CONSULTING INDIGENOUS PEOPLES IN THE MAKING OF LAWS IN MEXICO: THE ZIRAHUÉN AMPARO

Naayeli E. Ramirez Espinosa*

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I. INTRODUCTION

In August 2001, the Mexican Congress promulgated a constitutional amendment that established the current framework for Indigenous peoples' rights. Among other rights, the amendment established the right to be consulted. The federal government and authorities praised the amendment, but many Indigenous communities submitted judicial actions against it arguing that legislators had not consulted them in the drafting of the amendment. In this paper I discuss one of the many judicial actions against the amendment process for laws regulating Indigenous peoples, the *Zirahuén Amparo*. I argue that the changes made to the Constitution remain meaningless to many Indigenous communities due to a lack of dialogue, consultation, and a lack of initiatives to build and recognize Indigenous communities' jurisdiction.

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* Naayeli E. Ramirez Espinosa is a postdoctoral fellow at the Education Research Institute of Universidad Veracruzana, Mexico. Her current research is on indigenous normative perspectives and law. She holds a PhD in Law from the University of British Columbia in Canada and a PhD in Public Administration from Waseda University in Japan.

II. THE ZIRAHUÉN AMPARO

The Zirahuén Community[1] presented an *amparo* plea in the Federal District Court in Morelia, Michoacán on September 26, 2001.[2] The Community complained that the government failed to consult them on the federal constitutional amendment of August 14, 2001. According to the plaintiff, the authorities had a duty to consult them under the International Labour Organization (ILO) Indigenous and Tribal Peoples Convention, 1989 (No. 169),[3] an international treaty Mexico ratified in 1992. This treaty establishes that authorities shall consult Indigenous peoples regarding legislative or administrative measures, which may affect them and their rights directly. The Zirahuén Community requested immunity against the constitutional amendment.

The trial judge denied the *amparo* and dismissed the plaintiff's claims. On December 4, 2001, the Community presented a *Recurso de Revisión* (an appeal). On October 4, 2002, the Second Chamber of the Supreme Court of Justice (SCSCJN)[4] changed the reasons for dismissal but also denied the *amparo* and dismissed the plaintiff's claims.[5] The SCSCJN decided that an *amparo* was

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[1] I use capital letters to distinguish the legal entity of the Zirahuén Community from the concept of territory and population living in the area of the Zirahuén Lake.

[2] The action of the Zirahuén Community is called *amparo*. *Amparo* means "protection" in Spanish. There are two kinds of *amparo* in Mexican legislation: direct and indirect. Direct *amparo*s (DA) are instruments used against the ruling of a lower court that are reviewed by higher courts (an appeal); indirect *amparo*s (IA) are instruments that can challenge any order, act, law, or decision made by any authority on constitutional grounds. In this sense, indirect *amparo*s are instruments established with the aim of protecting/enforcing constitutionalism and the rule of law. Sometimes indirect *amparo*s run parallel to the legal process that is challenged through the action, which in most cases is suspended while federal courts examine its constitutionality. The *Zirahuén Amparo* is exceptional in that it is a challenge against the process of constitutional reform that took place in August 2001. Still, the *Zirahuén* case ran parallel to an existing legal claim for extension of their communal property and was brought to the court within the context of such legal claim for extension. *See* González Oropeza, Manuel & Ferrer Mac-Gregor, Eduardo (Coord.) El juicio de amparo. A 160 años de la primera sentencia, Tomo II, IIJ-UNAM 2011, 10-15-2015 (Mex.) formato HTML, http://biblio.juridicas.unam.mx/libros/libro.htm?l=3065.

[3] International Labour Organization [ILO], Indigenous and Tribal Peoples Convention art. 6, Jun. 27, 1989, 28 I.L.M. 1382.

[4] The SCJN organizes itself in three organs: the first chamber, which reviews criminal and civil law cases; the second chamber, which reviews administrative and labor law cases; and the full bench, which reviews cases that are considered of particular importance.

[5] Comunidad Indígena de Zirahuen, Municipio de Salvador Escalante, Michoacán, Segunda Sala, Suprema Corte de Justicia [SCJN], Semanario Judicial de la Federación y su Gaceta, Novena Época, tomo XVI, Noviembre de 2002, formato PDF, https://www.scjn.gob.mx/Transparencia/Epocas/Segunda%20sala/NOVENA/81.pdf.

not a judicial action that could be used against the process of reform and that the Zirahuén Community had not proven any harm nor any detriment to their rights and thus, did not have legal interest nor standing.[6] The Court rejected the claims and granted the plaintiffs no relief.[7]

A. The Broader Context of the Lawsuit

Most of Mexico's population is a mix of cultures and heritages from different parts of the world, the result of a complex and long history of migration. At the same time, Mexico's Indigenous population is numerically the largest in Latin America, estimated by the National Council of Population (CONAPO) at twelve million in 2014, or around ten percent of the Mexican population.[8] Zirahuén is a Purépecha community. The Purépecha are Indigenous peoples that inhabit a large part of what today is known as the State of Michoacán in the southwest of Mexico since time immemorial.[9] Their *cazontzi* (king) surrendered certain rights to the Crown of Castille in the 1520s through accords. The surrender indicated submission to the Crown but not conquest.[10] In 1530 conqueror Nuño de Guzmán annexed Michoacán after killing *Cazontzi Tzintzincha,* the last king of the Purépecha, violating previous accords.[11]

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[6] *Id*. at 135.

[7] *Id.*

[8] *Indigenous & Tribal Peoples' Rights in Practice: A Guide to ILO Convention No. 169*, INTERNATIONAL LABOUR ORGANIZATION (2009), http://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/---publ/documents/publication/wcms_171810.pdf [hereinafter *Indigenous & Tribal Peoples' Rights in Practice*]; *see also* Indicadores socioeconómicos de los pueblos indígenas de México, Estimaciones de la población indígena, a partir de la base de datos del XII censo general de población y vivienda 2000, Indigenous 2002, 10-10-2015 (Mex.), format PDF, http://www.cdi.gob.mx/indicadores/em_cuadro01.pdf .

[9] *See* Bernal, Ignacio, et al., Historia General de México, México: El Colegio de México, 2000; *see also* Castro Gutierrez, Felipe, Los Tarascos y el Imperio Español: 1600-1740, México, Universidad Nacional Autónoma de México Universidad Michoacána de San Nicolás de Hidalgo, 2004.

[10] Bernal, *supra* note 9, at 281.

[11] *Id*. European explorers arrived at what is now known as the Mexican territory in the 16th century. Even though there were many Indigenous nations, empires, kingdoms, and communities that were conquered or "annexed" later, it is usually considered that the conquest of Mexico by the Spanish occurred in 1521, when *Mexico-Tenochtitlan* fell. *Mexico-Tenochtitlan* is now Mexico City and was the capital of the Aztec empire. Several Papal bulls such as Pope Alexander VI's *Inter Caetera* of May 4, 1493, were helpful to the Spanish kingdom when establishing its jurisdiction over Mexican territory. Mexico was a Spanish colony from 1521 to 1821. The Viceroyalty of New Spain covered some areas of what today is Canada to Panama, Pacific islands (such as the Philippines), and some areas of Venezuela and Colombia. *See also* de Alcala, Jerónimo, Relación de Michoacán,

Purépecha communities in Mexico have suffered from policies of dispossession, genocide, slavery, and assimilation as other communities in Mexico and other parts of the world. Still, most Purépecha populations maintained varying control over parts of their territories until the 1930s. Some still do. Most Purépecha communities endured epidemics, converted to Christianity, and adapted to the political environment of Mexico.[12]

In Mexico, there is no registry of Indigenous peoples. The courts consider that a "consciousness of Indigenous identity" is sufficient to have legitimacy to begin or to appeal procedures in order to protect their Indigenous rights and freedoms.[13] The authorities that carry out the population census and the *Comisión Nacional para el Desarrollo de los Pueblos Indígenas* (CDI, Commission for the Development of Indigenous Peoples) consider language as the main indicator that distinguishes Indigenous peoples from non-Indigenous peoples.[14]

The laws regulating land and the rights of Indigenous peoples have changed considerably over time. In Mexico, as in most of Latin America, few Indigenous forms of law preceded the emergence of the modern nation-state and continue to coexist alongside state law.[15] One of those exceptional forms of law is communal ownership of land.[16] The Mexican Constitution recognizes public, private, and communal ownership of the land.[17] In Mexico, there are two schemes

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Linkgua digital, 2012; Florescano, Enrique, Historia General de Michoacán, Morelia, Michoacán: Instituto Michoacano de Cultura, 1989.

[12] This is an ambitious statement and it is contested from different perspectives. Many Purépecha people did not convert to Catholicism as many others that self-identify as indigenous in Mexico, e.g. many Huichol communities. The Yaqui people were always against the Spanish and afterwards, against the Mexicans. The Sierra Gorda was also importantly controlled by Indigenous nations until late 1810s. Today there are areas in Mexico where no government authorities exercise jurisdiction. *See* Bernal, *supra* note 9.

[13] Tribunal Electoral del Poder Judicial de la Federación, Sala Superior, Índice Jurisprudencia 2012, Comunidades indígenas. La conciencia de identidad es suficiente para legitimar la procedencia del juicio para la protección de los derechos político-electorales del ciudadano, 4-2012, 10-10-2015 (Mex.), formato DOC, http://www.ine.mx/ (type "Índice Jurisprudencia 2012" into search field (*Buscar*), then follow first result, titled "Jurisprudencia").

[14] *Indigenous & Tribal Peoples' Rights in Practice*, *supra* note 8.

[15] Rachel Sieder, *Legal Cultures in the (Un)Rule of Law: Indigenous Rights and Juridification in Guatemala*, *in* LAW IN MANY SOCIETIES: A READER, 152-153 (Lawrence M. Friedman, Rogelio Pérez-Perdomo & Manuel A. Gómez, eds., 2011).

[16] For example, the Aztecs had different kinds of communal possession of land. Among them were the *tlalmilli (*given to certain families that could give the land as inheritance but could not be leased or sold) and *altepetlalli* (worked by the entire community to cover public expenses), which belonged to the *calpullis* (the unit of social organization in the Aztec society). *See* Kohler, José, El derecho de los aztecas, en: Antología jurídica mexicana, México: UNAM-IIJ, 1992, p. 58.

[17] Constitución Política de los Estados Unidos Mexicanos, CP, art. 27 ¶ 1, Diario

of communal ownership: *ejido* and *communal property*.[18] *Comuneros*[19] (joint-holders of the communal property) and *ejidatarios* (members of an *ejido*) share rights and duties over land with other members of their community, and until recently it was not possible to sell your rights to the land. In the 1990s, the federal government started implementing programs (e.g. Programa de Certificación de Derechos Ejidales y Titulación de Solares "PROCEDE" [Program for Certification of Ejidal Rights]) to ease the process of selling rights of *ejido* and *communal* land. Many *ejidatarios* in Michoacán are now able to divide and sell their rights to the land.

According to Mexican law, the federal agrarian authorities are in charge of the organization and legal supervision of *ejidos* and communities, and the resolution of conflicts concerning *communal* and *ejido* property, whether Indigenous or non-Indigenous.[20] The members of the communities and *ejido* that hold property together are registered in the *Registro Nacional Agrario* (Agrarian National Registry). According to law, the list of *comuneros* is updated in community assemblies and registered before the Agrarian National Registry.[21] Indigenous *comuneros* are considered to be the descendants of those Indigenous families that have been living in the area since before Spanish colonization. But there is no formal legal requirement regarding such ancestry in all communities. Each community self-identifies as Indigenous or not, and decides by itself whom to add as members in their assemblies.

B. The Zirahuén Community

The Zirahuén Community is a legal entity that represents part of the population and territory of the community of Zirahuén, which is also comprised of the Zirahuén *Ejido*, other *ejidos*, and neighbors. To distinguish the Zirahuén Community from the community of Zirahuén, I use capital letters. The Zirahuén Community owns its land under a communal property regime.

Zirahuén is a small Community with around 250 members (at the time of writing there was a motion to increase the number of *comuneros* to around 550 people) and only 604 hectares of land surrounding the Lake Zirahuén.[22] It is one

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Oficial de la Federación [DOF] 5-2-1917, últimas reformas DOF 29-07-2010 (Mex.).

[18] *Id.* at art. 27 § VII.

[19] *Comunero* is a Spanish term that literally means member of a community. Usually the term refers to the individual members of a community that share the property, profit, and utilize it; in other words, the joint owners of the land.

[20] Ley Agraria [LAG] art. 40, 47 & 65, Diario Oficial de la Federación [DOF] 26-2-1992, últimas reformas DOF 28-11-2012 (Mex.).

[21] *Id*.

[22] Six hundred and four hectares is equivalent to 1,492 acres or six square kilometers.

of the most active Indigenous Communities in Mexico in the protection of communal properties. It has a long and notorious recorded history of judicial and legal conflicts regarding its land. It is one of the founding communities of the Unión of Comuneros Emiliano Zapata (UCEZ), a popular and active organization that works to maintain and protect communal properties of Indigenous communities in México.[23] The UCEZ is one of the most supportive communities outside of the Chiapas of the Zapatista Movement in Mexico. The Zirahuén Community was the first self-declared autonomous municipality (Caracol Zapatista) in Mexico.[24] The sessions of the Zirahuén Community assembly are carried out in Spanish and most of the members only speak Spanish.[25]

The colonial government of the Viceroyalty of New Spain recognized the Community and its territory through a deed from the year 1733, the Real Registry Title 1607.[26] Its territory at that time covered 21,183 hectares.[27] After independence, the Community divided part of its land and lost some of its territory to large owners.[28] During the Mexican Revolution of the 1910s, the community lost its legal status as a Community and legal recognition of their communal lands.[29] In 1916, the community sought to recover the recognition of their territory but the government only granted it land in the form of *ejido* in the 1930s. It was not until 1970 that the Community of Zirahuén regained its status as a Community along with 604 hectares of communal land.[30] As soon as it regained status, the Community requested an extension of land.

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[23] Del Carmen Zárate Vidal, Margarita, En busca de la comunidad: identidades recreadas y organización campesina en Michoacán, México: El Colegio de Michoacán A.C., 1998, p. 63.

[24] Rojas, Rosa, La Jornada, Se suma CNI a declaratoria Zapatista, 22-06-2005 (Mex.), formato HTML, http://www.jornada.unam.mx/2005/06/22/index.php?section=politica&article=013n1pol.

[25] Interview with Eva Castañeda Cortés, Lawyer, Co-counsel of the Zirahuén Community, in Morelia, Michoacán, México (July 13, 2011).

[26] Comunidad Indígena de Zirahuen, Municipio de Salvador Escalante, Michoacán, *supra* note 5, at 4.

[27] 21,183 hectares is equivalent to 52,344 acres or 211.83 square kilometers.

[28] Guevara Sánchez, Brenda Griselda, Comunidad y Conflicto: Zirahuén 1882–1963, Michoacán: Universidad Michoacana de San Nicolas de Hidalgo, 2010, p. 4-5. According to Guevara Sánchez, some historians, such as Roseberry, are of the opinion that this was a smart move on the part of the community because those communities in the same province of Michoacán that rejected all the attempts of the authorities to divide their lands finally lost them due to seizure by the authorities. Those that accepted the requests by the government for division, such as the community of Quiroga, were dissolved a bit later. Roseberry affirms that most of the communities that agreed to partially divide their lands survive today. Roseberry, William, *Neoliberalism,Transnationalization, and Rural Poverty: A Case Study of Michoacán, Mexico* 25 AM. ETHNOLOGIST 53, 53-54 (1998).

[29] *Id.*

[30] Interview with Eva Castañeda Cortés, *supra* note 25.

In 1992, article 27 of the Mexican Constitution was amended, establishing the current communal property regime and the Zirahuén Community's request for extension of land was labeled *rezago agrario*. This label means "agrarian delay" and includes cases or filings of requests for restitution for land, forests, and water that by 1992 were unresolved. To this day, the filings remain unresolved, mainly because land is unavailable to grant.

The Community has been requesting the restitution of their lands for almost a hundred years. Today, the Zirahuén Community claims 6,000 hectares of land, down from the original 21,500 hectares requested in 1916 and the 12,000 requested in 1978. The Community recognizes that 15,000 hectares have been given to the *ejidos* of *Zirahuén*, *Santa Rita*, *Santa Ana*, *Agua Verde*, and *Copándaro*, whose members were members of their ancestral Indigenous community living around the lake.[31] The 6,000 hectares of land that the Community claims are now in possession of many small and large private owners. In order to extend communal property to Zirahuén, the agrarian authorities would have to take lands from those private owners. To this day, authorities and the community have not been able to finally resolve the Zirahuén Community's request for an extension of land.

C. The Zapatista Movement, the San Andrés Accords, and the Constitutional Amendment of August 14, 2001

The *Zirahuén Amparo* was not an idea of the Zirahuén Community. Rather, Purépecha lawyers designed the plea using the legal profile of the Community to fight the constitutional amendment of August of 2001. Thus this *amparo* must be seen as part of a broader social and legal movement.

Efrén Capiz Villegas, the Zirahuén Community's former principal lawyer, designed the *amparo*. Efrén Capiz Villegas was a Purépecha man from a nearby community. The *comuneros* of the Zirahuén Community supported and voted for the making and submission of the plea in a Community assembly. Eva Castañeda Cortés, the Community's current principal lawyer, a Purépecha activist, and a co-drafter of the document, declared in an interview that the Zirahuén Community decided to support the legal actions taken by several Indigenous organizations against the reform: "They decided to support us in this quest" is the literal translation of her statement.[32] The following paragraphs explain that quest.

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[31] *Id.* 6,000 hectares is equivalent to 14,826 acres and 60 square kilometers.

[32] Interview with Eva Castañeda Cortés, *supra* note 25. Cortés also self-identifies as a Purépecha and is from a nearby community. The phenomenon of one group litigating on behalf of a movement can be seen in other cases regarding Indigenous issues all over the world. The Nibutani Dam case was also a court case brought on behalf of the Indigenous movement in Japan. In the Nibutani Dam case, the plaintiffs' main objective was not only to protect just their particular assets, it was also to protect the cultural and traditional assets

1. The Zapatista Revolution

On the last day of 1994, an armed group mainly comprised of Indigenous peoples called the Zapatista Army of National Liberation (hereinafter Zapatista Army) took the cities and towns of San Cristobal de las Casas, Las Margaritas, Altamirano, and Ocosingo in the State of Chiapas and declared war on Mexico.[33] Today, as it was in its origins, the Zapatista Army's main goals are the recognition of Indigenous peoples and their rights, and its activities are defensive against the military forces of Mexico.[34] A large network of organizations, institutions, and Non-Governmental Organizations (NGOs) around the world now supports the Zapatista Army (Zapatista Movement).

The Federal government started peace negotiations with the Zapatista Army in 1995. In 1996, the Federal Government and the Zapatista Army signed the San Andrés Accords.[35] The San Andrés Accords consummated a joint effort of the parties to achieve peace. They included a set of compromises from the federal government towards Indigenous peoples in Mexico.[36] One of the compromises was to work on a constitutional amendment that would include the opinion of those Indigenous peoples. Using most of the agreements discussed in the negotiation table of the San Andrés Accords, the *Comisión de Concordia y*

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of the Ainu people and make a legal statement of the situation of the Ainu in Japan. This can also be partly seen in Delgamuukw in Canada where two First Nations joined forces for litigation. All three cases were brought as part of a broader social movement as one of the strategies implemented to pursue the goal of protecting the rights and freedoms of their communities but also of Indigenous peoples more generally.

[33] Bernal, *supra* note 9, at 940.

[34] Primera declaración de la selva lacandona, Enlace Zapatista, 1-1-1994 (Mex.), formato HTML, http://enlacezapatista.ezln.org.mx/1994/01/01/primera-declaracion-de-la-selva-lacandona/. To hear Zapatista Army's declarations, see Enlace Zapatista, (Mex.), formato HTML, http://enlacezapatista.ezln.org.mx. One of the most relevant and recent declarations of the Zapatista Army is the Sixth Declaration of the Lacandona Jungle in 2005. *See* Cartas y comunicados del EZLN, (Mex.), formato HTML, http://palabra.ezln.org.mx.

[35] Los Acuerdos de San Andrés Larraínzar [San Andrés Accords], Mexico-Zapatista Army of National Liberation, Feb. 16, 1996.

[36] The San Andrés Accords is comprised of four parts and holds a commitment by the federal government to establish a new relationship with Indigenous peoples based on pluralism, sustainability, the participation of Indigenous peoples, free self-determination of Indigenous communities, and integrality. Among the commitments is the promotion and openness towards the participation of Indigenous peoples in the daily and continuous construction of Mexico; betterment of the quality of life of Indigenous peoples; recognition of Indigenous peoples in the Constitution and other laws; guarantee for the access to justice; promotion of the cultural expressions of Indigenous peoples; and education and job opportunities. The last part of the document is a commitment of both parties to send the proposals and agreed documents to the different assemblies in Mexico for their debate and decision-making. *See* Cartas y comunicados del EZLN, *supra* note 34.

Pacificación (COCOPA, Cooperation and Pacification Commission)[37] drafted a proposal of a constitutional amendment. The Zapatista Army accepted this proposal, called the COCOPA Proposal, but the federal government rejected it.

Most Indigenous nations participating in the negotiation process were very disappointed when the federal government rejected the COCOPA Proposal and ignored other commitments it had made in the San Andrés Accords. In 1998, there were several attempts to resume peace negotiations between the Zapatista Army and the federal government through the *Comisión Nacional de Intermediación* (CONAI, National Intermediation Committee)[38] but the Zapatistas rejected all of them. The Zapatista Army argued that the federal government had to comply with the San Andrés Accords before it would come back to the negotiation table.

2. The Rejection of the Constitutional Amendment of August 14, 2001

In 2000, the party controlling the Federal government changed for the first time in more than 60 years. Vicente Fox, from *Partido Acción Nacional* (PAN, National Action Party), presented the COCOPA Proposal to the Senate in one of his first acts as President of Mexico.[39] The Senate worked on the draft and changed the Proposal. The Senate finalized a project of amendment on April 25, 2001. It approved the project on July 18, 2001 while the Permanent Commission of the Federal Congress was on recess.[40] The Senate's bill was not agreeable to a

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[37] The COCOPA was a commission of the Congreso de la Unión [Federal Congress]. The Federal Congress is organized in an Upper Camera, the Senate and the Lower Camera, the Deputies. The COCOPA was integrated by deputies and senators of all parties represented in the Congress and had as objective to support the process of negotiation and dialogue between the Federal Government and the Zapatista Army. The COCOPA was established in 1995 and ceased its negotiating activities shortly after President Ernesto Zedillo rejected its constitutional proposal in 1996. Bernal, *supra* note 9.

[38] The CONAI was an institution integrated by intellectuals, artists, and recognized leaders of the larger civil society. The aim of the Committee was to act as the mediator between the Zapatista Army and the Federal Government. The CONAI was formally established in 1994 but Bishop Samuel Ruiz had already been acting as a mediator before the establishment of the CONAI. López y Rivas, Gilberto, Autonomías: Democracia o contrainsurgencia, México, D.F.: Ediciones Era, 2014.

[39] Comisión de Concordia y Pacificación, Propuesta introducido por Vicente Fox Quesada, Secretaria de Gobernación, Diario Oficial de la Federación [DOF] 5-12-2000 (Mex.), formato PDF, http://www.diputados.gob.mx/comisiones/asunindi/Iniciativa%20de%20%20Presidente%20VFox.pdf (last visited Oct. 27, 2015).

[40] Constitución Política de los Estados Unidos Mexicanos, CP, arts. 1, 2, 4, 18 ¶ 6, 115, Diario Oficial de la Federación [DOF] 14-8-2001 (Mex.), formato PDF, http://www.diputados.gob.mx/LeyesBiblio/ref/dof/CPEUM_ref_151_14ago01_ima.pdf (last visited Oct. 27, 2015).

large portion of the Indigenous population in Mexico, including the Zapatista Movement because it did not establish a constitutional framework for promoting, protecting, and providing autonomy to Indigenous peoples in Mexico.

Zapatista Army representatives presented an argument in favor of the COCOPA Proposal in the Federal Deputies Chamber of the Congress on March 28, 2001, urging the Federal Congress to pass such proposal.[41] On April 30 of 2001, the Zapatista Movement publicly expressed its rejection of the Senate's finalized proposal of amendment, "contending that it betrayed the San Andrés Accords," and that it did not respond to the needs and demands of Indigenous peoples in Mexico. Indigenous communities all over Mexico campaigned through media, held blockades and protests, and organized a large walk that crossed the country.

The amendment remains among the most contested constitutional amendments in Mexican history.[42] Of thirty-two federal entities (thirty one states and one federal district), eight states rejected it (Baja California Sur, Guerrero, Hidalgo, México, Oaxaca, San Luis Potosí, Sinaloa, and Zacatecas) and seven abstained from voting. The amendment passed with only the minimum votes allowed.[43] Municipal governments, state legislatures, and Indigenous communities brought legal actions against the amendment.

Hundreds of municipalities in the states of Oaxaca, Chiapas, Tabasco, Veracruz, Michoacán, Hidalgo, Puebla, and Guerrero submitted *Controversias Constitucionales* (Constitutional Controversies),[44] a different judicial action,

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[41] Transcript of the Work Session of the United Commissions of Constitutional and Indigenous Issues of the Federal Congress with delegates of the Zapatista National Liberation Army and the Indigenous National Congress, Second Ordinary Period, 58th Legislature, Mar. 28, 2001, Diary 13, Formato HTML, https://www.ilo.org/dyn/normlex/es/f?p=NORMLEXPUB:50012:0::NO::P50012_COMPLAINT_PROCEDURE_ID,P50012_LANG_CODE:2507251,es [hereinafter Transcript of the Work Session].

[42] Constitutional amendments in Mexico are common; the Mexican Constitution has been reformed on more than 200 occasions. *See* Constitución Política de los Estados Unidos Mexicanos, Diario Oficial de la Federación [DOF], (Mex.), formato HTML, http://www.diputados.gob.mx/LeyesBiblio/ref/cpeum_crono.htm.

[43] Manuel González Oropeza, *Recent Problems and Developments on the Rule of Law in Mexico*, 40 TEX. INT'L L.J. 577, 578 (2005); Mariscal, Angeles & Ruiz, Victor, La Jornada, Rechazo en Oaxaca, Chiapas y Tlaxcala a la Entrada en Vigor de Reformas en Materia Indigena, 15-8-2001 (Mex.), formato HTML, http://www.jornada.unam.mx/2001/08/15/007n1pol.html.

[44] Constitutional controversy is the translation of "controversia constitucional." Constitutional controversy is a cause of action to solve conflicts of competency, power or jurisdiction between authorities. It is a claim of unconstitutionality of actions of an authority. This cause of action does not comprehend electoral or territorial issues. The Supreme Court of Justice of Mexico (SCJN) is the only court that reviews this kind of action. The authorities that can bring this claim are the Federal Government, provincial governments, the Federal District government, the municipalities, the Congress, and the powers and organs of government of the provinces and of the Federal District. Only those

which only government authorities can bring against the amendment.[45] The legislatures and state executive powers of Oaxaca and Chiapas also challenged the amendment. Courts reviewed these challenges together with the indirect *amparo*s submitted by Indigenous communities. The Supreme Court of Justice of Mexico (SCJN) dismissed all challenges, *amparos* and *controversias constitucionales*, as "notoriously out of order" following the pattern used for the *Zirahuén Amparo* and explained in this paper.[46]

The amendment[47] established that indigenous communities are entities of "public interest" indicating tutelage of the state over the communities and a

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decisions that are voted with a supermajority of eight justices make the acts challenged invalid with general effects.

[45] For a list of Constitutional Controversies, *see* Suprema Corte de Justicia de la Nación [SCJN], Nos. de Controversia 30/2001, 37/2001, 47/2001-51/2001, 329/2001-340/2001, Diario Oficial de la Federación [DOF] 2001 (Mex.), formato PDF, http://www.legisver.gob.mx/transparencia/FraccionXXVII/LISTADO_CONTROVERSIAS_DIGITALIZADAS.pdf (last visited Oct. 27, 2015).

[46] The SCJN had a press conference (No. 066/2002) on September 6, 2002 regarding its decision on the constitutional controversies. The plenary resolved by eight votes against three that all constitutional controversies against the reform were to be considered improper or out of order (*improcedente*). The reason given was that the court did not have the power to review processes of reform of the Constitution. Many constitutional controversies were presented. The audience in which this issue was solved was not a public one. López Barcenas, Francisco, Zúñiga Balderas, Abigail & Espinoza Sauceda, Guadalupe, Los pueblos indígenas: Ante la suprema corte de justicia de la nación, Mexico: COAPI, 2002, vol. 6 Serie Derechos Indígenas, p. 23, http://www.lopezbarcenas.org/sites/www.lopezbarcenas.org/files/LOS%20PUEBLOS%20INDIGENAS%20ANTE%20LA%20SUPREMA%20CORTE.pdf (last visited Oct. 27, 2015).

[47] The constitutional amendment, as finally approved by the Federal Congress, added and changed articles 1, 2, 18 and 115 of the Mexican Constitution. The amendment added two paragraphs to article 1 regarding the prohibition of all kinds of discrimination and slavery in Mexico. Article 2 was significantly reformed, providing more precise rights to Indigenous communities. Article 18 was modified to promote the incarceration of prisoners in prisons closer to their communities. And finally, article 115 was changed to add legislation regarding the association of Indigenous communities or organizations. The amended article 2 prescribes as follows:

> The Mexican Nation is unique and indivisible. It is a multicultural nation that originates from its Indigenous tribes, it is essentially integrated by descendants of those inhabiting the country before colonization, who preserve their own social, economic, cultural and political institutions, or some of them.
>
> A consciousness of Indigenous identity is the fundamental criteria that determine to whom apply the provisions on Indigenous people. Indigenous communities are communities that constitute cultural, economic and social units, settled in a territory and recognize their own

authorities, according to their own customs and traditions.

Indigenous peoples' right to self-determination shall be exercised within the framework of a constitutional autonomy ensuring national unity. The recognition of Indigenous peoples shall be done in States' and Federal District's Constitutions and laws, taking into account the general principles established in the Constitution, as well as ethno-linguistic and land settlement criteria.

A. This Constitution recognizes and guarantees the Indigenous peoples' right to self-determination and, consequently, the right to be autonomous, so that they can:

I. Decide their internal forms of coexistence, as well their social, economic, political and cultural organization. II. Apply their own legal systems to regulate and solve their internal conflicts, subject to the general principles of this Constitution, respecting constitutional guarantees, human rights and, taking special consideration of the dignity and safety of women. The law shall establish the way in which judges and courts will validate the decision taken by the communities according to this article. III. Elect, in accordance with their traditional rules, procedures and customs, their authorities or representatives. Exercise their own form of government, guaranteeing women's participation under equitable conditions before men, and respecting the federal pact and the sovereignty of the States and the Federal District. IV. Preserve and enrich their languages, knowledge and all the elements that constitute their culture and identity. V. Maintain and improve the environment and protect the integrity of their lands, according to this Constitution. VI. Attain preferential use of the natural resources of the sites inhabited by their Indigenous community, except for the strategic resources defined by this Constitution. The foregoing rights shall be exercised respecting the forms of property ownership and land possession established in this Constitution and in the laws on the matter as well as respecting third parties' rights. To achieve these goals, Indigenous community may form partnerships under the terms established by the Law. VII. Elect Indigenous representatives for the town council. The constitutions and laws of the States shall regulate these rights in municipalities, with the purpose of strengthening Indigenous peoples' participation and political representation, in accordance with their traditions and regulations. VIII. Have full access to the State's judicial system. In order to protect this right, in all trials and proceedings that involve natives, individually or collectively, their customs and cultural practices must be taken into account, respecting the provisions established in this Constitution. Indigenous people have, at all times, the right to be assisted by interpreters and counsels familiar with their language and culture. The constitutions and laws of the States and the Federal District shall regulate the rights of self-

hierarchy that subordinates Indigenous communities to provincial and federal authorities.[48] The approved amendment also recognized only "the association of Indigenous communities at the municipal level," implying a disregard for proposals to allow free association of Indigenous organizations and communities at all levels. It also limited the access of Indigenous communities to their property in consideration of neighbors and state authorities. The COCOPA Proposal, on the other hand, had classified Indigenous communities as entities of "public law," recognized association of Indigenous communities at all government levels and ruled that ancestral Indigenous territory would be used and enjoyed collectively.[49]

The approved constitutional amendment also disregarded a proposed reorganization of the state and municipal territories in consideration of Indigenous communities.[50] This issue had been broadly discussed in the negotiations of the San Andrés Accords during the 1990s and many Indigenous communities consider it a central reform to achieve autonomy and protect their rights. Indigenous communities have pressed for a reorganization of municipal governments according to communities since long before the uprising of the Zapatista Army. Nevertheless, there is no legislative initiative and the government has not taken any administrative measure to reorganize municipalities in accordance to ancestral territories and communities.

> determination and autonomy looking for the best expressions of the conditions and aspirations of Indigenous peoples, as well as the rules, according to which Indigenous community will be defined as public interest entities.

The article continues on establishing the obligations of the state towards Indigenous peoples. These obligations include providing health services, education and consulting Indigenous communities in the drafting and preparation of the development plans of the federal and state governments. Constitución Política de los Estados Unidos Mexicanos, CP, art. 27 ¶ 1, Diario Oficial de la Federación [DOF] 5-2-1917, últimas reformas DOF 29-07-2010 (Mex.).

[48] Transcript of the Work Session, *supra* note 41; s*ee also* Suprema Corte de Justicia de la Nación [SCJN], No. de Controversia 365/2001, Diario Oficial de la Federación [DOF] 2001 (Mex.), formato PDF, https://www.scjn.gob.mx/Transparencia/Epocas/Pleno/Novena%20%C3%A9poca/2001/365_01.pdf.

[49] The text of the COCOPA proposal can be accessed online through the Center of Documents about Zapatism. Centro de documentación sobre Zapatismo, Iniciativa de Reformas Constitucionales en material de Derechos y Cultura Indígena presentada por la Comisión de Concordia y Pacificación, 29-11-1996 (Mex.), formato HTML, http://www.cedoz.org/site/content.php?doc=404&cat=6. The word "territory" was taken out of the final constitutional proposal completely.

[50] *See* Centro de documentación sobre Zapatismo, Compromisos para Chiapas del Gobierno del Estado y Federal y el EZLN, correspondientes al Punto 1.3. de las Reglas de Procedimiento, 16-2-1996 (Mex.), formato HTML, http://www.cedoz.org/site/content.php?doc=367&cat=6.

In my opinion, the re-delimitation and organization of municipalities according to Indigenous communities is a necessary measure to build autonomy, jurisdiction, and ease certain processes of consultation. At the same time Indigenous peoples would be more protected because municipalities enjoy more political influence and can take advantage of a different set of causes of action against authorities' acts, such as the establishment of new laws and regulations. Municipal authorities are usually consulted when state authorities plan the application of new regulatory and administrative measures and are able to establish their own normative systems.

C. The *Amparo* Actions

The Zirahuén Community had a robust file in the Secretary of Agrarian Reform requesting restitution, extension, and entitlement to their lands. So, its lawyers thought it would be straightforward to prove their legal interest. Still, only exceptional claims against the Constitution, a constitutional amendment, or the process of constitutional reform are allowed. The *Zirahuén amparo* was a complicated legal strategy because of so-called "legitimization" issues. The Community tried to take advantage of an isolated guideline established by the SCJN in September of 1999 that allowed citizens to challenge the legality of the process of reform of the Constitution.[51] This guideline established that when

[51] Suprema Corte de Justicia de la Nación [SCJN], 193249. P. LXII/99, Diario Oficial de la Federación [DOF] 9-1999 (Mex.), formato PDF, http://sjf.scjn.gob.mx/sjfsist/Documentos/Tesis/193/193249.pdf. This thesis establishes that when challenging a constitutional amendment process, it is not the content of the Constitution but the actions carried on during the legislative process that culminate in its reform that are challenged. In a case against a process of amendment, the responsible authorities are the authorities involved in this process, from which the act emanates. These authorities have to adjust their actions to the legal regulations and framework established to protect the principle of legality. The court also established the fact that while the reform process had as result a law elevated to the status of supreme law, the protective efficacy of an *amparo* as a means of constitutional control had the aim of ensuring the legality of all processes and acts of the authorities. To not allow an action against the process of reform would leave violations of the formalities and regulations established in Article 135 of the Constitution without remedy. *See also* Suprema Corte de Justicia de la Nación [SCJN], 193251. P. LXIV/99, Diario Oficial de la Federación [DOF] 9-1999, (Mex.), formato PDF, http://sjf.scjn.gob.mx/SJFSist/Documentos/Tesis/193/193251.pdf. The SCJN established this guideline in the context of the case of Manuel Camacho Solís, who challenged a constitutional reform that established new rules that did not allow him to compete for office as the Mexico City governor in 1997. He argued that the process of reform was illegal for several reasons. Among those reasons was that the presenters of the proposal in Congress were senators, who cannot submit proposals to the Federal Congress. The court allowed his argument establishing a thesis (guideline) that allowed the process of reform of the Constitution to be challenged by an indirect *amparo*. Suprema Corte de Justicia de la Nación [SCJN],

reviewing the legality of the constitutional reform process, the courts had to apply a test to check whether authorities fulfilled all procedural requisites regarding constitutional amendments.[52] But the SCJN rejected this guideline while the Community of Zirahuén's appeal was under review. This change precluded the possibility of using an *amparo* and became a source of uncertainty for courts and Indigenous plaintiffs alike.

The Community offered only written documentation; no oral evidence was offered at trial.[53] The Community brought their title from 1733 as evidence to the court, the documents that proved their current application for extension of their territory, and other documents, such as assembly decisions and documents that proved the ratification of the ILO Indigenous and Tribal Peoples Convention, 1989 (No. 169). The trial court also requested evidence from different authorities regarding their participation in the process of reforming the Constitution. The most relevant were the reports of actions by state legislatures regarding the voting processes for the amendment.

D. The Decisions Rendered in the Case

The First Federal District Court of Michoacán and the SCSJN on appeal, both dismissed the Community's claims. In his decision, the district court judge denied the *amparo* because he considered that the Zirahuén Community's argument regarding the constitutionality of the process due to the infringement of an international treaty was without legal fundament.[54] The judge concluded that the plaintiffs did not demonstrate the unconstitutionality of the process of reform. He also found that the ILO Indigenous and Tribal Peoples Convention, 1989 (No. 169) did not regulate the process of amendment of the Constitution and thus was not binding.[55] Today, this interpretation is obsolete because current Article I of

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193250. P. LXIII/99, Diario Oficial de la Federación [DOF] 9-1999 (Mex.), formato PDF, http://sjf.scjn.gob.mx/sjfsist/Documentos/Tesis/193/193250.pdf.

[52] *Id.* The test asks: (1) whether two thirds of the Federal Congress approved the amendment; (2) whether the legislatures of the different states had rendered an opinion on the amendment; (3) whether an absolute majority voted for the amendment in the state legislatures; (4) whether there is a declaration of homologation of the law; and (5) whether the appropriate authorities brought the amendment proposal to the Federal Congress.

[53] Comunidad Indígena de Zirahuen, Municipio de Salvador Escalante, Michoacán, *supra* note 5.

[54] *Id.* at 29-32.

[55] *Id.* at 29-30. The process of reform is not regulated by international treaties or federal laws because the legislative power cannot be subject to any other rules in any other legal or political system and is only subject to the formalities established in the Constitution itself. Under this premise, it is irrelevant that part of the Mexican legal system did not abide by an international treaty because the Constitution is the apex of the Mexican legal system, over which there is no law.

the Constitution provides that all human rights established in international treaties ratified by Mexico are to be enjoyed and protected, and the duty to consult is considered to be a human right.[56]

The Zirahuén Community appealed the decision, arguing that the trial judge did not comply with the courts' duty of *suplencia de la queja*.[57] They also argued that he erred in his analysis about the binding power of the international treaty, which should have been considered "supreme law" (constitutional level law). In addition, they argued that he did not correctly assess the issue of the detriments to the rights of the Community or harm. In the opinion of the Zirahuén Community, the detriment to their right to be consulted ought to be considered in regard to the standards set by the international treaty, which are considerably higher than those contained in the constitutional amendment.[58] They also made other arguments regarding procedural issues such as the lack of reports regarding the final votes for the approval of the amendment in certain states' legislatures.

There were many *amparo*s related to the constitutional amendment of August 14, 2001 but the Second Chamber of the Supreme Court of Justice of Mexico (SCSCJN) only heard the case of Zirahuén, probably because it was among the strongest and most complete of the cases. The *Tribunales Colegiados* (federal high collegiate tribunals) heard the rest of the *amparos* following the direction of the Zirahuén decision. The two drafters of the decision were two veteran members of the court, Lourdes Ferrer Mac-Gregor Poisot, Secretary of the Court,[59] and Justice Mariano Azuela Güitrón.[60]

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[56] Constitución Política de los Estados Unidos Mexicanos, CP, art. 1 ¶ 2, art. 27 ¶ 1, Diario Oficial de la Federación [DOF] 5-2-1917, últimas reformas DOF 29-07-2010 (Mex.).

[57] The Constitution and *Amparo* Law require judges to investigate all possible arguments of unconstitutionality in cases regarding claims of violations to the rights over communal and *ejido* land. This is called *suplencia de la queja*, which in English is translated as the courts' inquisitorial supplementary function. This task of the judiciary in agrarian amparo cases is meant to protect weaker parties in the judicial process and avoid the application of unconstitutional laws to communities and *ejidos*. This task includes the mending of omissions, errors, or deficiencies in the claims of the weaker party and requesting evidence that the plaintiffs could not supply. *See* El juicio de amparo. A 160 años de la primera sentencia, *supra* note 2.

[58] In the claims, the plaintiffs make a comparison of certain words used in different sections of the international treaty, the COCOPA proposal and the decree of reform, e.g. the word "territory" in comparison to "place."

[59] "Secretary of the Court" is the literal translation of the position in Spanish: *Secretario de la Corte*. The *secretarios* work with the justices in the drafting of the decision. They are well prepared professionals who sometimes act as law professors, and who could become justices themselves.

[60] Comunidad Indígena de Zirahuen, Municipio de Salvador Escalante, Michoacán, *supra* note 5, at 1.

The SCSCJN decided that the Zirahuén Community did not have standing because the Community's rights were not affected detrimentally by the amendment. In the opinion of the court, there were no partial or total privations of their lands consequent to the amendment.[61] But, the cause of action did not allow the Zirahuén Community prove any detriment to their land or rights due to the amendment. Their action was against the constitutionality of the process of amendment of the Constitution and thus their cause of action only allowed them to prove such unconstitutionality. Further, the plaintiffs could not allege an affectation by the content of the Constitution due to a characteristic of the *amparo* action, presented only within the next 30 days of the promulgation of the law. To require the plaintiff to prove a detriment to their rights from the content of the amendment within an action against the process of amendment asked for the impossible.

1. Whose Harm?

It was legally impossible for the Zirahuén Community to prove harm due to the approval of the amendment because such harm could only be understood and proven in terms of a comparison of the standards set in the San Andrés Accords, the COCOPA Proposal, the ILO Indigenous and Tribal Peoples Convention, 1989 (No. 169), and the constitutional amendment of 2001. From the plaintiff's perspective, the constitutional amendment granted a lower degree of self-determination[62] and established a higher degree of subordination to federal and provincial authorities than the propositions contained in the COCOPA Proposal's clauses. The Court did not consider the COCOPA proposal and the San Andrés Accords legally binding and dismissed these arguments.

The decision did not discuss how the lack of jurisdiction and a subordinate position of Indigenous communities would affect their rights to protect their community, culture, and the possibility to exercise their autonomy to self-determine their political, economic and social life. The SCSCJN relied

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[61] *Id.* at 133-35. The new guideline was established in a case presented by the municipality of San Pedro Quiatoni in Oaxaca challenging the same reform in almost the same sense as the *Zirahuén* case. The municipality did not use an *amparo*, but instead used a controversia constitucional. *See* Suprema Corte de Justicia de la Nación [SCJN], No. de Controversia 82/2001, Diario Oficial de la Federación [DOF] 2002 (Mex.), formato PDF, https://www.scjn.gob.mx/Transparencia/Epocas/Pleno/Novena%20época/2001/82_01.pdf.

[62] Autonomy is a concept related to the idea of self-determination. The concept of autonomy implies the right that Indigenous peoples have to control their territories and natural resources. It also regards their right to govern themselves. Aparicio Wilhelmi, Marco, *La Libre Determinación y la Autonomía de los Pueblos Indígenas. El Caso De México*, 29-5-2008 (Mex.), formato PDF, http:www.juridicas.unam.mx/publica/rev/boletin/cont/124/art/art1.htm#N*.

exclusively on its own views and perspectives on the merits of the constitutional amendment. It was not critical of its own cultural background nor its legal assumptions in assessing the plaintiffs' claims. This lack of awareness or mindfulness was amplified by the fact that the court had the duty of *suplencia de la queja.*

The Court went as far as to state that it was not legally appropriate to protect them from the constitutional amendment because granting the *amparo* would cause the plaintiffs harm.[63] According to the Court, the amendment benefited Indigenous communities.[64] The court interpreted the rights established in the Constitution to be minimum standards that state legislatures could expand.[65] This radical opinion shows that the Zirahuén Community could not prove the harmfulness of the amendment process. The Court dismissed the suit because it considered the plaintiffs' evidence of no consequence or relevance in determining the constitutionality of the process of reform. The Court did not recognize, study, or evaluate the Zirahuén Community's perspective on their own harm and did not express any knowledge or recognition of Purépecha normative perspectives and the Community's legal context. Thus, I conclude that the SCSCJN in Zirahuén was formalistic and unaware of the diversity in Mexico.

2. Remedies for Whom?

As I stated before, weeks before the SCSCJN resolved the Community of Zirahuén's appeal, the SCJN abrogated the guideline established in 1999 that allowed *amparo* actions to challenge the legality of the process of constitutional amendment.[66] The current ruling principle is that there are no judicial resources to challenge the process of constitutional amendment on any basis. The court concluded that if it had continued to hold otherwise, difficulties would arise in choosing an appropriate remedy for the plaintiff.

The Zirahuén Community did not request to re-do the process of amending the constitution by consulting indigenous peoples and communities, but

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[63] Comunidad Indígena de Zirahuen, Municipio de Salvador Escalante, Michoacán, *supra* note 5, at 125.

[64] *Id.* at 122.

[65] Estudio sobre los pueblos indígenas y el derecho a participar en la adopción de decisiones, Información sobre México, 2002 (Mex.), formato PDF, http://www2.ohchr.org/english/issues/indigenous/ExpertMechanism/3rd/docs/contributions/MexicoContribucion-1.pdf. This guideline also seems to suggest that the freedom of association can be expanded through legislative means at the state level.

[66] Suprema Corte de Justicia de la Nación [SCJN], 185941. P./J., Diario Oficial de la Federación [DOF] 2002 (Mex.), formato PDF, http://sjf.scjn.gob.mx/SJFSist/Documentos/Tesis/185/185941.pdf. This is a Jurisprudence (legal interpretation principle) that is legally binding.

rather requested immunity from the amendment. Still, the SCSCJN found that the proper remedy would have been to re-do the process of amendment and consult the Community, which would affect the entire Mexican population. Thus, what the court found to be the appropriate remedy was a relief that it could not legally grant. The court stated:

> [T]he lack of legal interest of the plaintiffs to bring this *amparo* case is evident if we hypothesize that if a decision gave constitutional protection against the challenged amendment process, such decision would be detrimental for the community instead of benefiting it, because the favorable constitutional norms included in the amendment could not be applicable to the community. *Moreover, attending to the relativity principle of all amparo decisions (according to articles 107, fr. II of the Amparo Law), such hypothetical decision could not force the reforming organ of the Constitution to redo the process of reform because that would be like giving general effects to the decision instead of only protecting the plaintiff in the case*.[67]

The *principle of relativity* is a basic principle governing *amparo* actions. It means that the remedies of an *amparo* action must be of *relative effect*s, relative meaning affecting only the plaintiff. An *absolute effect* remedy is a remedy that affects the entire population or a broad section of the population. Absolute remedies can be granted in some cases by the SCJN but only for certain causes of action: *acciones de inconstitucionalidad* (actions of unconstitutionality)[68] and *Controversias Constitucionales* (Constitutional Controversies).

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[67] Comunidad Indígena de Zirahuen, Municipio de Salvador Escalante, Michoacán, *supra* note 5, at 123 [emphasis added].

[68] There are three legal actions established for the "control of constitutionality of legal norms": *amparo*, *controversia constitucionales* (constitutional controversy) and *accion de inconstitucionalidad* (action of unconstitutionality). Action of unconstitutionality is an action to challenge the constitutionality of a law. It is only available to the General Prosecutor of the Republic, political parties (only for challenging electoral laws at the federal and provincial level), the National Commission of Human Rights, one third of the members of the Federal Deputies (for challenging federal laws, and laws passed by the Federal Congress), one third of the members of the Senate Chamber (to challenge federal laws and laws passed by the Federal Congress and international treaties), one third of the members of provincial deputies chambers (against laws passed by the provincial legislature), and one third of the members of the Federal District Legislative Assembly (against laws passed by the Assembly). If unconstitutionality is found, the laws become void. The Supreme Court is the only court in Mexico with jurisdiction to review actions of unconstitutionality. The Constitution requires a supermajority of eight votes in order to declare a law unconstitutional through this action.

The greatest number of challenges against the constitutional amendment was *controversias constitucionales* because lawyers and experts thought this cause of action was more likely to succeed than an *amparo*. It was available for Indigenous communities that were represented by municipal governments. However, the Community of Zirahuén could not use this cause of action because it is not a municipality.[69]

Many years later, in May of 2014, the SCSCJN decided a Constitutional Controversy of Cherán, a Community close to Zirahuén in Michoacán.[70] The Community of Cherán submitted this Constitutional Controversy for the lack of consultation regarding the Michoacán constitutional amendment of March of 2012 about Indigenous peoples' rights.

In the case of Cherán, the SCSCJN found that because the municipal council was a representative organ of the Indigenous community, it had the right to be consulted by the state congress regarding constitutional amendments on Indigenous peoples' rights and regulations.[71] Nevertheless, the SCSCJN did not declare the amendment null; the SCSCJN held that the amendment of March 16 of 2012 had no legal effects between the parties. This decision left the municipality of Cherán in limbo within the legal system in Mexico. Cherán may enjoy an autonomy that few municipalities in Mexico enjoy, but it does so at a high cost and with few consequences for the relationship between the federal and state governments, judiciary, and legislatures with Indigenous peoples. For example, in June 25, 2014, the Constitution of Michoacán[72] was again amended as to Indigenous peoples' rights and the regulation of political parties and the Congress again proceeded with the amendment without consulting the Municipality.[73] Today, other communities are in the same situation as if the decision that granted

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[69] *See* Suprema Corte de Justicia de la Nación [SCJN], 185941. P./J., Diario Oficial de la Federación [DOF] 2002 (Mex.), formato PDF, http://sjf.scjn.gob.mx/SJFSist/Documentos/Tesis/185/185941.pdf.

[70] Suprema Corte de Justicia de la Nación [SCJN], No. de Controversia 32/2012, Diario Oficial de la Federación [DOF] 2012 (Mex.), formato DOC, http://www.diputados.gob.mx/LeyesBiblio/compila/controv/172controv_23sep14.doc.

[71] *Id.* at 43. The Concejo Mayor del Gobierno Comunal [Major Council of Communal Government] of the municipality of Cherán was first recognized by Consejo General del Instituto Electoral de Michoacán [General Council of the Electoral Institute of Michoacan], in its acuerdo [decree] CG-14/2012 on January 25th, 2012. Periódico Oficial del Gobierno Constitucional del Estado de Michoacán de Ocampo, Instituto Electoral de Michoacán, 2015 formato PDF http://transparencia.congresomich.gob.mx/media/documentos/periodicos/qui-9215.pdf.

[72] The complete name is Constitución Política del Estado Libre y Soberano de Michoacán [Constitution of the Free and Sovereign State of Michoacán].

[73] In the diary of debates of the 110th session of the Michoacán congress, the congress recorded that the Commission of the Major Council of the Communal Government of the Indigenous Municipality of Cherán manifested its rejection of the congressional actions regarding the amendment since there was no previous consultation.

the *amparo* to Cherán had never existed. This shows the inadequacy of legal remedies for transgressions against the duty to consult in Mexico and the challenges that need to be confronted in order to fill this gap and protect the constitutional rights of Indigenous peoples.

3. Whose Rights?

The Zirahuén decision created *isolated theses*, which are legal guidelines. Higher courts establish *isolated theses* for lower courts to use when trying cases. One of the theses of the Zirahuén case created the "territorial principle of Indigenous peoples" as a principle now enshrined in the Constitution.[74] The most progressive feature of the guidelines the SCSCJN developed in the *Zirahuén Amparo* is a thesis that interprets article two of the Constitution as establishing the unit of Indigenous territory. This guideline considers the unit of Indigenous territory to be an expression of the autonomy of the Indigenous community. And this autonomy regards the capacity to decide how to exploit the resources of the territory and the freedom of Indigenous communities to associate with other Indigenous communities at the municipal level. However, the guidelines also emphasized the principle of "national unity" and its limitation of Indigenous peoples' rights.[75]

The term "national unity" is now the most relevant principle limiting the right to self-determination and autonomy of all Indigenous communities in Mexico. Professor Jorge Alberto González Galván, among other scholars has criticized the inclusion of this principle in the amendment. He argued that adding the statement that "Mexico is a single and indivisible nation" to a Constitution that also states "recognition of Mexico as a multicultural society" was unnecessary and ambiguous. It was unnecessary because Indigenous peoples' claims arise within the state, and so do not intend to sever or divide.[76]

The SCSCJN interpreted the rights of the Community of Zirahuén under the premise that any interpretation of the constitutional rights of Indigenous

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[74] The Constitution never uses the word "territory." *See* Suprema Corte de Justicia de la Nación [SCJN], 185567 CXXXVIII/2002, Diario Oficial de la Federación [DOF] 11-2002 (Mex.), formato PDF, http://sjf.scjn.gob.mx/SJFSist/Documentos/Tesis/185/185567.pdf. None of the theses established in this case can be used to create jurisprudence, which means they are not a source of law but mere standards to be used by lower courts receiving similar cases.

[75] Suprema Corte de Justicia de la Nación [SCJN], 185565 CXL/2002, Diario Oficial de la Federación [DOF] 11-2002 (Mex.), formato PDF, http://www2.ohchr.org/english/issues/indigenous/ExpertMechanism/3rd/docs/contributions/MexicoContribucion-1.pdf.

[76] González Galván, Jorge Alberto, La reforma constitucional en materia indígena, Cuestiones Constitucionales, 2002 (Mex.), formato PDF, http://www.redalyc.org/articulo.oa?id=88500709.

peoples in Mexico, as with any constitutional article, must be made in consideration of the principle of "national unity."[77] It also held that the principles of "gender equality, the federal pact and provincial sovereignty" limit the rights of Indigenous peoples to elect their own representatives and give effect to their own practices of political organization. The SCSCJN has confirmed these principles in several cases since then. The most recent guidelines in this respect (2010) also use the language of a "diminished national sovereignty":

> [T]he Constitution recognizes and guarantees the fundamental right of all populations, among them Indigenous populations and communities to self-determination; the autonomy to decide their internal ways to socialize and their economic, political, cultural and social organization; and decide their fate. Nonetheless, such right is not absolute; meaning that such autonomy is to be exercised within the limits of the principle of National Unity . . . the recognition of their rights does not in any way imply a *diminished national sovereignty and does not imply the creation of a state within the Mexican state*. The recognition of the power of self-determination of Indigenous peoples does not imply their political independence and sovereignty but only the possibility to freely elect their situation within the Mexican state [emphasis added].[78]

This has provoked considerable hesitation among government authorities to address the problems, complaints, and concerns of Indigenous Communities. Authorities interpret the rights of Indigenous peoples as narrowly as possible, limiting the aim of the 2001 constitutional amendment of achieving the protection and promotion of a multicultural society.

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[77] Comunidad Indígena de Zirahuen, Municipio de Salvador Escalante, Michoacán, *supra* note 5, at 67.

[78] Suprema Corte de Justicia de la Nación [SCJN], XVI/2010, Diario Oficial de la Federación [DOF] 2-2010 (Mex.), formato PDF, https://www.scjn.gob.mx/Primera_Sala/Tesis_Aisladas/TesisAisladas1Sala201020110524.pdf. The guideline concerned the case of Alejandro Paredes Reyes et al. (Direct *Amparo* 3/2009) decided in October of 2009. The isolate thesis considers articles 2, 40, and 41 of the Constitution. Article 2 has been cited and quoted above as the one that establishes the rights of Indigenous communities. Articles 40 and 41 are part of Chapter I of the Constitution, which refers to issues of National Sovereignty and Forms of Government. Article 40 establishes that the Mexican state is a Democratic Republic organized in a Federation of Sovereign States and article 41 establishes that the sovereignty resides in the people, who exercise it through the Powers of the Union and the states.

III. CONCLUSIONS

The case that I describe and discuss in this article reveals the considerable difficulties that Indigenous peoples face in protecting their right to be consulted through the courts in Mexico. The *Zirahuén Amparo* shows that the current interpretation of Indigenous peoples rights is formalist and does not promote or enable a truly multicultural society.

Firstly, the courts' interpretative approach assumes that since the federal congress and the courts considered the new constitutional standards a benefit for the plaintiffs, the amendment was good whether Indigenous communities agreed or not. This standard for review of the Zirahuén Community's harm imposed a culturally biased set of rules that undermined the normative systems and perspectives of the Indigenous plaintiff. It also left a vulnerable population without the protection of international and constitutional law.

The judges seemed to not comprehend how the trial process and its rules prevented them from writing a decision that enhances legal diversity. In my opinion, this is because courts have no vision of reconciliation of the current dominant normative perspectives with Indigenous peoples' normative perspectives. This urgently needs to change. The judiciary needs to give proper recognition to the existing and historical agreements between Indigenous communities and authorities and their violations, and educate legal professionals and judges about Indigenous normative systems and perspectives.

Moreover, the courts' decisions in Zirahuen did not provide certainty on the duty to consult. The federal judiciary affirms it is making an effort in this respect but the fixation on principles and precepts such as "national unity" and "diminished sovereignty" will not help the judiciary to fight such uncertainty. Interpretations based on such principles and paradigms allow authorities and third parties to remain doing as less as possible to contact and consult Indigenous peoples for development plans and other projects while ambitious constitutional regulations are in place with the aim of promoting self-determination and autonomy among Indigenous peoples. At the same time, the courts should be mindful of the need to grant more far-reaching remedies to provide certainty to communities, government agencies, authorities, and investors.

Until now, courts have granted remedies that have left Indigenous communities in risky situations. Such is the case of Cherán mentioned above. The lack of appropriate remedies is very problematic, and Indigenous peoples wonder if it is possible to transform rights into outcomes within the current legal environment.

Finally, any meaningful transformation of the legal environment will require the recognition and building of some kind of jurisdiction of Indigenous communities. This could be achieved partly through a re-organization of municipal governments according to Indigenous communities. It is an ambitious project but in my perspective only a radical project will change the pseudo-

colonial and monotonous pattern of the relationships between the Mexican State and its Indigenous peoples.