the indigenous community, will make a right and “fair” decision that takes into account the social and cultural features of indigenous communities located hundreds of miles away.

In these contexts, the apparent judicial neutrality and impartiality is no more than ignorance surrounded by arrogance that only produces useless or ornamental rulings and, in a worst-scenario, triggers or exacerbates conflicts which generate more social violence and uncertainty.

The Santiago Yaveo Case shows the complexities and the possible routes to defuse the conflict through an inter-community agreement. The rotatory order to integrate some regidurías was agreed in the presence of the municipal authorities and in view of the need to reach an agreement. In this manner, the municipio advances towards the construction of agreements. Likewise, more women are incorporated to the municipal public offices to promote and ensure a

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64 Cf., in general, Bartolomé (2006); Bouchot (2015); Alcalá Campos (2015); Olivé (2008); Del Toro and Santiago (2015) and Santos (2009); Fornet-Betancourt (2004).
greater equality in the political participation. However, there are still people who consider the agreements unfair and the incorporation of women, insufficient. Evidently, some time has to pass until the electoral processes stabilize. In any case, the electoral authorities have to seek with their decisions and resolutions to contribute to the process of stabilization and not to unjustifiably generate with them greater conflict due to a decontextualized interpretation of individual rights.

There are many other conflicts that reflect the tensions between individual and collective rights in the context of the indigenous elections. The electoral participation of women is one of them. Here, just like in many other cases, one can witness changes and processes of inclusion taken by the communities themselves. Nonetheless, there are also resistances and conflicts product of different factors, such as, the decisions of the judicial authorities, which, by ignoring the community context, impose or hurry apparent solutions that in fact are totally ineffectual and alien to the collective dynamics. Hence, the importance of the context and of the analysis on topics such as: how the systems of municipal public offices work; the collective and familiar –rather than individual– citizenship of many communities; or the level of participation of women in the community work, without falling into essentialisms or feminist ethnocentrisms.65

From the perspective of the universal suffrage, the exclusion from the electoral municipal process of some residents of the locality according to the indigenous normative systems raises controversy. In these cases, the denial responds more to dynamics of external protection than to internal restrictions, because those who are excluded frequently are people alien to the community who claim for themselves the right to vote for the municipal authorities. It is difficult to find negotiation routes in cases where granting the right to participate in the election to people who are non-members of the community, and yet reside inside the municipio, would entail the risk of

changing altogether the internal normative system. The same thing happens when the conflicts between *agencias* and *cabecera* answer more to political interests rather than to attempts of integration or conciliation.\(^\text{66}\)

In the aforementioned cases, as in others of high local divisiveness, the logic of the case law is not generally the ideal if it does not acknowledge the specific context of each community. The increasing importance of expert analyses, reports of authorities specialized in indigenous matters and *amicus curiae* writs in the judicial forum have contributed to a new understanding of how the rights are understood and exercised by the communities, in a way that is not incompatible with an intertextual reading of national and international human rights.

The intercultural key does not guarantee that the judges’ rulings will be the right ones nor that they will put an end either to the conflicts that the indigenous communities experience or to the many social gaps that they face, nonetheless, it allows a more reflexive approach that encourages the dialogue and the understanding of the *other* from a more equalitarian –and less vertical– recognition of cultures.

VIII. Bibliography

Anaya Muñoz, Alejandro (2006), _Autonomía indígena, gobernabilidad y legitimidad en México. La legalización de usos y costumbres electorales en Oaxaca_, México, Universidad Iberoamericana-Plaza y Valdes.


Bengoa, José (2016), _La emergencia indígena en América Latina, 3ª ed._, Chile, Fondo de Cultura Económica.


Bonilla, Daniel (2006), _La Constitución multicultural_, Colombia, Siglo del Hombre Editores-Universidad de los Andes-Pontificia Universidad Javeriana-Instituto Pensar.

Bouchot, Mauricio (2005), _Interculturalidad y derechos humanos_, México, UNAM-Siglo XXI.


Bustillo, Roselia (2016), _Derechos políticos y sistemas normativos indígenas. Caso Oaxaca_, México, TEPJF.

Celestino de Almeida, María Regina (2016), “La cultura política indígena frente a las propuestas de asimilación: un estudio comparativo entre Río de Janeiro y México (Siglos XVIII-XIX), en _Las poblaciones indígenas en la conformación de las naciones y los Estados en la América Latina decimonónica_, coordinado y editado por Ingrid de Jong, y Antonio Escobar, México, El Colegio de México/El Colegio de Michoacán/CIESAS.

Consejo General del Instituto Estatal Electoral de Oaxaca, Acuerdo: CG-IEEPCO-SNI-147/2013, Respecto de la elección de concejales al Ayuntamiento del Municipio de Santiago Yaveo, que electoralmente se rige por sistemas normativos internos. 

______, Acuerdo IEEPCO-CG-SNI-240/2016, Respecto de la elección ordinaria de concejales al Ayuntamiento celebrada en el municipio de Santiago Yaveo, Oaxaca, que electoralmente se rige por sistemas normativos internos. 
http://www.ieepco.org.mx/archivos/acuerdos/2016/IEEPCO-CG-
SNI%2E2%80%90240_2016.pdf.

Cruz Rueda, Elisa (2014), _Derecho indígena: dinámicas jurídicas, construcción del derecho y procesos de disputa_, México, Instituto Nacional de Antropología e Historia.

Del Toro, Mauricio y Rodrigo Santiago (2015), _La perspectiva intercultural en la protección y garantía de los derechos humanos_, México, Comisión Nacional de Derechos Humanos.


Hernández Díaz, Jorge (2016), *Derechos indígenas en las sentencias del TEPJF*, México, TEPJF.


Juan Martínez, Víctor Leonel (2016), *Multiculturalidad, ciudadanía y derechos humanos en México. Tensiones en el ejercicio de la autonomía indígena*, México, CNDH.


Olivé, León (2008), *Interculturalismo y justicia social. Autonomía e identidad cultural en la era de la globalización*, México, UNAM.


Del Toro, (2010), Mexico’s Indigenous Communities. Their Land and Histories, 1500-2010, University Press of Colorado.

Santos, Boaventura de Sousa (2009), Sociología jurídica crítica. Para un nuevo sentido común en el derecho, Madrid, Trotta-ILSA.

SCJN (2013) Protocolo de actuación para quienes imparten justicia en casos que involucren derechos de personas, comunidades y pueblos indígenas, SCJN, México.


Valdivia Dounce, María Teresa (2010), Pueblos mixes: sistemas jurídicos, competencias y normas, México, Instituto de Investigaciones Antropológicas/UNAM.

