Limiting Indigenous Autonomy in Chiapas, Mexico: The State Government’s Use of Human Rights

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“Human Rights should not be another form of colonialism.”
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I. INTRODUCTION

This headline in the 23 November 1999 edition of the Mexican newspaper La Jornada quoted Mary Robinson, United Nations High Commissioner for Human Rights.¹ She was observing that human rights can no longer “be considered an imposition of Western values,” because many national
governments, such as that of Indonesia, have established human rights commissions of their own. Now that international commissions can work cooperatively with national and local ones, they can avoid the appearance of imposing Western values on unwilling peoples. In this paper, we draw on Robinson’s comments to frame our discussion of the current situation in the state of Chiapas, in southern Mexico, because we believe that her words both name a problem we see and suggest a possible solution. In Chiapas, where indigenous groups are trying to assert a measure of political autonomy, the state government appears to be using human rights as “another form of colonialism.” But if indigenous groups in Chiapas obtain the political autonomy they need to develop their own understandings of human rights, the optimistic vision articulated by Mary Robinson, of cooperative efforts among groups with different histories and values, may yet prevail.

The state government of Chiapas appears “colonialist,” not just in imposing a literal interpretation of human rights documents on indigenous peoples, but, more importantly, in using the discourse of human rights to justify intervening in the affairs of indigenous communities whose leaders happen to displease government officials. Just as colonial authorities in the past justified to intervening in the affairs of colonized peoples by claiming to eradicate practices that were “repugnant” to “civilized” sensibilities, so government officials in Chiapas are justifying their right to arrest indigenous leaders who (the government claims) have violated the human and constitutional rights of community members. In this paper, we describe two recent legal cases from Chiapas to illustrate how the Universal Declaration of Human Rights (UDHR), which was designed to protect individuals from arbitrary punishments by their governments, can have the opposite effect of rendering indigenous leaders vulnerable to state sanctions.

Because we focus on how government officials in Chiapas are using the discourse of human rights, we will not address the question most often asked of anthropologists, which is whether the idea of human rights is universal. Instead, we follow Richard Wilson in focusing on how rights

2. For example, Keebet von Benda-Beckman states:

   Most colonial powers had a repugnance clause stating the limits of what they would tolerate from the subjugated people, who nevertheless were granted a fair amount of self-government. This repugnance clause turned out to be a very convenient tool to interfere with the internal affairs whenever the colonial governments saw fit.

   Western Law and Legal Perceptions in the Third World, HUMAN RIGHTS IN A PLURALIST WORLD: INDIVIDUALS AND COLLECTIVITIES 235 (Jane Berting et al. eds., 1990).

3. If forced to answer the question of universality, we would reply that the idea of human rights originated in the West. But because it has now spread around the globe, and is being invoked by indigenous peoples to claim rights previously denied them, the question of universality has become irrelevant.
discourses are understood and used by people living in the world today: The intellectual efforts of those seeking to develop a framework for understanding the social life of rights would be better directed not towards foreclosing their ontological status, but instead by exploring their meaning and use. What is needed are more detailed studies of human rights according to the actions and intentions of social actors, within wider historical constraints of institutionalized power.4

We will also avoid commenting on the supposed incompatibility between individual and collective rights. As anthropologists who sympathize with indigenous demands for autonomy, we are often asked how we can support the collective right of indigenous peoples to practice their customs when some customs violate the rights of individuals. Once again, we follow Wilson in focusing on “the actions and intentions of social actors.”5 Just as context determines whether or not the enforcement of human rights constitutes another form of colonialism, so context determines whether an assertion of collective indigenous rights should be treated as a violation of individual human rights. To supplement a theory of rights, we need a theory of contexts, as Boaventura De Souza Santos observes when he argues that we who care about social justice “must develop cross-cultural procedural criteria to distinguish progressive politics from regressive politics, empowerment from disempowerment, (and) emancipation from regulation.”6

We also follow theorists who observe that the apparent conflict between collective and individual rights is inherent in the discourse of rights itself as it developed in the West after the First World War. When international negotiators drafted the peace treaties that broke up multiethnic empires, they bowed to nationalist demands for recognizing “peoples’” right to “self-determination,” and imagined a legally supreme “international community” to oversee and protect the rights of cultural, racial, and religious minorities.7 After the Second World War, the concept of collective minority rights fell into disfavor. But the concept of individual human rights that replaced it kept both the nationalist ideal of “peoples’” right to “self-determination” and the idea of an “international community” charged with

5. Id. at 3–4.
7. See, e.g., Nathaniel Berman, But the Alternative is Despair: European Nationalism and the Modernist Renewal of International Law, 106 (8) HARV. L. REV. 1792 (1993); Jelena Pejic, Minority Rights in International Law, 19 HUM. RTS. Q. 666 (1997).
ensuring that nation-states respect the rights of their inhabitants.\textsuperscript{8} The modern discourse of human rights, which supposedly limits rights to individuals, thus retains a concept of “peoples” which, despite efforts by nation-states to limit its use, is available for adoption by groups that hope to claim a collective right to “self-determination.” The post Second World War discourse of human rights also retains the idea of an “international community” to which would-be “peoples” may appeal for help against the nation-states that they claim are oppressing them.\textsuperscript{9} In recent decades, indigenous groups have been both active and successful at lobbying the international community for recognition of their claim to be “peoples” with a right to practice customs that differ from those of majorities in states where they live.\textsuperscript{10}

Finally, as should be obvious, we treat the discourse of human rights as a language of argument that establishes the terms in which individuals and groups may make conflicting claims.\textsuperscript{11} The discourse provides at least three “protagonist positions”\textsuperscript{12} for claiming rights: that of “persons” whose individual human rights are being violated, that of a “people” whose collective right to self-determination is being denied by a “colonialist” state, and that of the supposedly neutral “international community,” which decides whether the values of “civilization” are being upheld. The discourse of human rights also establishes at least three stigmatized protagonist positions to which individuals or groups may consign their opponents. These consist of states that can be accused of violating the human rights of individuals or of acting like colonial powers in thwarting the desires of subject peoples for self-determination; of sub-state groups that states can accuse of violating the human rights of individuals or of subverting world order by trying to dismember the state; and of supra-state international


\textsuperscript{12} The term “protagonist position” is borrowed from Berman. See supra note 8.
organizations or foreign powers that states can accuse of trying to interfere in their “internal” affairs.\textsuperscript{13}

When Robinson observed that human rights should not be another form of colonialism, she was not thinking about state efforts to limit the autonomy of indigenous groups within their borders. Rather, she was talking about Western impositions on former overseas colonies that have since become states. Nevertheless, we feel that her warning applies more widely, because there is an eerie similarity between the terms that colonial powers imposed on conquered peoples and the modern formulations limiting the right of indigenous peoples to practice their customs. For example, Article 8 of the 1989 International Labor Organization Convention Concerning Indigenous and Tribal Peoples in Independent Countries (ILO Convention 169) states that “these peoples shall have the right to retain their own customs and institutions, where these are not incompatible with fundamental rights defined by the national legal system and with internationally recognized human rights.”\textsuperscript{14} Roberto Albores Guillen, the interim state governor of Chiapas, adopted similar wording for his 1999 law on indigenous rights and culture. Article 10, which opens the section on the administration of justice, states that: “the uses, customs, and ancestral traditions of indigenous communities constitute the fundamental basis for the resolution of their controversies. Such uses, customs and tradition . . . will be applied within the limits of their habitat, as long as they do not constitute violations of human rights.”\textsuperscript{15} And in Guatemala, the 1995 Agreement on the Rights and Identity of Indigenous Peoples “explicitly commits the state to respect (the traditional norms of indigenous peoples) as long as they do not violate fundamental human rights or national laws.”\textsuperscript{16} These formulations, all of

\begin{flushleft}
\textsuperscript{13} When the Mexican government refused to ratify the accords on “indigenous rights and culture” that its negotiators reached with representatives of the Zapatista Army of National Liberation at San Andres in February 1996, apologists for the state tried to assign their opponents to the stigmatized category of those who violate individual human rights. They argued that granting autonomy to indigenous communities would not only “dismember” Mexico, but also “cause real harm to individual rights” because indigenous majorities are “unused to tolerating dissident opinions.” See Enrique Krauze, Chiapas: The Indians’ Prophet, N.Y. REV. OF BOOKS 65 (16 Dec. 1999).
\textsuperscript{15} Translated by one author from March 1999 pamphlet prepared by the government of the State of Chiapas titled, Iniciativas de reforma constitucional y de ley de derechos y cultura indigenas del estado de Chiapas (on file with author).
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which were written in the last two decades, echo earlier colonial documents, such as a 1580 ruling by the Spanish crown that allowed indigenous groups in the Americas to govern themselves according to their “usos y costumbres” (roughly, practices and customs) as long as these did not violate the “precepts of our sacred religion” or laws promulgated by the crown. Today, “religious precepts” have been replaced by “internationally recognized human rights” and “laws promulgated by the crown” have become “national laws,” but the affinity is obvious. Moreover, the authority to decide what constitutes a violation of human and constitutional rights—and therefore the right to punish violators—remains firmly in the hands of officials who claim to represent Western civilization. Although, we focus on the potential of human rights to become another form of colonialism, we also want to affirm our commitment to international human rights standards. Not only do we recognize that claims for indigenous rights are grounded in the prior discourse of human rights, but we also know that appeals to international human rights have played a vital role in restraining government repression in Chiapas. Moreover, we are all too aware of instances in which indigenous authorities in Chiapas have violated the human rights of individuals, and then claimed to be exercising their indigenous right to practice their customs. Our point, therefore, is not that indigenous peoples should be allowed to practice their customs without regard for the human and constitutional rights of individuals. We feel strongly that indigenous peoples should respect human and constitutional rights. But given that the equality of all individuals envisioned by human rights law has not been realized (and can probably never be realized), we feel it is important to confront the reality of power inequalities. It is because states enjoy far more power than indigenous peoples, and because some individuals within indigenous communities wield far more power than others, that we feel indigenous peoples must be given the space and opportunity to negotiate among themselves a concept of human rights that fits their cultural and social context. Only when the protection of human rights becomes a project in which many voices participate will human rights cease to be an imposition of Western values and become the cooperative venture suggested by Robinson’s statement.

18. See, e.g., Wilson, supra note 4; Williams, supra note 9.
II. AUTONOMY AND THE DISCOURSE OF “USOS Y COSTUMBRES” IN CHIAPAS

Although Mexico has one of the largest indigenous populations in the Americas, a national ideology of mestizaje, or racial mixing, has long held that Indians are part of Mexico’s past. This discursive erasure of living indigenous peoples who maintain distinctive languages, cultures, and communities has long underpinned a system of political exclusion and economic exploitation. So total was this political exclusion that in the more than seven decades from the writing of the 1917 Constitution to 1992, the word “indigenous” was never mentioned, either in the Constitution itself or in constitutional jurisprudence. Not until January 1992, two years after Mexico ratified ILO Convention 169, was the Mexican Constitution reformed to recognize the existence of cultural minorities. But even then, the constitutional reform offered little basis for the realization of indigenous rights. To this day, legislation to implement them has yet to be developed. Moreover, the 1992 constitutional reform focused only on the cultural rights of indigenous peoples, omitting reference to political rights, self-determination, or autonomy.

Nevertheless, indigenous groups in Mexico have long enjoyed various levels of de facto autonomy. Municipal governments in areas where most people are indigenous have been able to practice local forms of social organization and conflict management. An example we will discuss is the
case in Zinacantán, a Tzotzil Maya municipality. Although many local practices in Zinacantán reflect colonial and post-colonial impositions, the Zinacantecos have modified imposed forms to fit their needs and reflect their values. For example, many judges serve in the municipal court, rather than the single judge required by law. And people have enriched the court’s mandate to reconcile disputants through informal, oral procedures by incorporating local beliefs about the need for disputants to settle their conflicts if they are to avoid angering the ancestor gods, who will send sickness as punishment.

Tierra y Libertad, the other indigenous community we discuss in this paper, is one of thirty-two new “municipalities in rebellion” established after the Zapatista uprising of 1994 in a territory where there is strong support for the rebel group. Although the area was sparsely populated until the 1950s, the mostly indigenous migrants who colonized it brought familiar forms of social organization with them. They adapted the administrative structure of the “ejido,” the organizational unit established by Mexico’s now defunct land reform program, to manage local affairs, and they established regional associations to coordinate the activities of isolated farming communities. The flexibility and strength of these structures allowed local communities to integrate new waves of immigrants, including thousands of Guatemalan refugees who arrived in the 1980s, and to enjoy considerable autonomy in handling local affairs in a region where the Mexican state had little presence. The governing body of Tierra y Libertad—the Autonomous Municipal Council—emerged from the social network established by overarching organizations. Officials of the autonomous municipality base

25. A municipality in Chiapas is roughly comparable to a county in the United States.
26. Many customs and social institutions now regarded as “indigenous” are legacies of colonial policies. See, e.g., Roger Bartra, Violencias Indígenas, 130 LA JORNADA SEMANAL, 8–9 (1997); Juan Pedro Viquera, Los Peligros del Chiapas Imaginario, 1 LETRAS LIBRES (1999).
27. In Mexico, the task of enforcing the law through the use of formal written procedures is reserved for state courts staffed by trained judges. Because colonial and later state administrations imagined themselves as governing through “positive law,” the “customary law” they imposed on indigenous communities tends to reflect the devalued side of Western conceptual dichotomies. If the state is defined as governed by “laws” administered through “formal, written” procedures, then indigenous communities must be regulated by “customs” maintained through “informal oral” ones. And if state judicial officials “enforce the law” by “punishing offenders,” then indigenous judges are assigned the task of “settling conflicts” by “reconciling disputants.”
their authority to handle local disputes—such as those involving alcohol sale and use, theft, property damage, illegal wood cutting, and domestic violence—on the claim that the people of the region have asked them to do so. Local people are reluctant to take their problems to official courts for several reasons, among them is that official courts are often inaccessible, either because they are too far away or are staffed by political opponents. Indigenous people also complain that distant officials are unable to understand local problems and indigenous languages, that court processes are lengthy, and that Mestizo officials often mistreat indigenous litigants.32

The two communities of Zinacantán and Tierra y Libertad differ in significant ways. They have different histories: Zinacantán dates from Pre-Columbian times whereas Tierra y Libertad is a new administrative unit. And leaders in the two communities belong to opposed—indeed warring—political factions. Those in Zinacantán are loyal to Mexico’s national ruling party, the Partido Revolucionario Institucional (PRI), whereas leaders in Tierra y Libertad are allied with the Zapatista Army of National Liberation (EZLN), which is fighting the Mexican government. Despite these important differences, however, leaders in both municipalities are invoking the discourse of indigenous rights to assert control over the administration of justice in their communities.

When indigenous leaders assert their right to administer justice in accordance with indigenous usos y costumbres, they are usually referring to three related issues. First, they would like indigenous courts to be able to settle conflicts in accord with local norms, even if these differ from or are in contradiction with state laws. For example, the court in Zinacantán regularly handles accusations of witchcraft, requiring those who have performed actions that constitute witchcraft—such as praying clandestinely in caves—to conduct (and to pay for) ceremonies to remove their curses.33 The Zinacantecos also treat adultery as a crime, requiring proven adulterers to perform a couple of weeks of shameful community service, sweeping the streets during the day and spending nights in jail.

Second, those who argue for indigenous rights commonly demand that indigenous peoples should be able to select local authorities according to their own customs rather than having to comply with state laws governing the election and appointment of officials. In the state of Oaxaca, recent

32. Declaration of Aureliano Lopez Ruiz, President of the autonomous council, Off. Rec., file #132.
33. In the Chiapas highlands, witchcraft accusations have led to killings. See, e.g., June Nash, Death as a Way of Life: The Increasing Resort to Homicide in a Maya Indian Community, 69 AMERICAN ANTHROPOLOGIST 455 (1967). It is not clear, however, whether prohibiting indigenous courts from handling witchcraft cases would increase or decrease the rate of witch-murders.
constitutional and legal reforms have granted this right to indigenous communities, but state officials in Chiapas are resisting this demand.\textsuperscript{34} Because the state government of Chiapas seems committed to recognizing only those authorities elected or appointed by officially sanctioned means, many of the authorities recognized and respected by indigenous communities are formally illegal or illegitimate.\textsuperscript{35} This problem is particularly acute for authorities in Zapatista municipalities in rebellion, such as Tierra y Libertad, but the problem arises even in indigenous communities such as Zinacantán, whose leaders are allied with the ruling party. In most indigenous communities, “authorities,” whatever their formal designation (municipal councilors, members of school, health, or land use committees, or simply respected elders), are expected to help quarrelling kin and neighbors settle their disputes. But when such authorities act as mediators, they become liable to accusations by state judicial officials of having “usurped the functions” of legally appointed judges.

The third issue raised by those who support the right of indigenous peoples to practice their \textit{usos y costumbres} concerns the use and nature of sanctions. This is the most hotly contested issue and the one most associated with human rights violations. Article 12 of the new indigenous law proposed by the interim governor of Chiapas reads:

\begin{quote}
In penal matters, indigenous judges of peace and conciliation may apply sanctions in accord with the uses, customs, and traditions of the indigenous communities where the judgement occurs, as long as they do not violate fundamental rights enshrined in the Constitution of the Republic and are not in conflict with human rights.\textsuperscript{36}
\end{quote}

When government officials read this article to indigenous leaders gathered in Zinacantán, the Zinacanteco judges protested that the limiting clause would prevent them from imposing customary sanctions, particularly their favorite ones of community service and jail time.\textsuperscript{37} As one judge

\textsuperscript{34} See, e.g., Ley de Derechos de los Pueblos y Comunidades Indígenas del Estado de Oaxaca, DERECHOAS DE LOS PUEBLOS INDÍGENAS: LEGISLATION EN AMÉRICA LATINA 522–40 (Gisela González Guerra ed., 1999).

\textsuperscript{35} One hamlet of Zinacantan, for example, has two agentes municipales, one belonging to the PRI and therefore recognized by the state government, and another belonging to the PRD, who lacks official recognition but who nevertheless serves as a rural judge for disputants belonging to his political party. See George A. Collier, \textit{The New Politics of Exclusion: Antecedents to the Rebellion in Mexico}, 19 DIALECTICAL ANTHRO. 1 (1994); see also the epilogue in George A. Collier, \textit{Basta: Land and the Zapatista Rebellion in Chiapas} (rev. ed. 1999). On Zapatista autonomous authorities, see Adriana López Monjardin and Dulce María Rebolledo Millán, \textit{La Resistencia en los Municipios Zapatistas}, PODER LOCAL, DERECHOS INDÍGENAS Y MUNICIPIOS 63–74 (Cuadernos Agrarios 16, 1998).

\textsuperscript{36} Translation by one author from a government pamphlet. See \textit{supra} note 15.

\textsuperscript{37} The most serious sanction allowed to indigenous courts by the Mexican Constitution would be the minor one of keeping someone in jail for thirty-six hours. See \textit{infra} note 56.
observed, “when we put someone in jail for fifteen days, ‘human rights’ comes along and frees him.”

State officials defending the governor’s law responded that the limiting clause referred only to such punishments as beating prisoners, torturing them, stoning them, tying them to trees, or hanging them. The Zinacanteco judges contemptuously replied that they did not condone any of the above mentioned punishments. Because indigenous leaders had been invited to suggest modifications to the proposed law, they suggested substituting the word “will” for “may” in the section about applying sanctions, and eliminating the limiting clause. Such wording had no chance of being passed by the state legislature of Chiapas. Officials of the state government, when asked why indigenous courts are allowed to impose only minor sanctions, usually respond that indigenous judges are not supposed to punish people. They are supposed to reconcile disputants.

38. In Chiapas, people often use the names of organizations to refer to people from those groups—so, “human rights” in the judge’s statement refers to a human rights worker. This quotation is a loose translation of what the Zinacanteco judge said, as drawn from Jane Collier’s field notes. During the meeting, which was held on 11 May 1999, she jotted handwritten notes in a small notebook. Over the next two days, she wrote a more detailed description of the meeting on her computer. She did not try to tape record the meeting, so the quotation reflects only what she was able to record in her notebook. The field note record from which the quotation is taken actually reads:

The first juez of Zinacantan, who was sitting near me, then stated in Spanish that ‘para quedar bien, we should modify the law. Because we (indigenous judges) do act against derechos humanos. There is a conflict. If we impose one or two weeks of trabajo comunitario on a wrongdoer, derechos humanos comes to save him, and tells us that we cannot do it.’

39. Jane Collier’s field notes of 11 May 1999 record that a Zinacanteco judge told the government officials that “If we are to respect our costumbres, then derechos humanos needs to respect our costumbres too. We don’t use torture or golpes. But we do tie people up when we are moving a prisoner. So derechos humanos needs to respect us.” As far as Jane Collier knows, the Zinacanteco officials are correct when they report that they do not beat prisoners, torture them, stone them, tie them to trees, or hang them. She has heard of recent instances in which mobs have stoned suspected thieves or threatened to beat suspected witches. In these cases, however, the Zinacanteco authorities have intervened to jail the suspects and thus protect them from mob violence. In the past, Zinacanteco political leaders did resort to tactics such as hanging suspects from trees to encourage them to confess, see supra note 38. But Jane Collier heard no mention of such practices during her recent research in Zinacantán.

40. State officials also tend to observe that indigenous judges impose restitutive sanctions designed to reconcile disputants rather than punitive sanctions designed to punish wrongdoers. This is true, at least for Zinacantán, where judges rarely punish people but often require those who have harmed others to pay for repairing the damage. But if Zinacanteco judges rarely impose punitive sanctions, they often hold people in jail until they agree to pay for repairing the damage they caused and/or their relatives arrive with the cash. The author has never heard of such jail terms as lasting longer than a week or two.
III. HUMAN RIGHTS ON POLITICAL TERRAIN

In Chiapas, the discourse of human rights has been, and continues to be, mobilized primarily by non-state organizations seeking to obtain equal treatment for oppressed peoples and to restrain abuses by government security forces. The Zapatista rebels and their sympathizers probably owe their continued survival to the willingness and ability of independent human rights organizations to publicize violations, which has made the Mexican government reluctant to use military force against dissidents. Given the crucial role that human rights discourse is playing in limiting state power in Chiapas, it is not surprising that both the federal and state governments are increasingly trying to adopt—or co-opt—the discourse. Particularly since 1996, “defending human rights” has become a major concern of federal and state officials. Both the National Human Rights Commission (CNDH) and the State Human Rights Commission (CEDH) have established branch offices in the city of San Cristóbal de Las Casas.

Federal and state officials, however, appear less concerned with investigating and prosecuting complaints of human rights violations by government security forces and their paramilitary allies (although they have made recommendations in such matters), than with limiting the powers of indigenous authorities. In recent years, both the CNDH and the CEDH have devoted considerable time and effort to educating indigenous authorities about the constitutional and human rights of Mexicans.41 Although teaching indigenous officials to respect human rights appears to be a worthy project, it marks, in fact, a continuation of the now discredited government policy known as “indigenismo,” whose aim was to “civilize” Mexico’s Indians by erasing cultural differences.42 Since at least the 1960s, the state government of Chiapas has been trying to teach indigenous officials to obey and enforce state and federal laws, particularly in situations where state laws conflict with customary norms. The current effort to teach indigenous authorities about human and constitutional rights continues this educational tradition. Although it is possible to imagine ways of teaching about human and constitutional rights that would respect the right of indigenous peoples to practice their customs, this is not happening in Chiapas today. Officials of the CEDH, for example, appear to regard “equality before the law” as the

41. An official from the CEDH arrived one day at the courthouse in Zinacantán with a handful of educational pamphlets for the indigenous authorities. The court secretary filed the unread pamphlets in a desk drawer.

42. See, e.g., CARLOS GARCÍA & ANDRES MEDINA, LA QUERA DE LA ANTROPOLOGIA SOCIAL EN MEXICO (1987); HÉCTOR DÍAZ POLANCO, LA CUERTE ETNICO-NACIONAL (1985); see also supra note 16.
fundamental right of all Mexicans. As a result, they seem committed to erasing any differences that might exist between justice as it is enforced in indigenous communities and as state and federal legal codes define it.

In the current political climate, government officials cannot openly acknowledge a desire to eradicate cultural differences. Not only have assimilationist policies fallen into disrepute internationally, but Mexico has amended its national constitution to include an article recognizing the cultural rights of indigenous peoples. As a result, the discourse about cultural difference has shifted. No longer do government officials advocate “civilizing” Mexico’s Indians. Instead, official rhetoric now endorses the right of indigenous peoples to practice their usos y costumbres. But this right is severely limited. As the interim governor of Chiapas recently declared, the “rule of law” must be re-established—forcibly if necessary—in situations where indigenous leaders advocating “a highly primitive approach to usos y costumbres,” trample “on individual rights” and violate “the elemental laws and norms of human coexistence.”

The Mexican government has long claimed the right to distinguish between “good” indigenous customs that should be preserved and “primitive” or “bad” ones that must be eradicated. Over time, however, the criteria have shifted. In 1978, a government official speaking in Zinacantán defined “good” customs as those that help people live together in peace, and “bad” ones as those that provoke conflict. “For example,” he said, “it is a good custom to pray before a cross; it is a bad custom to pray in a cave (i.e., practice witchcraft).” Today, state officials are more likely to distinguish

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43. When Jane Collier interviewed an official from CEDH in San Cristobal de Las Casas in spring 1999, he stated that, in his view, “equality before the law” is the most important right of Mexicans.

44. Those who would have indigenous peoples comply with state and federal laws talk only about such laws as written, not as practiced. While the concept of equality before the law exists in the Mexican Constitution, it has been documented that the law is unevenly applied, to the disadvantage of indigenous people, women, and political opponents of the ruling party. See, e.g., ELENA AZAOLA, EL DELITO DE SER MUJER (1996); HUMAN RIGHTS WATCH, IMPLAUSIBLE DENIABILITY (1997); see also infra note 67.


47. This is one author’s translation of the official’s sermon, as tape recorded by John Haviland and presented in transcribed form by him. See John B. Haviland, La invención de la “costumbre”: el diálogo entre el derecho zinacanteco y el ladino durante seis
between customs that do and do not violate the human and constitutional rights of individuals. Unfortunately, but not surprisingly, the indigenous customs that are held to “violate” human and constitutional rights are largely practices that the state has long been trying to eradicate and that indigenous peoples are fighting to have recognized as legitimate—such as indigenous norms that differ from state laws, and methods for selecting local authorities that are not recognized by the government.

The UDHR turns out to provide the state government of Chiapas with an effective weapon for combating indigenous aspirations to control the administration of justice in their communities, particularly in the three areas that most concern them—norms, authorities, and sanctions. Article 7, which states that “all are equal before the law and are entitled without any discrimination to equal protection of the law,” is being interpreted by government officials to justify denying indigenous authorities the right to enforce customary norms that conflict with state and national laws. Similarly, Articles 10 and 11, which require fair and public hearings, are being used by government officials to justify arresting indigenous authorities who “exceed” their legal powers or who were not elected or appointed according to state and national laws. Similarly, Article 9, which offers protection against “arbitrary arrest, detention or exile,” provides state officials with a potent weapon for use against indigenous judges who exceed the overnight jail stays and miniscule fines permitted by law, as well as against indigenous authorities in “municipalities in rebellion,” whose arrests are “arbitrary” by definition.

IV. WHEN RIGHTS CLASH: NOTES FROM CHIAPAS

The two cases we describe in the following sections reflect different experiences of indigenous autonomy and relationships with the state, but both reveal how a literal interpretation of international human rights documents can render indigenous authorities vulnerable to state sanctions. The cases also offer an opportunity to speculate on whether and how indigenous communities might participate in national and international discussions on the proper role of human rights in a multicultural world, although we reserve that discussion for the conclusion.

décadas (1998) (unpublished manuscript, on file with Jane Collier). When the official distinguished between acts that promote community peace and those that cause conflict, he was using the logic most often invoked by the Zinacanteco court to distinguish between good and bad acts.
In December 1998, indigenous judges in the municipal court of Zinacantán settled a case involving an accusation that in neighboring communities had led to mob violence and to the murder of those accused. The case involved seven young men who held salaried jobs in highway construction, the men were accused of forming a gang in order to assault other Zinacantecos for the purpose of procuring bodies to serve as human sacrifices in the construction of highway bridges. There is a widespread belief in the Maya area—and probably beyond—that major constructions, such as highway bridges, need to have bodies buried in the cement in order to withstand heavy traffic, earthquakes, and floods. Because many highway bridges in Chiapas had been washed out in the autumn rains, which had been particularly heavy that year, Zinacantecos had good reason to fear that roving bands of cortacabezas (Spanish “decapitators”) were wandering the countryside in search of bodies. Local rumor reported that highway engineers were paying 15,000 pesos (approximately $1,500 US) for a dead or sick person’s body and 30,000 pesos ($3,000 US) for a live and healthy one. As one person remarked during the trial, a cortacabeza who sold only one body could earn enough to buy a used car.

The accusers in the trial were local authorities from three rural hamlets whose inhabitants felt threatened. The authorities had arrested the accused young men and tried to settle the case themselves. But because the alleged cortacabezas refused to admit guilt and beg pardon, the hamlet authorities brought them to the municipal court. On the day of the trial, the accusers and family members of the accused filled the courtroom. The seven accused, who had spent the night in the nearby jail, were brought in one by one to be questioned by the judges. The first prisoner had allegedly been caught in the act of assaulting a witness. He denied every accusation, however, saying that the witness must be mistaken in his identification. Each of the other six prisoners also denied the accusations. Even though the judges lied to the prisoners, telling each one that the others had confessed, none of them admitted guilt.

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48. The description of this case is taken from the field notes of the author who observed it.
49. See, e.g., Graciela Freyermuth, Violencia Y Étnia En Chenalho: Formas Comunitarias De Resolución De Conflictos 6–7 (1999) (unpublished manuscript, on file with Jane Collier); See also Witold R. Jacobzynski, Sacrificio, Capital, Ecología Y Violencia: Temas Simbólicos De La Narrativa Sobre Cortacabezas En Los Altos De Chiapas (1999) (unpublished manuscript, on file with Jane Collier); see also infra note 66.
50. Because the trial was held in Tzotzil, the indigenous Maya language, no one used the Spanish term “cortacabezas.” Instead, the young men were accused of being “jmak’beetik” (“road closers” in Tzotzil). The term refers to people who “close” or “cut” roads or paths in order to assault and/or rob those who pass by. Cortacabezas are always jmak’beetik, but jmak’beetik are not always cortacabezas.
After all the prisoners had been interviewed and removed, a process that took several hours, the judges conferred with the hamlet authorities. None of the Zinacantecos present seemed to believe that the accused men were innocent. But they were not sure what action to take, given that none of the prisoners had confessed and that the evidence against them was weak or non-existent. The witness, for example, could have been mistaken in his identification because his attacker’s face had been partially covered. And the only evidence against the other six prisoners was that they were friends who often drank together on weekends. Nevertheless, the hamlet authorities argued that something had to be done. People in their communities were terrified. They were afraid to leave their homes. Finally, the most vocal accuser announced that the people of his hamlet were prepared to forgive the accused “this time.” But he asked that the prisoners be punished by having to spend another night in jail. He also demanded that they pay the transportation costs of all the people who had come from the hamlets to attend the trial, a not inconsiderable sum, since it amounted to about thirteen days wages per prisoner. After some discussion, all those who were present—which did not include the prisoners but did include their relatives—agreed to this solution. The prisoners were then brought in one by one and informed of the group’s decision. Because the court’s secretary-typist had left before the long trial concluded, the participants met the next day to prepare the “acta de acuerdo” (statement of agreement) that recorded, in Spanish, the terms of the settlement. As the judges briefly outlined the “facts” of the case, one of them mentioned that none of the prisoners had confessed. Another judge broke in to say that their failure to confess “made no difference.” While the secretary typed, the judges motioned their assistants to open the bottles of soft drinks that the hamlet authorities had presented. In Zinacantan, it is customary for someone who asks the judges to hear a dispute to give them soft drinks or liquor. The cost of the gift reflects the seriousness of the matter. For this trial, an entire case of soft drinks had been presented. After the bottles were opened, they were passed around among the judges and the audience, which included the prisoners. Everyone drank to signify agreement. According to Zinacanteco beliefs, drinking “calms the anger” in a person’s heart, thereby preventing that anger from crying out spontaneously to the ancestor gods for vengeance.

51. Each of the accused young men was required to pay 385 pesos—about $38.50 US in an economy where the wage of an unskilled worker is 30 pesos (about $3.00 US) a day.
52. Although the judges spoke to the secretary in Tzotzil, the judge used Spanish for this phrase: “pues da lo mismo.”
53. In Zinacantan, people who refuse to drink at the end of a court case are suspected of being witches. After all, people who refuse to “calm” the anger in their hearts must want their opponents—or a member of an opponent’s family—to fall sick and die.
The written agreement followed the format common to Zinacanteco *actas.* After listing the date, the place, the names of the judges and those of the parties, the *acta* stated that representatives from the three hamlets (on one side) and the seven accused young men (on the other) had come together “for the sole purpose of reaching a harmonious agreement.”\(^{54}\) It went on to declare that the seven young men are “presumed responsible” for “road assaults.” The *acta* reported the witness’s account of being assaulted, and of being told by his attacker that “150 bodies are needed for building a bridge.” The factual part of the document ended with the statement that the attacker “just likes to talk because it makes him feel important.” The *acta* then listed four “agreements.” First, people from the three hamlets agree to pardon the accused this time. Second, the accused will be punished if they continue to frighten people with their talk, and they will be presumed responsible if anyone from the three hamlets disappears. Third, they will be held responsible and punished if the road linking the hamlets is blocked by stones. Fourth, the seven accused young men agree to pay the transportation costs of the hamlet authorities.

It would be easy to argue that the human and constitutional rights of the seven accused young men were violated by the proceedings in Zinacantán. They were tried for a crime that does not appear in any Mexican penal code. They were presumed guilty despite the lack of credible evidence against them. And they were punished for their “crime.” They were required to pay the transportation costs of everyone who attended the trial and they had to spend another cold night in jail. Finally, they were held in jail considerably longer than the thirty-six hours allowed by law.\(^{55}\) Although they spent only two nights in the municipal jail, they had probably spent at least a week in a hamlet jail before being taken to the municipal seat.

It can also be argued, however, that it is precisely because their human and constitutional rights were violated that these seven young men are alive today and living at home with their families. Two years earlier, in October 1996, an angry mob in a nearby indigenous community murdered seven

\(^{54}\) The Spanish words were something like “con el único fin de llegar a un acuerdo armonioso.” Unfortunately, the author was not able to write fast enough to record the exact words spoken by the court secretary as he read the document aloud, nor was the author able to see a written copy. But a similar phrase is used in many of the Zinacanteco *actas* that have been photographed.

\(^{55}\) The Mexican Constitution allows “administrative officials” (such as the municipal judges in Zinacantán, who lack law degrees and appointments in the judicial hierarchy) to keep prisoners in jail for thirty-six hours unless the judges are conducting an investigation, in which case they may hold prisoners for up to seventy-two hours. But after seventy-two hours, the judges must release prisoners, or send them to properly qualified judicial authorities.
accused cortacabezas and dumped their bodies down a ravine.\textsuperscript{56} Although it is impossible to know what might have happened in Zinacantán had the judges been prevented from violating the rights of the accused, it does seem reasonable to assume that the judges’ ability to handle this case according to local usos y costumbres forestalled the kind of mob violence that occurred elsewhere. Put into different terms, it was the judges’ ability to ignore written laws that enabled them to fulfill the primary aim of human rights conventions, which is to protect the lives and property of individuals whose neighbors or political leaders want to murder them.

Had the Zinacanteco judges been prevented from handling “crimes” not recognized by state and federal penal codes, they would not have been able to settle this case. They would have had to either dismiss it, or fit it into some category recognized by the penal codes, such as “assault.” Neither option, however, would have allowed the judges to address the issues that sparked the conflict. Acquiring sacrificial victims to sell to highway engineers might not be recognized as a crime in the code books, but it is an offense recognized and feared by many people in the Chiapas highlands. Only by treating the case as one of alleged cortacabezas could the judges address the accusers’ fears that they were about to be snatched for sacrificial victims, and the fear of the accused that their neighbors wanted to lynch them. When indigenous leaders demand the right of indigenous peoples to administer justice according to their own norms, even if some of the offenses recognized by indigenous peoples are not listed in any penal code, they have a point. Courts that cannot address people’s real concerns have little chance of achieving solutions that promote peace.

Similarly, had the Zinacanteco judges been forced to treat the accused men as if they were innocent until proven guilty, as required by section 1 of Article 11 of the UDHR, the judges would have been forced to dismiss the case for lack of evidence. But had the judges dismissed the case, they would not have calmed the fears of people in the three hamlets. People would have continued to wonder who was seeking sacrificial victims, given that nightly television broadcasts portrayed dramatic images of washed out highway bridges that needed to be replaced. As a result, people might well have concluded that the court was wrong. They might have decided to take matters into their own hands and murdered the accused young men. Or they might have suspected other people, whose lives would then have been in danger. Only by allowing everyone to assume that the accused were guilty could the judges achieve a solution that averted bloodshed. Once the

cortacabezas had been identified, and had promised not to snatch victims, people in the hamlets could relax their guard.

The presumption of guilt even benefited the accused. Once they no longer had to fear that their neighbors might kill them, they could return home to their families. They did not have to flee the community. Even the clauses declaring that the accused would be presumed responsible and punished if anyone from their hamlets disappeared or if the road between hamlets were blocked with stones were not as unjust as they seem. Despite their wording, these clauses meant only that a disappearance or road blockage would trigger another court hearing, and another attempt at reaching a conciliatory solution. Because Zinacantán is a rural community, where people spend their lives interacting with kin and neighbors, people do not expect settlements reached in court to be applied mechanically or to last forever. They know that old conflicts never die, but are revived with each new dispute. This, they say, is why there must always be authorities available to help disputing parties settle their differences before they injure one another and/or their quarrel angers the ancestor gods.

There is also deeper sense in which forcing Zinacanteco judges to determine guilt or innocence would undermine the court’s ability to achieve peaceful solutions to local conflicts. Because state policy has long assigned indigenous courts the task of settling conflicts rather than enforcing laws, the Zinacanteco court lacks the investigative capacity to determine guilt. It also lacks the incentive to do so. Zinacantecos in general, including the judges, prefer to find solutions that will allow conflicting parties to live together peacefully in the future. As a result, they are more interested in discussing the relationship between the parties than in determining what happened in the past. The judge in the cortacabezas case was right when he remarked that it did not matter if alleged offenders were proven guilty or not guilty. What mattered was the court’s ability to forge an agreement about how the parties would henceforth treat one another. While a preference for reconciliation is found around the world in lower courts that have to deal with messy conflicts involving kin and neighbors, the Zinacanteco preference for reconciliation reflects a local understanding of social order that differs slightly from that inherent in legal systems derived from Europe. Whereas people familiar with European law tend to imagine that individuals will pursue their self-interest unless restrained by fear of legal sanctions, Zinacantecos tend to imagine that because people will inevitably fight with one another, authorities must always be available to help them settle their differences before anyone gets hurt.

Finally, there is the issue of sanctions. The Zinacanteco authorities clearly violated the constitutional rights of the accused when they kept them in jail longer than the thirty-six hours allowed by law. Yet it is possible to argue that this jailing saved their lives. While they were locked in the hamlet jail, they were protected from the angry mob outside that was threatening to murder them. It is also true that Zinacanteco jails bear little resemblance to state prisons. Jails are usually small rooms with barred doors and windows that allow prisoners to interact with people outside. In Zinacantán, a prisoner’s relatives are expected to visit, and to provide the prisoner with warm clothing, food, and emotional support.

Once again, however, there is a deeper sense in which indigenous leaders have a point when they argue that their courts should have the right to apply customary sanctions, even if these violate written laws. In the event that the Zinacanteco court be deprived of its ability to hold people in jail for a week or two, or sentence them to fifteen days of community service, the court would lose most of its power to promote conciliatory solutions. State officials are wrong when they argue that indigenous courts do not need to impose sanctions because their mission is to reconcile disputants rather than punish wrongdoers. Punishment and reconciliation are not mutually exclusive. Quite the contrary! It is because the Zinacanteco court can punish people that angry disputants are willing to take their cases to it rather than resorting to self-help. And the court is able to achieve conciliatory solutions because it can use the threat of punishment to neutralize the power differentials that would otherwise allow powerful disputants to disregard the wishes of less powerful opponents.

VI. TIERRA Y LIBERTAD: ARE AUTONOMY AND RIGHTS IN CONFLICT?

On 1 May 1998, approximately one thousand state police, federal police, soldiers, and immigration agents entered the town of Amparo Aguatinta, the municipal seat of Tierra y Libertad. The reason for this massive raid, according to state officials, was to arrest six persons for whom warrants had been issued, and notably, to reestablish the “rule of law.” Fifty-three persons were detained, only two of whom had been named in the arrest warrants. Three days after their arrest, forty-five of the detainees were released without explanation. Among those who remained in custody were the President, the Secretary of Agrarian Affairs, and the Vice-Minister of Justice of the Autonomous Council.58

The conflict that gave rise to the police raid began as a simple matter. Two brothers of Guatemalan origin, Pascual and Pedro Gómez Domingo, were accused by people from Rancho Villa las Rosas, La Independencia, of illegally cutting wood. When summoned by the authorities of the autonomous municipality, the brothers failed to appear. The President of the Autonomous Council, the Justice Minister and Vice-minister then signed an order for their detention. On 22 April, Pascual was detained and brought to the municipal jail in Amparo Aguatinta. He was held for one week while the authorities tried to negotiate a settlement between him and his accusers. They failed. Pascual continued to deny responsibility and refused to pay reparations. The autonomous authorities, following their regular procedure when dealing with Guatemalan refugees, contacted the offices of the UN High Commission on Refugees (ACNUR by its Spanish acronym) requesting their participation in resolving the problem. On the seventh day of Pascual’s detention, his brother Pedro presented himself to the authorities in Amparo Aguatinta. Pedro was then detained, and Pascual was released. On the third day of Pedro’s detention, the same day that officials from ACNUR proposed to travel to Amparo Aguatinta to help negotiate a settlement, the joint army-police-immigration raid took place. The police released Pedro during the course of the raid.

As in the case from Zinacantán related above, it could be argued that the autonomous authorities of Tierra y Libertad violated the human and constitutional rights of the Gómez Domingo brothers. Although there are written laws against cutting wood, the authorities seemed less interested in finding out if a recognized law had been broken than in negotiating a conciliatory solution based on repairing the damage. Moreover, in the process of seeking a conciliatory solution, the authorities violated other rights, such as that of the brothers to be presumed innocent until proven guilty and their right to a “fair and public hearing” to assess the evidence against them. Finally, the authorities violated the brothers’ right not to be

59. The Secretaría de Gobernación told ACNUR officials that they could not go to Amparo Agua Tinta. The government opposed ACNUR’s negotiating with the Autonomous Council because it considered such negotiation a “recognition of the Council’s legitimacy.” An official from ACNUR, however, stated that “On several occasions, for different problems, we have come to engage in dialogue with the Council to resolve issues relating to refugees. They even have some documents signed by us.” The ACNUR official also observed that “The ambiguity of the situation here does not allow ACNUR to define who is the competent authority. What we recommend is that members of the Guatemalan community decide for themselves the best way to resolve their problems. If they had recourse to the Autonomous Council, or to some other authority, then that’s what they should do.” (Carlos Zaccagnini, chief of the office of ACNUR-Chiapas, quoted in LA JORNADA, 3 May 1998 (translated by Shannon Speed), at 7.

arbitrarily detained by keeping them in jail far longer than the thirty-six hours allowed by the Mexican Constitution. At first, the authorities used jailing as a means of persuading the brothers to pay for the damage. In Tierra y Libertad, people apparently believe it is important for delinquents to replace or repair what they have stolen or harmed, not just to compensate victims but also because delinquents must be convinced to “live like other people.” Later, after the authorities had failed to negotiate a solution, they continued to hold the brothers as “punishment.” Because many inhabitants of Tierra y Libertad are too poor to pay reparations, people treat jail time as an alternative, referring to both as “multas” (fines.)

State officials used the jailing of the Gómez Domingo brothers as their justification for arresting the autonomous authorities of Tierra y Libertad, charging them with the crimes of “kidnapping,” “assault,” and “usurping the functions” of legitimate municipal authorities. It could be argued, however, that the government’s charges against the autonomous authorities had less to do with their detention of the Gómez Domingo brothers than with the community’s assertion of political autonomy and its affiliation with the EZLN. Several facts support this interpretation. First, the “crimes” allegedly committed by the autonomous authorities are directly related to their performance of their duties as authorities of the autonomous municipality—or, rather, to the government’s non-recognition of their municipality as having autonomy. The autonomous authorities denied the charges against them. They admitted having detained the Gómez Domingo brothers, but said they had not “assaulted” or “kidnapped” anyone. Rather, they were acting on the authority vested in them by the people who had elected them to enforce the law while respecting usos y costumbres. Detentions of

61. Universal Declaration on Human Rights, supra note 60, art. 9; American Convention on Human Rights, supra note 60, art. 9; ICCPR, art. 9; MEX. CONST., supra note 60, arts. 14, 21.
62. Aureliano Lopez Ruiz, President of the Autonomous Council, stated in his declaration that “[. . . I] was elected by the authorities of the communities of Amparo Aguatinta, [names twenty communities], among others, as President of the Autonomous Municipal Council of Tierra y Libertad. . . . My primary function is to reach agreements with each community and then to carry out these agreements as they are stipulated, such as fixing fines regarding [crimes such as] the sale and consumption of alcohol, as well as theft, and beating or harming women . . . [I] would like to clarify, we also call “fines” the days that one is locked up in the jail of Aguatinta—from two to ten days maximum, depending on the infraction.” See Off. Rec., file #132, supra note 30. Author’s translation. Expert witness, Yuri Escalante, testified that the ceremony in which newly elected authorities take office places a strong emphasis on the obligation of the authorities to respect usos y costumbres as they conduct their official duties.
seven to ten days, they said, are a standard practice in the region. The autonomous authorities also denied having “usurped functions.” They admitted participating in the Autonomous Council, but said that they had been properly elected by customary procedures, which involved consensus decisions taken in community assemblies.63

Other declarations given in the case support the interpretation that the charges against the autonomous authorities were political. One of the Gómez Domingo brothers stated in an official declaration that he had not been kidnapped. Rather, he had presented himself to the autonomous authorities in Amparo Aguatinta because he believed that they were the competent body to resolve the dispute.64 Finally, when the federal and state governments began a pre-electoral public opinion campaign, which had as a primary element the release of Zapatista political prisoners, some of the accused from Tierra y Libertad were among the first released—after having spent one year and four months in state prison. Their release could thus be understood as an admission on the part of the state that the autonomous authorities had been detained for political reasons—namely, their affiliation with the EZLN—rather than for having broken the law.65

In summary, there is good reason to believe that the arrest and imprisonment of the Tierra y Libertad authorities was a political act undertaken by the state government, in coordination with the federal government, as part of a systematic effort to eliminate autonomous municipalities in rebellion. By camouflaging this act in a discourse of rights, the government shifted a political conflict onto judicial terrain,66 thereby obscuring its political motivation.

The Tierra y Libertad case highlights the politicized nature of decisions about what constitutes a violation of rights and of who is a rights violator. Although detentions such as those of the Gómez Domingo brothers are standard in indigenous communities throughout Chiapas, in most instances no government official intervenes and no local authority is charged. The

63. The election process for autonomous authorities, which is based on consensus decisions taken in community assemblies, is discussed as a form of usos y costumbres by Yuri Alex Escalante, ethnohistorian and head of the Department of Juridical Customs of the National Indigenous Institute when giving expert testimony in the Tierra y Libertad case. See Off. Rec., file #132, supra note 30. See also supra note 31.
64. Declaration of Pascual Gómez Domingo, Off. Rec., file #132; see supra note 63.
66. Mexico’s ruling party has a history of using the judicial system for political ends. Human Rights Watch notes that “prosecutors use the judicial system punitively against perceived opponents of the government,” and expressed concern over findings that “in multiple cases officials appear to have acted out of partisan support for the ruling party... repeatedly fail[ing] to take appropriate measures to ensure the rights of people perceived as opponents to the government, while moving swiftly and often questionably or illegally to prosecute government adversaries.” HUMAN RIGHTS WATCH, supra note 44, at 17–18.
judges in Zinacantán were not arrested for holding prisoners in jail, whereas, the authorities of Tierra y Libertad were forcibly apprehended and imprisoned in a massive police and military action. The principal difference between the two sets of indigenous authorities lies not in their actions but in their political affiliations. The Zinacanteco authorities are loyal to Mexico’s ruling party, whereas, those in Tierra y Libertad are supporters of the Zapatista movement which has challenged ruling party power. A comparison of the two cases thus highlights the critical issue of who has the authority to define an act as a violation of human or constitutional rights. When decisions about what is a rights violation and who is a rights violator are left in the hands of the state, governments are able to make political use of their opportunities. In the case of Chiapas, the state government has been using a human rights discourse both to limit indigenous autonomy generally, and to repress political opposition in the form of autonomy projects.

The government’s massive raid on Tierra y Libertad also reveals the inherent vulnerability of all indigenous communities to government repression. When indigenous leaders point out that it is impossible to settle local disputes according to their usos y costumbres while complying with written laws protecting individual human and constitutional rights, they are correct. As should be obvious from our discussion of the cortacabezas and illegal woodcutting cases, the procedures that indigenous judges use to reach conciliatory solutions necessarily violate the rights of accused individuals to be presumed innocent until proven guilty, to have the evidence against them presented at a fair and public trial, and to be tried only for crimes written in code books. Similarly, the common practice of holding people in jail until they agree to cooperate necessarily violates constitutional guarantees to a speedy hearing before a legally trained judge. As a result, the governor’s new law on “indigenous rights and culture,” which the state government is touting as granting autonomy to indigenous communities, has precisely the opposite effect. Because indigenous judges who settle disputes according to their “uses, customs, and ancestral traditions”—as the governor’s new law tells them to do—cannot help but violate the human and constitutional rights of disputants, the new law provides the state government with a powerful weapon that it can use against any indigenous authorities it wants to punish. So far, the state government has been arresting primarily authorities from autonomous municipalities who are allied with the Zapatistas. But authorities in other indigenous communities clearly recognize their vulnerability. It seems no accident, for example, that the judges in Zinacantán, who are closely allied with Mexico’s ruling party and who therefore have little reason to fear government repression, nevertheless took care to insure that the written acta contained no mention of jailing and included the crucial statement that the parties had come to court for “the sole purpose of reaching a harmonious agreement.”
VII. CONCLUSIONS

In this article, we have focused on the potential of human rights to become “another form of colonialism” when used by a state government intent on discouraging the aspirations of indigenous peoples for a measure of self-determination. We have observed that contemporary laws, which allow indigenous people to practice their customs as long as they do not violate human and constitutional rights, can be a cruel hoax. Such laws are inherently “colonialist,” not just because they faithfully echo laws promulgated by earlier colonial powers, but because they reinscribe the right of conquering powers to decide which customs practiced by conquered peoples are “morally repugnant” and therefore subject to sanction. But if a literal interpretation of human rights provides settler states with a powerful weapon to use against indigenous peoples who aspire to autonomy, the idea of human rights, broadly construed as respect for human dignity, offers hope for developing cooperative approaches to protecting human rights of the kind discussed by Mary Robinson.

There are several inherent paradoxes in the discourse of human rights that states may manipulate to their own advantage. One is that states, which are the primary violators of human rights, are also the parties responsible for protecting them. Based on the idea that is in a state’s interest to protect the rights of its citizens, this arrangement assumes both an idealized level of political stability (i.e., no internal opposition), and a reasonable system of checks and balances (particularly an independent legislature and judiciary) that would allow a state to punish its own officials for violations. Unfortunately, few, if any, nation-states meet these criteria, and Mexico is no exception. This paradox is strikingly clear in highly politicized contexts, such as the present situation in Chiapas, where none of the requisites for adequate state protection of the rights of its citizens is present. In Chiapas today, the political interests of the ruling party seem to consistently override the state’s interest in defending the human rights of individuals, including those of indigenous leaders who oppose official policies.

Another inherent paradox of human rights discourse is the opposition between individual and collective rights that is embodied in the right of “peoples” to “self-determination.” Arguments over which groups may claim to be “peoples” and which rights are encompassed in “self-determination” open a range of possibilities to individuals and groups intent on pursuing particular ends. The state government of Chiapas, for example, has at different times supported both collective and individual rights. In the late-1980s and early-1990s, the state government used the discourse of collective indigenous rights to justify its reluctance to prosecute human rights violations by indigenous authorities who were closely allied with
Mexico’s ruling party. Recently, as we describe in this article, the state government has been using the discourse of individual human rights to limit indigenous aspirations for autonomy—now invoking the earlier case of indigenous authorities who expelled “religious dissidents” to “prove” that indigenous leaders will violate the human and constitutional rights of individuals if they are granted the political autonomy they demand.

A third paradox of human rights discourse derives from the fact that the imagined subject of international human rights law is an abstract individual, whereas real humans live in concrete circumstances. Real people not only have ties and obligations to kin and neighbors, but they inevitably live in communities where structural inequalities—of class, gender, ethnicity, appearance, ability, etc.—grant some people more power and authority than others. Whereas individuals in the abstract may benefit from laws that prohibit their arbitrary arrest and detention, real humans sometimes need to be protected from angry lynch mobs or would prefer to be tried by indigenous authorities who understand their needs and speak their languages. Similarly, abstract individuals may benefit from laws that protect them from being tried for crimes that are not written in any penal code, but real people who violate unwritten community norms sometimes need an opportunity to admit their transgressions and accept their punishments if they are to resume normal lives. States bent on limiting indigenous autonomy, however, may take advantage of the paradox inherent in the idea of abstract individuals to justify punishing indigenous authorities who dare to respect the wishes and needs of the concrete individuals who come before them.

Finally, there is the paradox that derives from the fact that human rights laws and constitutional guarantees were designed to protect individuals from powerful state governments that might try to deprive them of life and liberty. As a result, human rights laws understandably prohibit state officials

67. In the late 1980s and early 1990s, municipal officials in the indigenous community of Chamula expelled many people from their homes and lands, often using extreme forms of violence. The state government of Chiapas refused to punish the offending officials, instead seeking a mediated solution. While this may have been the most prudent course of action, the state government also endorsed a vision of the expulsions that portrayed them as due to religious conflicts rather than political ones, depicting the Chamula authorities as defending their culture by expelling Protestants and Catholic converts who mocked traditional ritual practices. Several scholars and observers, however, have pointed out that many of the people who were expelled from Chamula were not religious converts until their expulsion forced them to find new communities. Most of the exiles, however, did belong to political parties that opposed the ruling elite, and would have voted against them in the upcoming elections. Because the ruling elite of Chamula were allied with the national ruling party, the PRI, the state government’s refusal to halt the expulsions, or to punish the perpetrators, had the effect of ensuring an electoral victory for the ruling party. See, e.g., Kovic, supra note 19.

68. See, e.g., Krauze, supra note 13.
from arbitrarily arresting individuals who have violated no written law, or from treating arrested individuals as if they were guilty without holding a fair and public trial to assess the evidence against them. Such protections, however, make little sense in the context of indigenous courts, which since colonial times have been required to reconcile disputants by using informal oral procedures. Because judges in indigenous courts are charged with helping disputing parties reach an agreement on how they will treat one another in the future, rather than with punishing individuals who have disobeyed written laws in the past, indigenous judges cannot help but “violate” the individual rights of accused people to be tried only for recognized crimes, to be presumed innocent until proven guilty, and to a trial in which the evidence against them is presented and assessed. As we have argued, the requirement that indigenous courts resolve local controversies in accord with their “usos y costumbres” is inherently in conflict with the requirement that they respect the human and constitutional rights of individuals. The effect of this inherent conflict is to provide state officials with a powerful weapon that they can use against any indigenous authorities who happen to displease them.

Although we have focused on how a state government can abuse the discourse of individual human rights by using it to limit indigenous peoples’ aspirations for autonomy, we have done so not to argue that indigenous peoples should therefore be allowed practice customs that violate the human and constitutional rights of individuals. We are all too aware of past instances in which indigenous authorities have used the discourse of collective indigenous rights to justify violating the individual human rights of people who disagreed with them. Rather, we stress the ability of states to misuse the discourse of individual human rights because we believe that this form of abuse has received less attention from human rights advocates than state abuses of collective rights. Many scholars have described instances in which national elites have mobilized a discourse of collective rights to justify violating the individual human rights of individuals. But human rights advocates have paid far less attention to situations in which state governments use the discourse of individual human rights to undermine the legitimate aspirations of indigenous peoples for a measure of political autonomy. This is an issue that we who care about social justice urgently need to address.

Specifically, we hope that our examples of how a powerful state can abuse the discourse of individual human rights will stimulate activists and

69. See, e.g., Kovic, supra note 19.
scholars to imagine possibilities for social justice that have so far remained unexplored. As the situation in Chiapas makes clear, Mexico, like many other “pluricultural nations,” is finding it increasingly difficult to regulate a plural society with a monocultural legal system. The argument that all Mexican citizens are equal before the law does not hold up to scrutiny. Moreover, it is based on an interpretation of equality as sameness that is neither realistic nor desirable. Most indigenous people do not wish to be the same as all other Mexicans. They want to have their cultural differences recognized and respected. For these reasons, we believe it is essential to search for ways to integrate culturally distinct legal systems into a pluricultural legal system that works for all citizens.

The most practical way to begin developing a pluricultural legal system is to involve indigenous people in helping to construct it. The aim is not to allow each indigenous community to invent its own legal system and its own conception of human rights. Such a course would reinforce existing inequalities, both within the wider society between Indians and Mestizos, and within indigenous communities, as many indigenous women have pointed out. At the same time, however, the aim is not to impose a “Western” conception of human rights on indigenous peoples. In Chiapas, the state government seems to be trying this approach. It is planning to hold workshops for indigenous people to instruct them in human rights doctrine. Such workshops, however, are likely only to convince indigenous people that they are correct when they argue that forcing them to respect human rights would destroy their legal systems.

Instead of workshops designed to teach human rights doctrine, indigenous people need workshops that will encourage them to think about the inequalities in their own communities and how they might ameliorate them. In Chiapas, at least, indigenous people already have beliefs that require powerful people to respect the wishes and needs of the less powerful. It is simply not true that they are “unused to tolerating dissident opinions,” as apologists for the Mexican government have asserted. In the past,

71. Mexico is recognized as a nation of “pluricultural composition.” See, e.g., Mex. Const., supra note 60, at art. 4.
72. Human Rights Watch, supra note 44.
73. See, e.g., Iris Marion Young, Justice and the Politics of Difference (1987).
75. In July 1999, several days after the ruling party majority in the state legislature passed the Governor’s proposed law on indigenous rights and culture (despite strident protest from legislators belonging to opposition political parties), it was announced in the press that the CEDH would begin doing human rights workshops in indigenous communities throughout the state. See Cuarto Poder, 31 July 1999, at 12.
76. See, e.g., Krauze, supra note 13.
indigenous authorities whose ruling party connections granted them immunity from prosecution did violate the human rights of individuals, but such events are hardly unique to indigenous communities. Moreover, at least some of these leaders have since repented and are currently trying to promote reconciliation among people of different religions and political affiliations.\footnote{Jan Rus, personal communication to Jane Collier in January 2000, that indigenous leaders in the Chamula community he studied, who had participated in expelling supposed Protestants ten years earlier, now repented their actions and were arguing that indigenous people should work together despite religious and political differences.} Indigenous people in Chiapas are as capable as people everywhere of contributing constructively to discussions about how to implement a respect for individual human rights in a multicultural world.

Finally, indigenous people need to be involved in national and local level discussions of human rights. Just as indigenous people need to be involved in thinking about how to adapt the ideals of human rights to their own circumstances, so they need to participate in national discussions of how to implement human rights ideals in a pluricultural society. It is not enough for the state government of Chiapas to create a special court of appeals to hear cases from indigenous communities. Although an appeals court is needed to provide individuals who feel they have been unjustly treated by indigenous authorities with another opportunity to have their cases heard, such courts cannot apply either existing state laws or newly created “indigenous” ones. If an appeals court applies national and international laws as written, court officials will fall into the trap of using human rights in a “colonialist” manner. But if appeal courts invent special laws to handle “indigenous” cases, they will promote the segregation that has long underpinned the inequality of indigenous peoples. What is needed instead is a new conception of human rights that recognizes both the right of abstract individuals to be equal before the law and the right of real people to solutions that meet their specific needs. Mexico is fortunate in having activists and intellectuals who have been thinking about the problem of creating a legal system that respects both diversity and equality. Those who live in Chiapas may be maintaining a prudent silence given the current political situation, but they are ready to contribute their ideas when conditions change.