Access to Information, Agrarian Justice and Indigenous Rights

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Land is of vital importance to indigenous peoples. To them, it is not just the natural element where they can live and obtain their food, it is also the foundation of their worldview, which, is why they have a very special cultural relationship with it. So much so, that when they have been stripped of their lands, there have been unmistakable disruptions to their social structures, often leading to ethnocide. More than land, it is territory. That is why their claim, more than being a subjective right, involves the exercise of the power to continue to be a people.

This fact contrasts deeply with the commercial way in which the western world views land, where the freedom of action argument and the autonomy of the individual will have served as the means for the dispossession of peoples. During the 19th century, agrarian legislation focused on dividing up peoples' communal lands to turn them into private property, which left them with no room to exercise their power, a policy that continued during the 20th century, although less openly. The agrarian reform promoted by the Mexican State, much celebrated throughout Latin America because of its social orientation, did not recognize the collective nature of indigenous peoples' property and distributed lands more based on social pressures than on rights.

The Mexican State's 1990 ratification of Covenant 169 of the International Labor Organization, regarding indigenous and tribal peoples— an international legal agreement that went into effect the following year and that, under dispositions of Mexico's Federal Constitution, becomes part of domestic law, over and above federal laws— did not resolve the problem of lack of recognition for indigenous territories, even if there is special protection set up in it for lands that belong to indigenous peoples, as well as for the natural resources that are found in them.

The effects that this document could have had were nullified in practice when, in 1992, the Mexican State changed its agrarian legal framework, under the argument of giving certainty over land rights and promoting their capitalization. With these reforms, communal and *ejido* (agrarian reform) lands, which had been considered a social right, partially lost this characteristic and entered the market. As part of the certainty that the State sought to bring to the countryside, agrarian courts were created, in order to adjudicate land disputes.

One of the advantages of this new agrarian institution was that, finally, after almost a century of peasant struggle, the Mexican State set up institutions where farmers could go to have their land-related problems solved. This implied using the law and leaving behind the Mixed Agrarian Commissions and the Agrarian Consulting Agency, which were made up of politicians rather than judges, and therefore often settled disputes based on vested interests rather than recognized rights. This is not over yet, but at least when peasants have their rights violated, they have the option of asking the federal justice system for protection through the injunction process.

The central problem that indigenous groups have encountered when they go to these courts looking for justice is that in the most part, they are still applying criteria from civil justice and ignore their own normative (customary) law. The Agrarian Law, in its Article 164, only vaguely establishes that, "in trials where lands that belong to indigenous groups are involved, the courts should consider each group's customs as long as they do not infringe on the dispositions in this law, and they do not affect the rights of third parties. Likewise, when necessary, the court will ensure that the indigenous persons have translators." The first part of this legal norm includes a contradiction, based on its reference to indigenous peoples as indigenous groups; it allows for the application of indigenous customs and practices only as long as they do not conflict with the law itself, which is difficult since customs usually have a different meaning than state laws, because they reflect different realities.

However, for the subject that interests us here, the last part of the provision is key: establishing the court's obligation to ensure that indigenous persons have translators. This situation legally becomes a guarantee of due process, protected by the Federal Constitution through its Article 14 which establishes that no one can be deprived of their freedom or their properties, possessions or rights, "but through a trial presented before previously determined courts where essential procedural formalities are followed and according to laws issued before the fact." In this specific case, to have access to translators is a formality that not only achieves the goal of helping the parties communicate with each other, but also that they be able to obtain sufficient and prompt information to defend their rights, a situation that does not actually happen in practice because the courts lack translators.

Directly related with access to information, there is a document called, "Study on Transparency Issues for Other Institutions Obligated by the Federal Law for Transparency and Access to Information," which was carried out by the Center for Economic Research and Instruction (CIDE in Spanish) for the Federal Institute for Access to Information (IFAI in Spanish), which documents the strengths and weaknesses of the Higher Agrarian Court

(TSA in Spanish) in terms of information access. On one hand, it points out that the TSA, "has failed to set up specific regulations that govern information management within the organization. Likewise, this organization has not been able to fulfill its transparency obligations, which places it as the agency that has achieved the least in terms of its integration of these efforts." In spite of pointing out this deficiency, the same study states that, "the TSA has made considerable efforts to facilitate and improve access to information for the public. This has allowed it to give a certain degree of coherence to their organizational actions in relation to the scant normative framework which it has."

In other words, for the study's authors, in spite of lacking specific regulations on which to base its acts, the organization has made efforts to ease access to information for users. But, this statement should be interpreted with caution for the issue that interests us, for at least three reasons. The study refers only to the Higher Agrarian Court (TSA) and leaves out all the regular Agrarian Courts (TUA in Spanish) set up all over the Mexican Republic, which are the ones that more often deal with peasants that come to them seeking justice, since they only go to the TSA when they appeal sentences given by the TUA, and only where permitted by Agrarian Law. Similarly, access to information is restricted when the case is not resolved, and limited to what the parties involved in the process or persons authorized by them request. Finally, when it comes to indigenous peoples, they have to go to the leaders of agrarian communities that are found in their territories, and they will always get the information in Spanish, for there are no official translators that could make it available in their own languages.

However, the courts have not had the ability to resolve all agrarian conflicts, which has become a political problem derived mainly because of their incapacity to actually carry out their sentences when faced with pressure from political groups, to the point where judicial decisions, rather than general norms that apply to each case, have become the background for case-by-case negotiations, in which the winners do not always turn out to be those who are in the right, but instead are those who have more bargaining power.

This was clearest with the federal government program launched in 2004 to defuse especially explosive agrarian hotspots, officially designated as Red Alerts. Prior governments had already made efforts, though mobile brigades created to address highly conflictive land disputes, and rural agencies agreed to divide up the responsibility for resolving agrarian problems. According to the official discourse, these were conciliation processes where those involved had the last word, but the Ministry of Agrarian Reform forced the parties in most cases to reach agreements where the ones who lost were those who had the least political influence, even if they had the law on their side—just like before the program.

As in the agrarian courts, in federal government programs designed to defuse agrarian conflicts in *ejidos* and communities that belong to indigenous peoples, most of those involved have acted like passive subjects, either because they lack information or do not have enough of the right kind of information. For example, when the Ministry of Agrarian Reform was asked what the negotiation processes entailed and what peasants would win if they gave up part of their lands in dispute, they invariably received evasive answers. Government officials seem to endorse the idea that information is power and the less they inform those involved, the more control they will have over the negotiation process. But, above all, they have ignored the importance of land for indigenous peoples. This situation restricts the rights of indigenous peoples, who need quality information before they make decisions about the destiny of their cultural heritage or their rights over it.

There are many cases, but the conflicts in Chimalapas and San Pedro Yosotatu, in the state of Oaxaca, are paradigmatic. The federal government declared both conflicts to be Red Alerts, and in the latter case even gave its "word of honor" to the United Nations' Special Speaker for Human Rights and Fundamental Freedoms of Indigenous Peoples, by saying that it would be solved in the year 2005. The Santa Maria Chimalapas conflict had a 47-year history, as a result of an invasion of communal lands by members of the Cuauhtemoc settlement. On February 25, 2004, during a public ceremony, the federal government compensated the settlers and restored the invaded lands to their original owners. The problem was that those compensated did not find out the total amount of the payment, or the amount that corresponded to each settler. To this day, many are still demanding their share of the compensation.

The San Pedro Yosotatu case was similar. In 1998, the *ejido* of San Sebastian Nopalera invaded its lands, and although those affected pursued and won an agrarian lawsuit, the invaders were never evicted. The situation worsened and in November, 2004, there was a confrontation in which one person was killed (a settler) and three other people from San Pedro Yosotatu disappeared. It was not until this raw violence that the government decided to intervene and negotiations were launched. The talks were going well but not at the speed that the government intended, since each step that the community representatives took was discussed in assemblies. The federal government lost patience because of what they considered to be an unacceptable slowness and took another path: it divided the San Pedro Yosotatu *ejido* and negotiated with a faction that accepted selling the whole *ejido* to the settlers. The other faction, which was the majority, sought protection from the federal courts and managed to annul the agreement that stripped them of their property. The Ministry of Agrarian Reform, representing the federal government, drafted the agreement and presented it before the court again, which validated it without

analyzing its basis, as it had previously done. Those affected sought recourse from the federal judicial system again, in search of protection, and the case is still unresolved. In the meantime, the faction that had agreed to sell their lands entered into their own internal conflict because, as in the previous case, they lacked information about the amount of money that was given to their representatives, who have divided it up at their discretion, favoring those close to them and excluding others.

These problems would surely either not exist or would be diminished if the people involved could count on ways to access the information that they require to make decisions.