

The Journal of Social Encounters

Volume 7
Issue 1 *Extractive Politics, Conflict and
Peacebuilding*

Article 6

2023

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Recommended Citation

Torres-Wong, Marcela and Méndez-García, Elia (2023) "Fixing Prior Consultation for Indigenous Empowerment," *The Journal of Social Encounters*: Vol. 7: Iss. 1, 87-104.

DOI: <https://doi.org/10.69755/2995-2212.1163>

Available at: https://digitalcommons.csbsju.edu/social_encounters/vol7/iss1/6

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Fixing Prior Consultation for Indigenous Empowerment

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Over the last three decades, extractive conflicts in Latin America have become increasingly violent. Hundreds of Indigenous activists have been murdered for defending their land against extractive interests. The international formula for addressing this type of conflict is for governments to conduct prior consultation procedures with Indigenous communities before affecting indigenous territories. However, the misuse of consultations by governments and companies to legitimize ecologically destructive projects has led a sector of Indigenous organizations to reject prior consultation, while others continue advocating for free, prior, and informed consent. We compare two cases of Indigenous communities from Oaxaca and Yucatán in Mexico who have made diverse use of prior consultation with positive results for their communities. We underline the conditions under which Indigenous leaders can use these procedures for community empowerment. We emphasize that prior consultation fulfills its primary role when it enables Indigenous participants to achieve their goals rather than serving merely as a bureaucratic procedure that validates the economic agenda of a state. We argue that it is through Indigenous empowerment that participatory procedures can create new venues for peacebuilding within Indigenous territories.

Keywords: Indigenous peoples, conflict, violence, prior consultation, community empowerment, peacebuilding

Introduction

Indigenous peoples are among the most vulnerable groups on the planet. Multiple threats, including disease, extractive interests, poverty, climate change, and organized crime, jeopardize their lands and livelihoods. In addition, institutionalized discrimination and enduring racism have devastating effects on Indigenous societies (McNeish & Shapiro, 2020; Martínez et al., 2018). Over the past decades, progressive legislation has been passed at the international and national levels recognizing the right of Indigenous peoples to live in accordance with their culture and locally defined aspirations. Prior consultation has been considered the most important legal tool for securing Indigenous collective rights as it seeks to guarantee that communities are consulted in advance about all government or industry actions that could impact their livelihoods. Nonetheless, these procedures have only superficially transformed the way in which states relate to Indigenous territories. In various parts of Latin America extractive interests have managed to prevail over the ecological concerns guiding Indigenous anti-extractive mobilization (Torres-Wong, 2019). Moreover, deepened political division and intra-community violence frequently follow prior consultations (Rodríguez-Garavito, 2011). Critical voices argue that prior consultation procedures damage the strength of local organizations, one of the most important resources Indigenous peoples have with which to face extractive industries (Riofrancos, 2021; Machado et al., 2017). This has led some scholars to doubt the benefits of placing prior consultation at the core of Indigenous activism (Gómez Rivera, 2013).

Against this backdrop, a broad coalition of Indigenous communities, legal activists, and scholars, among other allies, is seeking to stretch the boundaries of prior consultation to expand and deepen its scope beyond procedural affairs (Guevara Gil, 2021). Obtaining Indigenous free, prior, and informed consent (FPIC), rather than “consulting,” is now the goal of many Indigenous rights activists in Latin America. Some Indigenous peoples, on the other hand, decline to participate in official consultations, while others undertake their own *auto-consultas* (self-consultations) to overcome the perils of biased consulting agencies. Despite implementing these diverse strategies to use prior consultation to their benefit, every year Indigenous environmentalists continue to lose their lives at the hands of criminal organizations and the extractive actors going after the natural resources beneath their land (Global Witness, 2021). In the following sections, we argue that Indigenous empowerment is necessary for peacebuilding. Empowering Indigenous communities to transform the vulnerable situations in which they now live must be at the heart of prior consultation or any other participatory procedures involving Indigenous populations. These procedures were imagined by international legislators to grant Indigenous peoples a voice in decisions that impact them. But under what conditions can this be achieved? The bulk of literature on this subject evinces how the enormous asymmetries between community actors and state and corporate actors prevents prior consultation from fulfilling this purpose. In this article, we highlight how Indigenous use of prior consultation procedures can empower Indigenous communities to bring about peace in their territories.

We examine the cases of Indigenous communities in two Mexican states with divergent histories of Indigenous political mobilization: Oaxaca and Yucatán. Whereas Yucatán has a weak tradition of ethnic-based organization, Oaxaca provides an example of strong Indigenous organizing. In both cases, Indigenous leaders use prior consultation to retain control over their water sources. In the case of Oaxaca, we show how, through a longstanding tradition of Indigenous organizing and deliberation, state-led prior consultation has had positive effects on Indigenous empowerment. In the case of Yucatán, the community-led process of *auto-consulta* has had similar effects. We also emphasize the procedural strategies used by Indigenous leaders and their allies to overcome structural asymmetries and achieve their goals.

In this article, we first introduce debates over prior consultations, Indigenous agency, and community empowerment. Second, we argue that the latter is interwoven with both retaining control over natural resources and meaningful processes of peacebuilding. We then analyze the two cases detailed above and the conditions that lead to positive results. The last section presents our conclusions.

Prior Consultation, Indigenous Agency, and Community Empowerment

Recent studies concerned with how Latin American states address violence against Indigenous peoples pay special attention to prior consultation procedures (Paredes, 2023; Jaskoski, 2021; Merino, 2018; Falletti, 2018; Flemmer & Vacaflor, 2017). To date, most Latin American states recognize their obligation to consult with Indigenous communities on any measure that could potentially impact them. Over the last decade, countries like Bolivia, Ecuador, Peru, Chile, and Mexico have incorporated prior consultation into their national legislation, which has received significant attention from nongovernmental organizations (NGOs) and scholars (Due Process of Law Foundation, 2015).

In theory, prior consultation seeks to create new relationships between Indigenous communities and the state regarding the administration of natural resources. Recently, scholars studying adaptation to climate change have argued that interactions between Indigenous communities national governments must be oriented toward empowering local decision-making (Hill et al., 2020). Previous studies which document how politically empowered Indigenous communities fare better against extractive interests than disempowered groups are consistent with this argument (Riofrancos, 2021; Torres-Wong, 2018; Machado et al., 2018). Nevertheless, prior consultations have yet to fulfill this purpose. Indigenous organizations and their NGO supporters have been quick to condemn state implementation of consultation procedures. Scholarly studies and NGO reports have found that governments misuse these procedures to obtain Indigenous approval of projects, precluding spaces for dialogue and joint decision-making (Merino, 2018; Leifesen et al., 2017; Flemmer & Schilling-Vacaflor, 2016; Rodriguez-Garavito, 2011). Indigenous communities are often divided over extractive projects. Scholars agree that one characteristic of state implementation of consultation procedures is that state actors selectively engage with community factions that are in favor of projects, using the promise of jobs and income and even bribery to obtain approval. Opponents are generally excluded from these procedures and their demands are discredited and marginalized (Poweska, 2017).

In the words of Urteaga-Crovetto (2018), the adoption and proceduralization of the right to prior consultation implies the transference of Indigenous self-determination to the realm of the state. In these procedures, deliberative spaces are designed by state actors, creating tension and uncertainty among Indigenous participants (Mendez, 2020). State laws, language, and governmental culture permeate consultations and reproduce inequality and power asymmetries, even when state officials promote Indigenous rights in discourse (Townsend & Townsend, 2010; Robinson, 2018; Llanes Salazar & Torres-Mazuera, 2017; Dunlap, 2017). As such, prior consultations produce a deliberative deficit that undermines Indigenous voices and traditions, producing little tangible benefits for Indigenous peoples (Pirsoul, 2019).

In the current context in which state-Indigenous relations are increasingly channeled through prior consultation procedures, Indigenous empowerment remains a challenge. Most Latin American Indigenous organizations are weak and disarticulated and customary systems are losing legitimacy as young people continue to migrate in search of education and jobs. There is no systemized data documenting the proportions of Indigenous groups with working political organizations capable of using their local institutions and norms to govern their territories. Mexican scholars studying politically powerful Indigenous groups in Oaxaca, Mexico argue that a collective mindset emerged among Indigenous communities in this region after the Spanish conquest. A mix of practices of resistance and adjustment allows these communities to face adversity with innovative organizational responses (Martínez, 2010). According to these scholars, Indigenous peoples in Oaxaca are defined by a deliberative tradition based on a shared sense of *lo común* (the common) together with institutionalized free community work and community assemblies (Martínez, 2010; Martínez Cruz, 2018; Garza, 2012; Stavenhagen, 2012).

There is another group of agency-focused scholars who analyze Indigenous peoples' ability to influence state decisions that impact them. Schroeder (2010) defines agency as the ability of Indigenous actors to prescribe behaviour and to substantively participate in setting their own rules related to the interactions between humans and their natural environment. Schroeder finds,

however, that in matters related to climate negotiations at the international level, Indigenous agency remains indirect and weak. Nonetheless, other scholars note that Indigenous agency can manifest in diverse ways (Winter et al., 2021). Some studies, for instance, document how small Indigenous groups combine tradition and change to secure their survival in a global context dominated by corporate extractive interests (Van Valen, 2013). Other studies highlight that Indigenous communities not only resist extractive projects but also develop agendas for sustaining life projects (Blaser et al., 2004). In contrast, other scholars point out that Indigenous agency manifests not only against extractive actors but through negotiations to improve their situation with extractive industries (Vindal Ødegaard & Rivera Andia, 2019).

Though Indigenous agendas are heterogeneous and often contradictory, Indigenous empowerment is conceptualized as a desirable outcome resulting from interactions with external actors. In general, scholars convey that empowerment is necessary for building capacity within Indigenous communities (Kinchin et al., 2015). Furthermore, recent studies argue that Indigenous empowerment is critical for peacebuilding in contexts defined by violence against these groups. In a study about the *Nasa* people from Colombia, Chaves (2019) demonstrates how Indigenous framing strategies for how to best portray their history contributed to building a nonviolent collective identity for the purpose of achieving peace in their community. Frequently, however, liberal notions of peace depict local actors as unwilling objects of the peacebuilding agenda (Millar et al., 2013). In response to this, Randazzo (2021) emphasizes that peacebuilders must be flexible about how they transplant their peacebuilding frameworks.

In the following section, we develop the argument of this article. Under specific circumstances, Indigenous use of prior consultation can contribute to community empowerment. In both cases analyzed here, Indigenous communities achieved their goals through nonviolent means, creating the conditions for meaningful political participation and long-lasting peace in their territories.

Conceptual and Methodological Framework

The literature identifies diverse responses from Indigenous peoples to states' persistent failure to implement international standards regulating prior consultation (Schilling-Vacaflor & Flemmer, 2020). Some communities engage in these procedures in the hope that they will obtain some benefit from accepting whatever project nation-states attempt to undertake on their land. Other groups undertake their own auto-consultas to overcome flawed or nonexistent state-led consultations in the hope of prohibiting unwanted projects (Correa de Almeida, 2020; Perez Ramirez, 2020).

Both types of community responses have received significant attention from scholars interested in the outcomes of prior consultations. Yet few studies have systematized the impact these responses have on the political strength of Indigenous communities. There are some studies showing the empowering effects of prior consultations and others showing the demobilizing effects of these procedures. Empowerment seems to result from prior consultations that create space for the co-design of legislation impacting Indigenous peoples' management of natural resources, such as forests or water sources (Méndez-Garcia, 2021; Miranda, 2020). The opposite happens when prior consultations are undertaken over specific extractive projects and participation is limited to Indigenous acceptance or rejection of extractive activities (Torres-Wong, 2019). In addition, when consultations are controlled by Indigenous communities through self-organized auto-consultas, state projects are typically rejected and community empowerment increases. In these cases,

framing Indigenous rights along the lines of free, prior, and informed consent can provide a discursive basis for coordinated action, especially in cases where Indigenous political organization is weak (Torres-Wong, 2022).

Per Miranda (2020) and Méndez-García (2020), when states implement prior consultations regarding specific pieces of legislation, indigenous agency can overcome structural asymmetries, resulting in positive results for community empowerment. In addition, when the territorial threat is extractivist, auto-consultas can create the setting for successful Indigenous strategies. As Jaskoski (2021) rightfully points out, prior consultation is a focal point that creates opportunities for mobilization.

In the following sections, we analyze the cases of two Indigenous organizations: *Coordinadora de Pueblos Unidos por el Cuidado y la Defensa del Agua* (COPUDA) in Oaxaca and *Ka'anan Ts'onot* in Yucatán, with different organizational histories and community responses to prior consultation. We compare and analyze the different results achieved regarding Indigenous organizational strength in each case. Through native deliberation spaces, organizational skills, national and international networks, and other resources for sustaining Indigenous participation in the process, Oaxacan communities from COPUDA finally secured their right to manage water resources using their customary norms.

Indigenous people in Homún, famous for having weak ethnic frameworks, were also able to benefit from prior consultation. Through water protection discourses and legal mobilization undertaken by NGO allies, Mayan leaders were able to deter a mega pig farm from being developed on their land. Over the last five years, auto-consultas have expanded across the region, creating incentives for ethnic-based mobilization formerly absent in Yucatán. In contrast to Oaxaca, the government of Yucatán refused to acknowledge Mayan communities as Indigenous people and to conduct prior consultations. Nevertheless, there has been an opportunity to expand the use of self-consultation.

Methods

We used a qualitative case study methodology to conduct an in-depth exploration of the different paths taken by two Indigenous organizations as they used prior consultation to secure control of their water sources. Both authors of this article are part of a network of academics and activists supporting Indigenous struggles in different states in Mexico. As part of our activities, we provide legal accompaniment and academic advice to Indigenous organizations in Oaxaca and Yucatán regarding Indigenous territorial rights and the scope of free, prior, and informed consent. We were able to directly access actors from Indigenous communities, NGOs, and the state and to conduct interviews in the cities of Oaxaca, Mérida, and Mexico City. We supplemented this data with participant observation from both regions during different phases of Indigenous defense of natural resources.

In the municipality of Homún, research was conducted from October 2017 to December 2019 and included participant observation, examination of newspapers' coverage of the conflict between Indigenous people and a mega pig farm attempting to operate on Indigenous lands, and interviews with the main stakeholders in the conflict. Participant observation took place in the municipality that was collaborating with Indigenous leaders from Homún and advising on Indigenous rights, as well as in the courts in the city of Mérida during litigation between Homún and the mega pig farm.

One of the authors of this article served as an *perito antropológico* (anthropological expert) in support of Homún during the trial against the mega pig farm. Additionally, 15 in-depth interviews were conducted with community leaders, Indigenous rights activists, employees of the judiciary, and public officials in Homún, Mérida, and Mexico City.

Research for the Oaxacan case also included participant observation and interviews with the main stakeholders in the city of Oaxaca, Ocotlán de Morelos, and Zimatlán de Álvarez. One of the authors served on the academic advisory committee of the Indigenous organization COPUDA, which fights for control over water sources. Participant observation took place during the 16 assemblies that comprised the informative phase of the prior consultation process (from September 23, 2015 to April 2, 2016) and during 32 assemblies in the deliberative phase (from March to November 2016). Research also included attending three workshops on groundwater and integrated watershed management held for Indigenous members of COPUDA, ceremonies, and forums to commemorate World Water Day (March 22) and World Environment Day (June 5). In addition, five in-depth interviews were conducted with members of COPUDA and the Indigenous rights NGO *Flor y Canto* regarding meetings with the National Water Commission (CONAGUA). Finally, one of the authors was responsible for reviewing the preliminary draft of the contract between the state and Indigenous peoples as part of the agreement reached during the consultation process.

Prior Consultation and Auto-consulta: Evidence from Oaxaca and Yucatán **Prior Consultation and Indigenous Deliberative Tradition in Oaxaca**

The Central Valleys of Oaxaca is a region inhabited by the *Zapoteca* ethnicity, one of the largest and most organized ethnic groups in the state. For many years, Zapoteca peasants faced drought and dry wells due to water sources being located far from the surface. Over the last 17 years, however, these groups have organized into COPUDA and found innovative solutions to facilitate access to water. Through the construction of more than 500 absorption wells, and even the reforestation of some areas, water levels have risen to only 10 meters or less from the surface, becoming more accessible to Indigenous families. Using their own economic resources, *tequios* (community work), and municipal funds, COPUDA has been able to reverse the situation of water scarcity, gaining autonomy and self-confidence for Indigenous communities (Méndez-García, 2020).

In 2005, COPUDA members received a letter from CONAGUA instructing them to pay for their water use. This caused discontent among Indigenous peasants who refused to pay the fee and went to the office of Flor y Canto for advice. There, they learned that a decree, *Decreto de Veda*, banned the extraction of water from the subsoil in 1967. The COPUDA members were also informed that they were operating with expired concessions and that if these were not renewed they would lose the electricity subsidy (known as Tariff 09) granted to them by the government for agricultural use.

COPUDA filed a complaint demanding respect for their right as Indigenous peoples to be consulted about any measure impacting their lands. On April 26, 2013, the First Chamber of the Superior Court of Fiscal and Administrative Justice ruled that CONAGUA had to carry out a FPIC Indigenous consultation with COPUDA communities. Although CONAGUA challenged the court's mandate in 2014, the decision was upheld.

COPUDA members agreed to participate in prior consultation with CONAGUA with the understanding that it was the best way to secure recognition of Indigenous management of the aquifer. A consultation process related to the modification of the decree banning the use of subsoil water in the Central Valleys began in June 2015. The process comprised of five phases: preliminary agreements, information, deliberation, consultation, and monitoring of agreements. During the informative phase, 16 assemblies were held within the territory of COPUDA where CONAGUA was obliged to explain the content of the decree, the status of the aquifer, and national legislation regarding water sources. The Secretariat of Indigenous Affairs and the National Institute of Indigenous Peoples also attended these meetings to advise on the process and guarantee that Indigenous rights were respected.

The deliberative phase was undertaken by Indigenous communities, academic advisors, and civil society organizations from March to November 2016. Agrarian and municipal authorities, members of Flor y Canto, the *Instituto Politécnico Nacional*, the *Universidad Autónoma Metropolitana*, the *Centro de Investigaciones y Estudios Superiores en Antropología Social* (CIESAS), and the *Centro de Investigaciones sobre América del Norte de la Universidad Nacional Autónoma de México* organized 32 assemblies to discuss proposals for water management. During the consultative phase, from February 2017 to October 2019, state and community participants revised the water management plans developed by COPUDA and a counterproposal was presented by CONAGUA. This phase was interrupted by a number of events, however, including federal elections, presidential decrees modifying water bans in several parts of the country, and ecological zoning plans that potentially altered the the Decreto de Veda.

The consultation was reactivated on January 26, 2019 after a new administration took power following the electoral victory of Andrés Manuel López Obrador (AMLO). Discussions centered around the environment and zones regulated by Indigenous norms, comprehensive community management plans for the conservation of water mirrors, community regulation of water according to Indigenous normative systems, and the volume of water that could be granted to each COPUDA community.

The consultative phase concluded on October 12, 2019 with an agreement in which the parties established a regulated area and collective concessions to the benefit of COPUDA allowing the use of 8.5 million m³ of water per year. In addition, Indigenous communities were allowed to participate in the administration of groundwater by assuming joint responsibility for the care and sanitation of the aquifer. CONAGUA committed to follow a new regulation after the repeal of the decree of 1967 and to respect collective concessions. COPUDA, on the other hand, committed to continually refilling the aquifer with support and technical advice from government specialists.

The fifth phase of the consultation process was beset with obstacles. The COVID-19 pandemic delayed the implementation of agreements. Indigenous organizations requested information, but never received a response. On October 9, 2020, the president of COPUDA denounced a series of irregularities in the prior consultation process: "One year after signing the agreements derived from the fourth phase of our Indigenous consultation process, the Mexican State has not complied and refuses to provide us with adequate information. They do not respond to our requests, and they refuse to meet with us. They ignore us and discriminate against us."

Through direct actions such as demonstrations in public offices, press conferences, and public interviews, COPUDA Sought to pressure the AMLO administration. The presidential decree granting Indigenous peoples the right to sustainably manage the water on their territory in the basin of the Central Valleys of Oaxaca was finally published in the Official Gazette of the Federation on November 24, 2021. Article 7 of the decree recognizes the communities' right to self-determination and autonomy regarding water affairs in accordance with the Constitution of Mexico and international treaties on matters of Indigenous rights.

The consultation process was grueling for Indigenous members. First, several phases of the consultation were undertaken in regard to state administrative regulations defining most of the rules of the process. Prior consultation lasted five years, but according to Indigenous norms, local authorities must rotate every 18 months (in some cases every three years). Because Indigenous representatives require the recognition of the state, the rotation of authorities limited COPUDA's ability to react because Indigenous leaders engaged in the process frequently lacked the necessary state recognition to represent their communities. On many occasions, state communications addressed municipal authorities directly, ignoring peasant organizations. These actions created division among Indigenous participants who frequently suspected that municipal authorities were receiving bribes in exchange for acquiescing to the demands of CONAGUA.

Second, the physical spaces used for deliberations were also detrimental to COPUDA. When assemblies were held in rural environments, Indigenous peasants were more confident in confronting state officials. For instance, at one point in the process COPUDA demanded information on issues that the authorities had excluded from consultation, such as water concessions granted by the state to mining companies. However, when meetings about these demands were held at the CONAGUA offices in the city of Oaxaca, fewer peasants were able to attend due to the increased time commitment and costs for transportation and food. Indigenous people were also subject to experiences of "otherness" and discrimination in this urban environment, which inhibited both their oral and strategic capacity.

Another negative outcome of the consultation process was the violation of the agreements that had been established in the consultation protocol at the start of the process. From the beginning of their struggle, COPUDA had refused to accept individual concessions. One of the agreements before the implementation of the consultation was that accepting concessions would not be a requirement for receiving the electricity tariff, which is important as it ensures a lower electricity price for agricultural use. This agreement, however, was not respected.

During some of the consultation assemblies, CONAGUA officials offered to help peasants obtain individual concessions, causing division among participants. Some were in favor of accepting individual concessions, while others insisted on a collective concession. Overcoming this became complicated as the state used agricultural programs and lower electricity prices as an incentive for peasants to break their agreement. Several peasants accepted the state offer, undermining COPUDA's cohesion.

Finally, building a model for the co-management of water proved challenging because a federal agency like CONAGUA is governed by a legal framework that is incompatible with Indigenous collective rights. Disagreements about the meaning of co-management as well the obligations and

capabilities of each party became commonplace. Currently, CONAGUA supervises the operation of the concessionaire community, which has 60-day term to submit a register of beneficiaries, containing the names, geographic coordinates, and measurements of each use. In addition to protecting and collecting water, Indigenous communities are responsible for systematizing each beneficiary's information.

In the past, when individual concessions were in force, maintaining the registry of community users was a bureaucratic and technical chore for CONAGUA. Today, the agency delegates this work to Indigenous communities.

Despite these setbacks, the process has had empowering effects on Indigenous peoples. As written by Tetreault (2019), environmental justice movements engage with NGOs, scholars, and students from diverse parts of the globe to form national and international networks. COPUDA has followed this pattern, engaging with Flor y Canto, as well as with several universities and research centers in Mexico and elsewhere, to secure external support for their demands. These networks have helped COPUDA to build alliances with other social movements struggling for territorial autonomy, such as the *Frente de No a la Minería* (No to Mining Front), a group of neighboring towns fighting the *Cuzcatlán* mining company in San José del Progreso in the Central Valleys, and the *Coordinadora de Agua para Todos* (Water for All National Coordinator). Women from COPUDA have also joined a global alliance of Indigenous women's movements in the struggle for territory and the defense of life. Together, these groups share a common language regarding the value of nature, recognizing Mother Earth as the primary source of food (Martínez Allier, 2020).

Through prior consultation, COPUDA established the need to make constitutional laws and other national legal frameworks compatible with Indigenous rights as recognized by international norms. Article 2 of the Constitution identifies Mexico as a multicultural country and Article 27 establishes the nation's ownership of the water. However, it has been necessary to bring these articles into alignment with article 15 of the International Labor Organization's (ILO) legislation that mandates the peoples' rights to their natural resources. Prior consultation between the state and COPUDA also unveiled discriminatory practices by the government, allowing Indigenous leaders to demand the realization of their rights as more than window-dressing for official discourse. The collective concession granted as a result of prior consultation represents state recognition of community organizational mechanisms for water management.

Perhaps the most important achievement for COPUDA is that the prior consultation enabled communities to fight environmental injustice by allowing them to maintain water control along the lines of the Zapoteca identity. The peasants show pride in having reversed a water crisis through community practices of rainwater harvesting and achieving their demands to repeal the ban decree, participate in water co-management, and secure state recognition of community practices regarding water administration.

The Auto-consulta as a Mechanism for Organizing Socio-environmental Defense in Mérida
Homún is a Mayan municipality inhabited by approximately 7,000 people located within the geohydrological reserve known as the *Anillo de Cenotes* (Ring of Cenotes) in southeast Mérida, the capital city of the state of Yucatán. Due to its environmental significance, this area acquired legal recognition as a natural protected area in 2013. A decade ago, Homún and nearby

municipalities began hosting ecotourism activities, using the cenotes that lie under their land to attract national and international visitors. Cenotes are natural pools of crystalline water formed millions of years ago by the collapse of limestone bedrock. Due to their cave-like formation, people can swim in the subterranean waters.

In 2016, the state government authorized the company Pig Meat Production (PAPO) to install a mega farm in Homún to raise 49,000 hogs for meat export. The aggressive expansion of these projects across the peninsula caught the attention of scholars and activists who labeled this industry as new form of agro-extractivism that posed a threat the quality of water sources (López-Fabila, 2020). For cenote owners in Homún, the project represented a threat to both the cenotes and ecotourism. Given the permeability conditions of the soil in Yucatán, the contamination of subsoil water is an ever-present risk. As part of their opposition strategy, Homún conducted an auto-consulta, claiming their rights as Indigenous people to determine the approval of the project. Around 800 people participated in the auto-consulta, most of whom rejected the mega farm before it was finally suspended by the courts.

Until the early 1990s, Homún was part of a plantation area for henequen, a crop known as “green gold” used to produce rope, hammocks, rugs, bags, clothing, and other textiles. The henequen industry predominated in the region until the mid-20th century, turning Indigenous peasants into salary earners. However, the industry declined when Cordemex, the state company responsible for henequen production, closed. During the boom of this industry, Mayan peasants lost control of their agricultural production. Indigenous groups became oriented toward labor rights to the detriment of demands for control of natural resources (Mattiace, 2013, p. 227). The state program PROCEDE, intended to dissolve collective land holding in rural Mexico, was more successful in Yucatán than Oaxaca because ethnic-based demands remained weak among Mayan communities (Torres-Mazuera, 2017).

In Homún, people continue to preserve common use land, but each *ejidatario* (shareholder of common land) owns their own plot. As such, the cenotes located on individual plots are considered private property. Nevertheless, this has not precluded the redistribution of profits generated by ecotourism. In collaboration with the owners of the cenotes (known as *cenoteros*), about 300 young people work as tourist guides or in transport services and several restaurants, lodgings, and rental stores for swimming equipment have opened to receive visitors.

Indigenous leaders sought the legal assistance of the prestigious human rights organization *Indignación* (Indignation) in Mérida city. On the advice of the NGO, several *cenoteros* formed the *Ka'anan Ts'onot* collective (Guardians of the Cenotes) to take on PAPO. Various legal appeals against the government of Yucatán were filed to stop the construction of the farm. Legal remedies targeted flaws in the Impact Assessment Evaluation provided by the company. Specifically, opponents argued that the evaluation had been written by a dentist lacking sufficient environmental knowledge and that it did not consider the Mayan people's right to prior consultation.

As part of the legal mobilization strategy, Ka'naan Ts'onot and lawyers from Indignación announced that, given state denial of prior consultation, a self-consultation would be carried out in Homún to allow the people to exercise their right to make a decision about the project. The *cenoteros* and Indignación members organized the auto-consulta process, arguing that neither the

municipal government nor the state government had acted in the interests of the residents of Homún. The announcement of the auto-consulta was made in parallel with protests and civil disobedience against the mega pig farm.

On October 8, 2017, the self-consultation was held among members of the municipality. To comply with the procedural standards recognized in ILO Convention 169, state authorities from the Ministry of Environment and Natural Resources (SEMARNAT) and the Secretariat of Development and the Environment (SEDUMA) were invited to attend alongside representatives of PAPO, though SEMARNAT and SEDUMA officials did not appear at the meeting. The consultation was attended by a public notary, representatives of different Mayan peoples of the Peninsula, councilors of the Mayan People of Yucatán, members of the Indigenous Government Council (CIG), representatives of the National Indigenous Congress (CNI), representatives of the *Unión de Pobladores y Pobladoras*, legal advisers from Indignación, observers from the United Nations Development Program (UNDP), and the municipal and state police. During the deliberation phase, two ballot boxes were installed in the main square of the town for most of the day. Overall, 732 inhabitants voted against the project, 52 voted to approve it, and there were 5 invalid votes. Of the 4,000 people registered in the municipality's electoral roll, 784 people voted. These results were presented to the state governor, Rolando Zapata Bello, to demonstrate participants' rejection of the project.

This event was preceded by a three-month organizing process led by the cenoteros and NGO allies. At first, many Homún residents were indifferent and some groups agreed with the municipal president's support for the project due to the potential for job creation. Many saw the Ka'anán Ts'onot collective as solely concerned with their own economic interests over the cenotes. In the past, several of the cenoteros had held the position of municipal president and many residents did not trust their intentions. This, added to the fact that three cenoteros had received substantial support from the Institute of Indigenous Peoples (INPI) to build their tourist inns, opened them up to accusations of corruption from their detractors. As time passed, however, the young people who work as tour guides and in tourist transport, together with their families, began to attend the informative meetings leading up to self-consultation.

At the end of September 2018, the mega pig farm project began amid much discontent. However, on October 9 of the same year, the judge of the fourth district of the state of Yucatán declared the definitive suspension of the project. The judicial decision was not based on Indigenous rights. Instead, Indignación had filed an appeal on behalf of the children of the municipality against the municipal president, SEDUMA, and the state governor for the violation of the human right of those children to enjoy a healthy environment. The court agreed that the company had not fully guaranteed that the water would not be contaminated.

The decision relied on the Constitution, which established that the free and healthy development of children is in the best interest of the nation. Additionally, it relied on the principles of the Rio Declaration on Environment and Development, which requires that nations prevent any danger of serious or irreversible environmental damage and that a lack of scientific certainty should not be used as a reason to postpone the adoption of effective measures for preventing environmental degradation (Section Amparos, Table V INC1128/, 2018). PAPO challenged the court's decision,

and while the project has been paused, to date the ultimate outcome of the conflict remains uncertain.

Indigenous cenoteros report that the self-consultation in 2017 was their first participatory experience that was not mediated by political parties. According to one lawyer from Indignación, people voted without any expectation of receiving something in exchange. While state agencies in Yucatán continue avoid the use of prior consultation, in 2021 three more auto-consultas were held in the Mayan towns of Kinchil, Celestún, and San Fernando. All three voted against mega pig farms. Spokespeople from these communities declared to the press: “It is about time that the rights of the Mayan people are respected. Throughout history, our people have not disappeared. We are living people . . . and we say never again without our permission” (Desinformémonos, 2021).

The Homún case shows how self-executed prior consultation united a sector of the community in a common goal against PAPO. For the first time, Homún members appealed to their Mayan identity and demanded respect for Indigenous collective rights. Ka'anan Ts'onot was empowered by the suspension of the project. Alliances with NGO actors and, more recently, academics interested in the fight against mega pig farming also contributed to community building and international visibility.

Discussion

Gaining recognition of Indigenous peoples' right to maintain control of natural resources was a common motivation behind calls for prior consultation in both Oaxaca and Yucatán. In Oaxaca, widespread state recognition of local communities as Indigenous peoples enabled COPUDA to demand rights on an ethnic basis. The Supreme Court mandated CONAGUA conduct prior consultation upon the legal assumption that complainants were Indigenous people entitled to the rights contained in ILO Convention 169.

COPUDA used prior consultation with the state strategically to obtain recognition of community management of subsoil water as well as exemptions from paying fees for using this vital resource. The agreements reached with CONAGUA had symbolic and material consequences on state-Indigenous relationships in Oaxaca. The prior consultation process validated Indigenous organization mechanisms, language, and internal procedures and obligated state agencies to recognize the rights of collective concessions. More importantly, Indigenous demands to co-manage water together with CONAGUA were finally accepted.

In Yucatán, ethnic-based demands have remained weak and community organization and deliberation mechanisms have been practically nonexistent for most of the past century. Unlike in Oaxaca, the local courts have been reluctant to recognize rights on an ethnic basis and prior consultation of Indigenous people has not yet been mandated. This lack of recognition, however, cleared the way for the emergence of locally organized auto-consultas with the potential to provide a new framework and mobilize new resources for Indigenous organizing. Through alliances with NGOs and other organizations, Mayan communities are creating new spaces for deliberation and decision-making.

These spaces remain free from state intervention primarily due to the indifference of state officials. This prevents state agencies from employing strategies to divide Indigenous communities which,

given the organizational context in Mérida, would not be difficult. At the same time, the use of auto-consultas is expanding because of social discontent with mega pig farms. As in the case of COPUDA, the legal concept of prior consultation is fulfilling its original purpose of empowering Indigenous communities through an innovative use of this participatory mechanism.

In both cases, participation in consultations has allowed Indigenous people to view themselves as subjects with collective rights. In Oaxaca, organizational capacities have enabled COPUDA to succeed in overcoming the obstacles inherent to state-led consultation. In Yucatán, state indifference has enabled Ka'anan Ts'onot to carry out direct consultation and build organizational capacities. An important feature of both cases is that these processes were free of violence. Despite tensions with state and corporate actors that led to peaceful demonstrations, participants were able to complete consultation procedures with positive results.

The cases differ in terms of two conditions scholars stress are important for the results derived from consultation procedures: the organizational capacity of the Indigenous communities and the actors responsible for undertaking the prior consultation process (the state in the case of COPUDA and the community in the case of Homún). Both Indigenous communities share a history of successfully managing of natural resources. This, added to the legal skills and rights discourses developed through NGO alliances, contributed to the positive outcomes of the both consultations.

Lessons Learned

Current debates over prior consultation in Mexico center on whether to demand a prior consultation law at the national level. In parallel, there is work in progress in Oaxaca regarding the development of an initiative to demand a consultation law at the state level based on the protocols derived from the case of COPUDA and CONAGUA. However, the case of Homún evinces that the legal regulation of prior consultation is not necessarily favorable for Indigenous participants. COPUDA was able to overcome state power and internal divisions due to its robust organizational capacity, but it is unlikely that Homún would have been as fortunate. On the contrary, the lack of state regulation regarding prior consultation procedures allowed the Mayan municipality space to employ potent strategies against a corporate actor before finally winning the battle in the courts.

One important lesson of this study is that in cases in which specific pieces of legislation are in debate, prior consultations can provide meaningful settings for Indigenous agency to gain traction. In the case of mega projects in which the debate focuses on the acceptance or rejection of economic operations, auto-consultas can offer an opportunity to advance Indigenous goals. Prior consultation policies should not be adopted homogeneously. Rather, these initiatives could benefit from acknowledging the organizational diversity that defines Indigenous communities in Mexico and elsewhere in Latin America. To date, prior consultations have rarely empowered Indigenous organizations and even less often have resulted in the granting of their demands. The cases highlighted in this study show that participatory procedures can contribute to nonviolent responses and the peaceful framing of Indigenous rights only when prior consultation procedures empower subjects by recognizing their ability to administer their own resources. The fact that in both cases Indigenous communities were able to disrupt regular state decision-making regarding natural resources administration is a step in the right direction. The two cases examined here are examples of how meaningful participatory outcomes can be achieved.

Fixing Prior Consultation for Indigenous Empowerment

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