

LITIGATING INDIGENOUS RIGHTS IN MEXICO: THE JUBA WAJIÍN IN SAN MIGUEL DEL PROGRESO CASE

Litigando derechos Indígenas en México: caso de los Juba Wajiín
de San Miguel del Progreso

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Abstract

In June 2017, the Juba Wajiín were the first Mexican indigenous peoples to reverse a decision by the Ministry of Finance, which had authorized the granting of approximately 80% of their territory to mining concessions. This significant victory of the Juba Wajiín was achieved in a Mexican court. The purpose of this article is to raise awareness about the struggle of the Juba Wajiín, an indigenous Me'phaa people in the state of Guerrero, Mexico. The article will analyze how the community organized itself socially and legally to protect its rights before courts, concluding with some possible lessons of this case for other Indigenous Peoples in Mexico and Latin America.

Keywords

Mexico, Indigenous People, Juba Wajiín, Inter-American Human Rights System, Business and Human Rights.

Resumen

El objetivo de este artículo es dar a conocer la lucha de los Juba Wajiín, un pueblo indígena Me'phaa del estado de Guerrero, México. En junio de 2017, los Juba Wajiín fueron el primer pueblo indígena mexicano en revertir una decisión de la Secretaría de Hacienda y Crédito Público, que había autorizado el otorgamiento de aproximadamente el 80% de su territorio a concesiones mineras. El artículo analizará cómo la comunidad se organizó social y legalmente para proteger sus derechos, y luego concluirá sobre las posibles lecciones de este caso para México y América Latina.

Palabras clave

México, Pueblos Indígenas, Juba Wajiín, Sistema Interamericano de Derechos Humanos, Empresas y Derechos Humanos.

1. Introduction

In June 2017, the Juba Wajiín became well-known in Mexico for judicially defeating the federal government, achieving the recognition by a court of their right to territory and to free, prior, and informed consultation (Juzgado Primero de Distrito del Estado de Guerrero,

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2017). This was the first time that a federal court in Mexico² reversed an order coming from the Ministry of Finance.

The Júba Wajjiín are an Indigenous Me'phaa people, located in the community of San Miguel del Progreso, in the state of Guerrero. This community has an ancestral presence in this territory, which is rich in natural resources. Given the geography of the place, surrounded by mountains, this community has been relatively isolated, being able to preserve much of their culture, traditions, and language. The surrounding mountains are sacred to the people, and a central aspect of their spiritual rites, culture, and religion.

Mexico, like many Latin American countries, constitutionally recognizes the rights of Indigenous Peoples and boasts of the multiculturalism of its societies. However, this recognition tends to be in name only, with Indigenous Peoples often marginalized and discriminated against (UN Special Rapporteur on the Rights of Indigenous Peoples, 2013). Although, most Latin American States, including Mexico, are parties to the International Labour Organization (hereinafter, "ILO") Convention 169 concerning Indigenous and Tribal Peoples in Independent Countries and have signed the United Nations Declaration on the Rights of Indigenous Peoples (hereinafter, "UNDRIP") governments rarely conduct prior consultation processes in accordance with international human rights standards, particularly those interpreted under the American Convention on Human Rights (hereinafter, "ACHR") and established by the Inter-American Court of Human Rights (hereinafter, "IACtHR").

With several barriers to seeking recourse in the formal justice system (Antkowiak, 2014), Indigenous Peoples often resort to social protest as the main vehicle for the defence of their territory (Quintana and Flores, 2017). This, however, makes Indigenous leaders more vulnerable and exposed to attempts on their lives and integrity (Blaser, et. al., 2004).

For human rights defenders and Indigenous leaders, the state of Guerrero is one of the most dangerous places in the country. Human rights defenders and Indigenous leaders are constantly harassed, disappeared, and killed. The kidnapping and disappearance of 43 students in 2014 in Ayotzinapa (IACHR, 2018), for example, took place just 200 kilometers away. This makes the Júba Wajjiín fight for their territory even more remarkable.

The case of the Júba Wajjiín is interesting for three reasons:

- i) It was a federal court decision, later confirmed by Mexican Supreme Court of Justice, that assessed and decided to overturn a decision of the Ministry of Finance
- ii) The legal strategy of the community was a combination of showcasing their local customs and traditions as a means to "prove their Indigeneity" with the use of International Human Rights Law (hereinafter, "IHRL")
- iii) The Júba Wajjiín community combined their legal defense with a sophisticated communications strategy to raise awareness and solidarity towards their cause.

The purpose of the paper is to explore the case of the Júba Wajjiín in San Miguel del Progreso and how their socio-legal tradition and advocacy allowed them to protect their rights and their territory. Section 1 will describe the origins of the conflict between the Júba Wajjiín and the Mexican government. Section 2 will present how the customs and traditions shaped the strategy of the

² As a personal disclaimer, I must note that I became aware of the Júba Wajjiín case in July of 2016, when organizations working on Indigenous rights in Latin America contacted our Human Rights Clinic of the Human Rights Research and Education Centre at the University of Ottawa, asking us to submit an amicus brief for this case. We submitted an amicus brief in November 2016.

Júba Wajiín to protect their territory. Section 3 will focus on the decision that recognized their Indigenous rights and how their identity and traditions were protected. Section 4 will present some conclusions on what this case means for Indigenous struggles in Mexico and Latin America.

2. The Júba Wajiín: Indigenous struggles for territory and identity

An important element of the Júba Wajiín's strategy in their fight to protect their territory was not legal at all—it was to produce and disseminate a documentary film. Released in 2016 (Tlachinollan y La Sandía Digital, 2018), the purpose of this film (Coryat, 2019) was two-fold: 1) to show the impact that mining activity would likely have on their livelihoods and, 2) to demonstrate and prove their indigeneity by showing their customs and traditions.

This last purpose is of importance for those interested in the field of public interest litigation, Business and Human Rights or Indigenous rights. Much of the content of the documentary shows religious rituals, typical dances and people going about their daily lives in traditional customs.

I had the possibility to talk to one of the members of the legal team about the purpose of the video. She explained that the video spent so much time showing the indigeneity of the community because the Ministry of Finance had, in its resolution, claimed that the Júba Wajiín were not Indigenous. Therefore, before the community could argue that there had been a breach of their right to consultation or to territory, they had to prove that they were an Indigenous People covered under the scope of ILO Convention 169 and the UNDRIP.

Even though article 1 of ILO Convention 169 and UNDRIP emphasize on the respect of self-identification to be considered Indigenous, Indigenous Peoples keep facing the need to prove their Indigenous nature “beyond reasonable doubt”. In practice, this represents an undue burden on Indigenous Peoples that hardly ever have the technical or financial resources to allocate it to tools to show their distinctive nature.

Unfortunately, the denial of a group's status as an Indigenous people—by officials at different levels of government—to obviate the right to consultation is a common practice in Latin America. For example, the Xinkas Indigenous People in Guatemala had to prove their existence in a specific part of the country, despite being one of the most important and significant Indigenous groups in the country. This practice has also been used in Ecuador and Peru, where Indigenous peoples find themselves constantly under pressure to prove their indigenous identity *vis-à-vis* third parties (Velasco Cruz, 2019).

The attempt of state organisms to politically determine who is Indigenous goes against the right to self-identification and their right to an identity. In the cases where a state cannot deny the existence of an Indigenous People, the efforts shift to question the existence or presence in a specific part of the country. The case law of the IACtHR on issues regarding land titling and delimitation of Indigenous territories reflects this tension (Corte IDH, 2021). This situation benefits extractive companies that, usually with the acquiescence of Ministries of Mining or Finance, tend to use legal voids to breach IHRL obligations to promote, protect and guarantee Indigenous rights to their land and territory.

3. Júba Wajiín: Community organization to protect their territory.

The Júba Wajiín's struggle to fight against mining activity on their territory is not new. In 2011, the Federal government decided to approve two pit mining licenses to a Mexican and a Peruvian company. The area granted for mining covered approximately 80% of the group's territory. The Juba Wajiín, supported by the Tlachinollan Human Rights Center

(Tlachinollan, 2016), presented an *amparo* constitutional recourse (Brewer-Carías, 2014) before the Supreme Court of Justice of Mexico. This case was dismissed because in the middle of the legal process, both corporations declined to continue using their mining licences.

The documentary, for example, shows a Júba Wajiín leader going to the Supreme Court of Justice, accompanied with a member of Tlachinollan, proudly leaving a copy of his legal recourse written in his own language, Me'phaa (Tlachinollan y La Sandía Digital, 2018, min. 31). Although symbolic, this shows the extent of measures Indigenous Peoples must do to prove their indigeneity.

A new legal case started in November 2015 with the publication of the “Declaratoria de Libertad de Terrenos No. 02/2015” by the Ministry of Finance. This resolution declared that most of the territory of the Júba Wajiín was free and available for mining activity. This concluded in October 2019, when the Appeals Court of the city of Acapulco confirmed the rights to consultation and territory of the Júba Wajiín (Segundo Tribunal Colegiado en Materias Penal y Administrativa del Vigésimo Primer Circuito de Acapulco de Juárez, 2019).

What is interesting about the case of the Júba Wajiín is how the indigenous community organized itself in its efforts to revert the resolution by the Ministry of Finance. Although the Júba Wajiín has had a presence in their territory for centuries, if not millennia, the borders of their territory were only established in 1968. As recounted by a community member (Tlachinollan y La Sandía Digital, 2018, min. 14:49-18:10), their Indigenous leaders met with representatives of neighbouring communities. The meeting ended up being an ambush and the seven Júba Wajiín representatives were killed. As a result of this episode of violence, the surrounding communities established their borders (Tlachinollan y La Sandía Digital, 2018, min. 14:49-18:10). This historical aspect is important, as the current Júba Wajiín leaders conceived of the struggle to protect their territory against mining activity to honour and uphold the memory and legacy of the seven community leaders that were killed in 1968.

The territory of the Júba Wajiín community is propitious for agriculture due to its temperate climate and access to fresh water sources. The main agricultural products they produce are coffee and corn. According to the testimonies of the community leaders, the fertility of their lands allows them not to require the economic benefits that come from mining exploitation (Tlachinollan y La Sandía Digital, 2018, min. 17:49-19:05).

The community learned that their territory had been granted a concession for mining activity through the Internet (Tlachinollan y La Sandía Digital, 2018, min. 19:05-21:00), as no state official or representative of the mining companies had previously spoken to the community. The Júba Wajiín make all their main decisions in public assemblies, or hearings, where all members have the possibility of expressing their positions (Tlachinollan y La Sandía Digital, 2018, min. 20:15-21:00). It was in such hearings that the community began planning their strategy and exploring their options. The community was already aware of international treaties that protect indigenous peoples. In one of the first assemblies on the subject, for example, community leaders referred to ILO Convention 169 (Tlachinollan y La Sandía Digital, 2018, min. 21:00).

In these hearings, the community unanimously decided to oppose the mining project, arguing “if we don't agree, it can't be exploited; they can't force us” (Tlachinollan y La Sandía Digital, 2018, min. 21:00). This decision was aided along by the fact that community representatives had visited the neighbouring community of Carrizalillo, which had a gold mining project operated at the time by Goldcorp. According to members of that community, this project had a negative impact on the health of local inhabitants, on soil quality, as well as on their access to clean water.

If the mining project had proceeded, with or without consultation, it would have severely diminished the Juba Wajiín territory. This would have caused internal displacement within the community, as well as a potential influx of outsiders into San Miguel del Progreso looking for work. As Guerrero is one of the most dangerous parts of Mexico due to drug-trafficking, this situation could have increased the potential for conflict and violence in the area (Carlsson, 2017).

Faced with this situation, community leaders sought to consult with their elders and other representatives on how to defend their territory. The community priest recommended consulting with human rights NGO located in the same state of Guerrero, Tlachinollan, to explain to them the impact that mining could have on their territory. Representatives of the NGO attended a hearing in the community to present the alternatives that the Juba Wajiín had to the government's decision to grant mining concessions in their territory. The unanimous response of the community was to work and collaborate with the Tlachinollan NGO.

A close relationship developed between the Juba Wajiín and Tlachinollan. Being a local NGO from Guerrero, the representatives of Tlachinollan were aware of the culture, language, and social structure of the Juba Wajiín. This not only allowed them to develop a relationship of trust but also enabled them to incorporate their traditions into the cases that were going to be decided by Mexican courts.

4. The decision of the Court of Guerrero: Protection of Indigenous rights

On 28 June 2017, a federal court in the state of Guerrero decided over the constitutional recourse¹² of *amparo* No. 429/2016, annulling the Ministry of Finance's resolution that had declared approximately 83% of Juba Wajiín territory as open for mining activity (Juzgado Primero de Distrito del Estado de Guerrero, 2017). The Juba Wajiín petitioners had successfully argued that the resolution breached Articles 1, 2 and 27 of the Federal Constitution of Mexico (Juzgado Primero de Distrito del Estado de Guerrero, 2017, p. 7).

The Federal government opposed and appealed this *amparo*, arguing that the state has the constitutional prerogative to foster the exploitation of national resources. Moreover, the Ministry's attorneys argued that the state owns the natural resources and therefore, it has the authority to determine the use of public resources, particularly those located underground (Juzgado Primero de Distrito del Estado de Guerrero, 2017, p. 7). In addition, the state considered that the action taken by the plaintiffs limited the rights of third parties to request mining permits (Juzgado Primero de Distrito del Estado de Guerrero, 2017, p. 7).

The Juba Wajiín community responded to the appeal, asking the courts to protect:

- i) Their right to identify themselves as an Indigenous People.
- ii) Their right to collective land and territory.
- iii) Their spiritual connection to the land.
- iv) Their right to consultation.
- v) All these petitions were accepted by the court in Guerrero.

4.1. The right to self-recognition and self-identification

The Juba Wajiín community claimed that they have been in San Miguel del Progreso since immemorial times (Juzgado Primero de Distrito del Estado de Guerrero, 2017, 10) with territorial presence in the entire area today known as the state of Guerrero. They see and identify themselves as part of the Me'phaa Indigenous People. This right of self-identification is established in Article 1.2 of ILO Convention 169 and Article 33 of the UNDRIP.

Due to the 2011 Constitutional reform in Mexico that included a major incorporation of IHRL within the Mexican federal legal system (Ortega García, 2015), the provisions of the ACHR and the jurisprudence of the IACtHR were also directly applicable. In accordance with these international standards, Article 2 of the Mexican Constitution determines that “Consciousness of indigenous identity will be the fundamental criteria to determine to whom apply the provisions on indigenous people”.

The Constitution does not require an Indigenous People to prove their Indigenous nature if the group self-identifies as indigenous. That is the purpose of the right of self-recognition. Despite this constitutional protection, in practice it indeed became the task of the Court of Guerrero to decide whether the Júba Wajíín were an Indigenous people. The Court made a succinct analysis of the legal obligations of the state, concluding that self-recognition as Indigenous was the required criteria to determine if a person is covered under Indigenous law (Juzgado Primero de Distrito del Estado de Guerrero, 2017, p. 14). The Court used IHRL and the case law of the IACtHR, the precedents from the Supreme Court of Justice of Mexico and, most importantly, a document from the National Commission for the Development of Indigenous Peoples of Mexico, recognizing that the Júba Wajíín were an Indigenous community (Corte IDH, Sarayaku, 2012).

Regarding the case law of the IACtHR, the standards set in *Saramaka* (Corte IDH, Saramaka, 2007) and *Sarayaku* (Corte IDH, Sarayaku, 2012) were particularly important for the cause of the Júba Wajíín. These two decisions expand on the elements that a state must fulfill to carry consultation processes as well as the connection between the indigenous people and their territory, which go beyond the tenure of the land. The relationship ties to their right to culture, religion, and existence as a distinctive community as a whole. All these elements were important for the federal court to rule in favor of the Júba Wajíín.

With these elements into account, the court of Guerrero decided that self-identification of a person or a group of persons as Indigenous is sufficient to accept the application of prerogatives related to Indigenous Peoples (Juzgado Primero de Distrito del Estado de Guerrero, 2017, 14). As it can be seen, there was a significant amount of legal and historical evidence to conclude that the Me’phaa were an Indigenous People with historical presence in San Miguel del Progreso. Yet, the attorneys of the Ministry of Finance decided or selectively ignored this evidence to try to push for mining concessions because they knew the community would oppose such project.

Not only the state attorneys used false claims, but this professional negligence has never been investigated or penalized. The impunity that state officials benefit when trying to get extractive projects approved, even if it is going to affect people’s lives and livelihoods, is another reason why Indigenous Peoples keep suffering and usually distrust the presence of strangers in their territory.

4.2. The right to consultation and the right to territory of the Juba Wajíín

Once the court of Guerrero decided that the Juba Wajíín were Indigenous (Juzgado Primero de Distrito del Estado de Guerrero, 2017, p. 30), any measure adopted by the Ministry of Finance related to that land, even if it was just a declaration that the territory could be available for mining projects, breached the communal rights of the Júba Wajíín (Juzgado Primero de Distrito del Estado de Guerrero, 2017, p. 34). This includes their right to territory, culture, and religion (Juzgado Primero de Distrito del Estado de Guerrero, 2017, p. 34).

An important element of the ruling is how the court used anthropological studies as evidence to solve the case (Juzgado Primero de Distrito del Estado de Guerrero, 2017, pp.

34-35). These studies were used to show the territorial presence of the Juba Wajiín since colonial times, to explain the relationship between the community and the territory, their culture, and traditions. After an assessment of the evidence, the court accepted the anthropological studies to determine that the relationship between the Juba Wajiín and the territory is not just a matter of possession, production, or exploitation of the land. This relation is more complex as it entails a material, spiritual, traditional and a sustainability component.³ With this evidence in hand, the Court used the cases of *Saramaka* and *Sarayaku* of the IACtHR to reiterate the elements related to the right to consultation (Juzgado Primero de Distrito del Estado de Guerrero, 2017, p. 47).

Another element of the decision is the interpretation that the court makes about Article 27 of the Mexican Constitution, which refers to the sovereignty of the state over natural resources *vis-à-vis* the right to consultation. The court determined that these are not contradictory, and that the state has the obligation to respect Indigenous rights, as stated on international instruments protecting Indigenous Peoples (Juzgado Primero de Distrito del Estado de Guerrero, 2017, pp. 54-56).

The final decision of the court was to grant the *amparo* to the Juba Wajiín community, ordering the Ministry of Finance to strike down any legal effect of the 2015 resolution related to their land (Juzgado Primero de Distrito del Estado de Guerrero, 2017, p. 62). In addition, it ordered that before the Ministry adopts any measure that could affect the Juba Wajiín, a consultation must take place (Juzgado Primero de Distrito del Estado de Guerrero, 2017, p. 62). This decision was confirmed by an appeals court in Acapulco in October 2019 (Segundo Tribunal Colegiado en Materias Penal y Administrativa del Vigésimo Primer Circuito de Acapulco de Juárez, 2019).

5. Conclusions

The case of the Juba Wajiín is a lesson of resilience and community mobilization. The community was forced to prove their indigeneity, even though the Constitution or IHRL did not require such measure. And therein lies one of the case's greatest lessons: IHRL and Constitutions must find a way to enable access to justice earlier in the process of legal claims. A case can take years to reach a Supreme Court, or more than a decade to reach the IACtHR. We must reflect on how to make our expertise available for community based organizations. Indigenous Peoples must be allowed and empowered to determine how to defend their rights, according to their culture and traditions. Legal advice should be an accompaniment to defend their interests, but it is important for their cause be fully endorsed by the community.

In December of 2019, one of the members of the Tlachinollan Board of Directors was kidnapped and disappeared. To this date, nobody has been prosecuted for this crime and most likely, nobody ever will. In February 2020, a member of this organization had been beaten by security officers for protesting alongside Indigenous communities and the parents of the Ayotzinapa students in the state of Chiapas. These are the complex and harsh conditions that human rights defenders and Indigenous leaders in Mexico face daily. The members of the Juba Wajiín, despite this significant legal victory, live also in constant danger and fear. It is our academic responsibility to learn from their experience and to try to replicate the strategies of the Juba Wajiín to other places in Latin America.

³The original text in Spanish reads: "La relación con sus tierras no es meramente una cuestión de posesión, producción y explotación, al representar más que un elemento material, constituido por un elemento espiritual, tradicional, incluso de sostenibilidad".

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