

**Indigenous Rights and Democracy in Southern Mexico:
Liberalism Laughs Last?**

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This paper explains how an examination of indigenous politics in southern Mexico might contribute to the existing theoretical debate over multiculturalism and the recognition of group rights for ethnic minorities. First, I describe the recent history of indigenous politics in southern Mexico, with a particular focus on the legalization of municipal autonomy in a number of indigenous municipalities in Oaxaca. Then I review the most common theoretical perspectives from which scholars have attempted to evaluate (or predict) the impact that increased respect for indigenous rights has on Mexican democracy. To oversimplify, the multicultural school argues that these developments are positive both for indigenous peoples and for democracy; political liberals (including liberal feminists) are more skeptical, based on the worry that individual rights might be made subordinate to (potentially illiberal) group rights.

After reviewing these arguments, I explain why an empirical investigation of indigenous autonomy as practiced in southern Mexico will help advance the theoretical debate. Much of the multicultural debate suffers from excessive theoretical abstraction. I argue that our judgments about the appropriateness of indigenous autonomy in southern Mexico, or about the recognition of group rights for peoples with (supposedly) illiberal cultural practices more generally, must be informed by empirical knowledge of how such group rights are actually exercised in particular cases. Unfortunately, ironically, and hypocritically, the empirical investigation I advocate depends upon field research that I have not yet done, and thus this paper is clearly a preliminary and incomplete effort. However, the paper does offer what I believe to be an original contribution to the literature, in the form of a theoretically-based prediction regarding the effect that formal recognition of autonomy is likely to have in the Mexican case. I argue that the formal

recognition of indigenous autonomy, rather than helping to secure indigenous rights and preserve indigenous culture, will actually facilitate the legal intrusion of the Mexican state into indigenous communities. These communities will ultimately be forced to abandon any customary practices that are deemed to conflict with individualist liberal principles. In other words, liberalism will laugh last.

The Formalization of Indigenous Autonomy in Mexico

Mexico has a three-tiered federal system, and is subdivided into 31 states and 2,428 municipalities.¹ For the most part, the formal division of powers within the federal system is straightforward and uniform. State governors are elected to six-year terms; state deputies are elected to unicameral state legislatures every three years; and municipal governments are elected every three years on a fused ticket that combines a mayoral candidate with a list of town councilors. There are some minor variations in local systems. For example, local elections in San Luis Potosí have had a two-party run-off provision in effect since 1997, and most states use limited forms of proportional representation to boost pluralism in state legislatures and town councils. But the basic structure of the electoral system is uniform.

The single glaring exception to this description is that 412 municipalities in the southern state of Oaxaca have not held multiparty municipal elections since 1995, when the state granted them the right to select political representatives according to *usos y costumbres*, or customary rule.² This was the first and only occasion on which the

¹ Mexico City is a federal district, and is neither a municipality nor a state. The exact number of municipalities changes slightly over time.

² Six more municipalities adopted *usos y costumbres* in 1998, making a total of 418.

Mexican government has formally agreed to let municipalities alter their form of leadership selection.³

Of course, traditional forms of political organization have been in use for centuries. In colonial times, most indigenous people lived separately from Spanish settlements, and indigenous communities functioned autonomously from the colonial regime, which had neither the bureaucratic capacity nor the will to impose Spanish institutions of governance on the vast expanse of the colony. Colonial rule was focused on preventing rebellions, extracting indigenous labor and tribute, and spreading Catholicism. Within those bounds, the viceroyalty was not concerned to dictate how indigenous communities ruled themselves. Chassen-López (2004) summarizes the colonial system this way:

Indigenous peoples inhabited *pueblos* or *repúblicas*, while the Spanish lived in cities, *villas* (towns), and *reales de minas* (royal mining centers). These *pueblos de indios* were privileged corporate entities based on medieval Spanish jurisprudence that had at least fifty tribute payers (about 360 inhabitants), with communally held land, annually elected indigenous officials, and a consecrated Church (Chassen-López 2004, 298).

Only after the liberal turn in Mexican political history, which began with independence, did the Mexican state show any concern with how indigenous communities governed themselves. The 1824 Constitution codified the liberal ideal of individual citizenship, and did not recognize corporate indigenous rights or identities. “Thus the *indio*, no longer legally a minor, became a citizen with all the corresponding obligations” (Chassen-López 2004, 298). But according to most scholarship on the subject, the “elevation” of indigenous people (or more specifically, indigenous men) to the status of

³ As I explain below, indigenous communities outside of Oaxaca are often granted some autonomy at the sub-municipal level, but the legal status of these arrangements is usually ambiguous.

full citizens was not a positive development, since it deprived indigenous groups of “their customary law and the few privileges that the Spanish Crown had offered them... The new Mexican Nation did not take into account the Indian personality, Indian cultures... This was its great error” (Cordero 1996, 251).⁴

Obviously, the official pronouncement that all Indians had become Mexicans did not automatically erase the collective identity of indigenous groups. Rather, the creation of a liberal state in Mexico touched off nearly two centuries of conflict between a state that was unwilling to recognize ethnic distinctions and indigenous communities that fought to maintain local autonomy and traditional forms of land tenure, leadership selection, and common law. Throughout the 19th century, the Mexican state encroached on the legal foundations of indigenous communities, by outlawing communal land holdings and denying grazing rights in some common lands, by demanding that indigenous individuals pay taxes and serve in the military, and by drawing (literally) indigenous communities into mestizo-ruled *municipios*.⁵ At the same time, the Mexican state did not have the capacity to enforce these laws thoroughly and uniformly, and it often had to make compromises. For example, when the municipal system was first created in Oaxaca after independence, large indigenous communities were re-formed as

⁴ The full quote from Cordero (1996, 251) is that the creation of the nation in the 19th century, declaring all citizens of the Mexican Republic equal before the law, “priva a los grupos étnicos de México de su derecho consuetudinario y de los pocos privilegios que les había otorgado la Corona de España, entre ellos, cierta autonomía jurídica. La nueva Nación Mexicana no tomó en cuenta la personalidad india, las culturas indias; no estableció ninguna legislación social. Este fue su gran error.”

⁵ The term mestizo means “mixed,” or more literally “half-breed,” but it is commonly used in the literature to identify non-indigenous Mexicans (the vast majority of Mexicans have at least some indigenous ancestry). I replicate this usage here, with the caveat that the term is more useful for simplicity than for accuracy.

municipalities, and thus maintained a degree of autonomy. But smaller indigenous and mestizo settlements were grouped together into municipalities that were typically ruled by mestizos (Chassen-López 2004, 301-2). Communal landholdings also remained common, though the lack of a legal basis for this form of ownership led to a long history of land conflict. Land conflicts, often between indigenous and mestizo groups, are still common today and occasionally lead to inter-communal violence.

A wide range of informal and legally ambiguous political arrangements persisted throughout the 19th and 20th centuries, and practices varied according to the regime's ability to enforce its own laws. Even today, there is a great deal of variation in how indigenous communities are able to govern themselves. While the autonomous municipalities in Oaxaca remain the only indigenous governments formally recognized by the federal government, de facto autonomy in some other areas has a semi-legal basis. For example, in some municipalities in Puebla the management of indigenous affairs is assigned to indigenous "auxiliary" officials, subordinate to municipal or district officials. Sierra (1995) describes the system as follows:

According to law, Indian communities in the state of Puebla are governed by a *junta auxiliar* composed [of] three officials elected by the community. The principal authority is the *presidente auxiliar* (auxiliary to the municipal president in the city...), who is responsible for the everyday management of community affairs... The other two local authorities [that] are also auxiliary to the district authorities... [are] the *juez de paz* (local judge)... and the *agente subalterno* [a representative for the public prosecutor]. The *juez de paz* and the *agente subalterno* perform legal functions within Indian communities (Sierra 1995, 235).

These officials are charged with managing local affairs and settling some disputes, but they are supposed to take "serious" cases to the municipal authorities. In practice these authorities often dispense justice on their own, and the point at which matters should be referred to municipal authorities remains ambiguous. "[A]lthough the office held by the

three members of the *junta auxiliar* is defined and recognized by the state, the state leaves an ambiguous arena for them to act within their communities.” This gives indigenous authorities some freedoms, but their position remains complicated by the fact that “the Constitution of the state of Puebla...does not recognize the validity of customs in judicial procedures” (Sierra 1995, 236).

Only recently have indigenous rights been granted any sort of explicit legal basis within the federal framework. For decades, the Mexican Constitution remained silent on the issue of indigenous cultures and identities, and government policy did not formally differentiate among ethnic groups within Mexico (Speed and Collier 2000, 883). But in 1990, the Mexican Congress ratified the International Labor Organization’s Convention 169, an international accord that committed states to recognizing and protecting the rights of indigenous peoples. In 1992, the Mexican Constitution was amended to recognize for the first time the country’s “pluricultural composition” sustained by its “indigenous peoples.” This reform also guaranteed in general terms the protection of indigenous languages, cultures, and “specific forms of social organization.”⁶

Many states, including Oaxaca, followed suit by amending their state constitutions to recognize the cultural rights of indigenous peoples.⁷ But in most cases

⁶ The reform consisted of adding this paragraph to Article 4 of the Mexican Constitution: “La Nación mexicana tiene una composición pluricultural sustentada originalmente en sus pueblos indígenas. La Ley protegerá y promoverá el Desarrollo de sus lenguas, culturas, usos, costumbres, recursos y formas específicas de organización social, y garantizará a sus integrantes el efectivo acceso a la jurisdicción del Estado. En los juicios y procedimientos agrarios en que aquellos sean parte, se tomarán en cuenta sus practicas y costumbres juridicas en los terminos que establezca la ley.”

⁷ In Oaxaca the relevant reforms were made as changes to Articles 16 and 25 of the State Constitution, made in 1994 and 1995 respectively. The 1995 reform establishes, in the context of the state’s responsibility to guarantee free and fair elections, that “the law will establish respect for the

the promise to “protect and promote” the “specific forms of social organization” of indigenous peoples has not led to the type of concrete legislative reforms that would be necessary for putting such protections into force. To date, only Oaxaca has moved beyond the platitudes in its state constitution by changing its organic law to allow for local autonomy at the municipal level. The state congress of Oaxaca passed a law allowing for election by “*usos y costumbres*” in September of 1995, and in the municipal elections held in November 1995, 412 municipalities selected leaders according to its provisions.⁸ Some of the details were ironed out over the next three years: the law was modified and adopted into the state electoral code (the *Código de Instituciones Políticas y Procedimientos Electorales de Oaxaca*, or CIPPEO), and six additional municipalities adopted customary rule for the 1998 elections (Ríos Morales 2001, 75).

I would like to emphasize two essential points that arise from this narrative account. First, the reforms of the mid-1990s merely legalized a set of practices that were already commonly used.⁹ Indeed, *usos y costumbres* by definition refers to modes of governance whose legitimacy is based on the fact that they have been used traditionally and over a long period of time. This does not mean that *usos y costumbres* bears a close resemblance to any pre-conquest form of local governance. To the contrary, many

traditions and democratic practices of indigenous communities.” (“En la ley se establecerán el respeto a las tradiciones y prácticas democráticas de las comunidades indígenas.”)

⁸ It remains unclear how each municipality made this collective decision, and accounts in the literature are contradictory. See Anaya Muñoz 2004; Recondo 2001.

⁹ Here I am bracketing an empirical question about whether Oaxaca’s autonomous municipalities actually used customary forms of rule prior to 1995, and indeed whether they even contain indigenous communities. In previous work I offer evidence to suggest that neither of these presumed facts about the autonomous municipalities is likely to be true in all 418 cases (Cleary 2006).

customary practices have roots in Spanish colonial institutions, and virtually all customary practices have changed over time. But the institutions of local governance that were legally recognized by the reforms of the mid-1990s have some basis in traditional practice as understood by the indigenous citizens who use them.

Second, and relatedly, the reforms of the mid-1990s do not specify what customary law entails, or how it should be implemented. Common practices include the appointment of indigenous judges with jurisdiction over certain intra-community affairs, the use of the *cargo* system to appoint community members to positions in the local government, and the use of community assemblies and public voting to make group decisions. Beyond this, however, practices are known to vary widely. One important example of such variation regards the participation of women – in about one quarter of the municipalities now governed by customary law, women are not allowed to hold *cargos* (positions of governance), nor to participate in communal assemblies (Recondo 2001).

Theoretical Perspectives on Indigenous Autonomy in Oaxaca

The rise of indigenous politics has sparked a serious intellectual debate about the relationship between indigenous cultures and liberal states. The most interesting parts of this debate are those that take place within the liberal tradition, which has grappled for centuries with the problem of accommodating differences without succumbing to moral and cultural relativism. In this sense, the debate over indigenous rights in Latin America is merely the latest theoretical skirmish in a larger intellectual conflict that has roots as far back as John Locke's argument for toleration among Protestant sects in Europe.

Within this broad liberal framework, scholars and protagonists have offered a series of justifications for recognizing (or denying) group rights for indigenous minorities in places like Mexico. I believe that many of the theoretical arguments can be dismissed as polemical or illogical. For example, the claim that indigenous autonomy of the type implemented in Oaxaca will destroy national unity or lead to the fall of Mexico's liberal regime (such as it is) is clearly exaggerated. Given that indigenous communities were already separated and marginalized from the mainstream Mexican political system (usually against their will, rather than because of it), it seems disingenuous to argue that local autonomy will have these catastrophic effects (see Izquierdo 1996, 264-5). On the other hand, it is equally insufficient to suggest that "when there is conflict between the [indigenous] group and individual members, ... they should be allowed the freedom to work out these issues by themselves" (Stavenhagen 2005, p.21). This sort of internal conflict resolution is common enough, among indigenous communities and other social groups. But it seems unreasonable to expect such mechanisms of conflict resolution to produce fair outcomes generally and routinely, and thus it is unwise to casually dismiss reasonable concerns about the violation of individual liberties in indigenous communities.¹⁰ And finally, appeals to the pronouncements of the UN and other international agencies are useless as philosophical justifications of autonomy.¹¹ As

¹⁰ Stavenhagen's argument is made in specific reference to "indigenous women [who] often complain about their inferior status in their own patriarchal societies." Group rights have precedence in this case because "In small land-based communities, persons have dignity and status but also the obligation to uphold the traditional values necessary for collective survival" (Stavenhagen 2005, p.21).

¹¹ Of course this does not mean that the position of the UN and other international bodies has no influence over particular outcomes; according to Yashar (1996, 2005), influence from international bodies

tempting as it might be cite the wisdom contained in recent UN proclamations about the rights of indigenous peoples (Stavenhagen 2005), it is easy to point to other eras in which an equally well-intentioned UN “deleted all references to the rights of ethnic and national minorities in its Universal Declaration of Human Rights” (Kymlicka 1995, p.3).

Whatever factors account for the position of the international community on such matters, philosophical rigor and consistency are not among them.

Other arguments deserve more serious attention, both because they show greater logical consistency, and because they suggest empirical implications that might be used to evaluate the theoretical claims offered by proponents and opponents of indigenous autonomy. One of the most common and sensible arguments in favor of autonomy in Mexico is a pragmatic appeal to the material interests of indigenous peoples. It is obviously true that indigenous communities have been neglected by the state, and that indigenous peoples often face marginalization, unequal access to public services, and unequal treatment in legal proceedings. Recognition of local autonomy, according to many proponents, simply helps to rectify some of these social wrongs, by giving indigenous people a greater voice in their own governance.¹² Customary rule is also better suited to managing communally held land, which is a fundamental issue in many indigenous communities. Thus, proponents argue, autonomy will help indigenous

was instrumental in the emergence of indigenous social movements in Latin America in the 1980s and 1990s.

¹² The Mexican state has also implemented other measures, unrelated to local autonomy, that may improve the ways in which indigenous citizens interact with the state. Most notably, advances have been made in the area of language rights. It is now more common for indigenous people to be able to access government documents in indigenous languages, or to have interpreters present during legal proceedings (I need a citation on this point).

communities better manage land and other natural resources. Similarly, autonomy restores full authority to local (and locally-chosen) leaders. Under the standard multi-party electoral system, the authority and perceived independence of local leaders were sometimes compromised by the fact that they were required to register as members (and candidates) of an officially recognized political party (usually the PRI). Autonomy regimes remove this constraint and lend full legitimacy to the leadership selection methods that indigenous communities had been using all along.

These arguments suggest any number of empirical implications that could be tested, at least in principle. For example, if these arguments about the material advantages of customary rule are correct, we would expect to observe (all else equal) better provision of public goods, fewer land conflicts, more respect for local authority, and many other outcomes, in indigenous communities governed by *usos y costumbres*. It would be interesting to know whether such predictions are actually met in practice. On the other hand, even if we were to discover this sort of advantage among autonomous municipalities in Oaxaca, it would be difficult to know how to weigh the material improvements against the illiberal practices and restrictions on individual liberties that critics impute to customary rule.

Thus, opponents of autonomy are correct to focus attention on the individual liberties of indigenous citizens, and they have often done so in the Mexican case (see Krauze 1999; Izquierdo 1996).¹³ In response, proponents of autonomy frequently appeal to the commonalities between liberalism and customary rule in places like Oaxaca. For

¹³ An additional criticism posits that the legal pluralism inherent in most autonomy claims will lead to unequal forms of citizenship in the wider polity; but multiculturalists may not see this as a reason for concern (for a discussion see Kymlicka and Norman 2000).

example, principles of equality and liberty, and particularly the liberal right to self-determination, seem to justify collective decisions for autonomy and the adoption of traditional forms of rule. At the same time, proponents of autonomy highlight the widespread use of community assemblies, public voting, and deliberative consensus-building in indigenous communities, as a way of suggesting that customary rule has its own democratic credentials (see for example Stavenhagen 2000, 2005). Without too much distortion (and with the important exception of restrictions on participation), indigenous community assemblies are depicted as the Mexican equivalent of the New England town hall meeting. As with arguments about improved governance discussed above, these appeals to the compatibility between liberal democracy and customary rule also have empirical implications, which I discuss in the following section of the paper.

First, however, I would like to address a third main justification for indigenous autonomy. Kymlicka (1989, 1995), Stavenhagen (2005), and many others argue that individual rights can only have meaning within particular cultural contexts, or that “the liberal value of freedom of choice has certain cultural preconditions, and hence... issues of cultural membership must be incorporated into liberal principles” (Kymlicka 1995, p.76). The distinction between individual and group rights is a false dichotomy, according to this argument. Rather, both types of rights are mutually constitutive, because people cannot exercise individual liberty outside of their own cultural context. Thus liberalism itself entails respect for various cultures, and individuals have a right to access their own “cultural membership.”

This is most clearly illustrated in reference to language rights, as language is a central and visible component of culture. Community members who do not speak the

common language often face insuperable difficulties in daily life, and find it much more difficult to access employment, markets, social services, or government agencies.

Without equal access to political and social systems, the formal possession of liberal freedoms would be quite hollow. More generally, multiculturalists argue that legal protections for minority cultures are warranted on the grounds that liberal principles imply the right to group membership, or in the extreme case, to “cultural survival.”

These claims too can be subjected to empirical evaluation, which I discuss in the next section.

Evaluating the Arguments Empirically

The previous section generated three sets of empirical claims that might be used to evaluate customary rule in Oaxaca. First, we might test claims about improved material outcomes like better governance and lower levels of intra-communal conflict. I have suggested that while interesting, this issue is not fundamental, and so I do not pursue it further here.¹⁴ Second, we might evaluate claims about the democratic nature of customary rule by comparing the institutions and actual practice of customary rule to generic definitions of democracy and universally recognized liberal rights and freedoms. Third, we can evaluate claims about the importance of culture for individual liberty by studying the ways in which indigenous people access and challenge their own cultural frameworks. In future field research I hope to generate more (and more systematic) evidence that could be used towards these ends. In the absence of such data, I offer

¹⁴ I hope to pursue this investigation in a separate paper.

below some preliminary evidence, culled from the secondary literature, which I believe is relevant to evaluating the second and third claims just mentioned.

There are many ways to empirically evaluate claims about the democratic nature of *usos y costumbres* in southern Mexico. The most straightforward approach would entail an investigation of the extent to which individual civil and political rights are respected in autonomous communities. Unfortunately for proponents of indigenous autonomy, the existing evidence does not favor the claim that customary rule has significant democratic elements.

Violations of individual rights are clear, and apparently commonplace, in indigenous judicial proceedings. For example Speed and Collier (2000) document several instances in Chiapas¹⁵ in which individuals were jailed without formal charges by indigenous judges, given no legal representation, and offered no opportunity to defend themselves (other than a suggestion from the judge that the proceedings would go more smoothly if the defendants confessed). Even according to Speed and Collier's generally sympathetic treatment of the customary judiciary in Chiapas, they admit that

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... [and further, that] 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 (Speed and Collier 2000, p.900).

¹⁵ Chiapas is one of several states that have semi-legal forms of indigenous autonomy at the sub-municipal level, as discussed above. In addition, significant portions of Chiapas have been reorganized into "free municipalities" since the Zapatista rebellion in 1994. The Mexican state is almost wholly absent from these communities, many of which observe *usos y costumbres* for local governance.

Another area in which there is a clear tension between democratic principles and customary rule is with respect to female participation. In fairness it should be recalled that virtually all cultures and polities struggle with issues of female inclusion and equality, and thus the patriarchal nature of indigenous communities in Latin America is not particularly rare or exceptional. But it is valid to ask how women fare under customary rule, especially given that the customs in question often explicitly prohibit female participation in politics. For reasons that are not clear to me, this question has not received much attention in the literature on indigenous autonomy in Mexico, and can sometimes be dismissed rather callously. For example, Recondo (2001, 102) writes that

the numbers speak for themselves (*las cifras son contundentes*) on this point, and the arguments about the exclusive or essentially authoritarian character of customary rule do not match with reality (*no se comprueba en realidad*). In the great majority of the 412 municipalities that use customary-rule elections, women have in fact participated actively.¹⁶

But according to the numbers the author cites, women have the right to vote in 76% of customary-rule municipalities, and the right to hold *cargos* or offices in only 72% (Recondo 2001, 102). As gratifying as it is to know that female participation is the more common practice, and that in principle autonomy need not conflict with female participation, the fact remains that women are explicitly barred from participating in collective decisions in a significant number of autonomous municipalities, and are openly intimidated and pressured not to participate in many others (Stephen 2005).¹⁷ In addition,

¹⁶ “Las cifras son contundentes en este aspecto y los argumentos sobre el caracter excluyente o esencialmente autoritario de los usos y costumbres no se comprueba en la realidad. En la gran mayoría de los 412 municipios que realizaron elecciones por usos y costumbres, las mujeres sí han participado activamente” (Recondo 2001, 102).

¹⁷ Furthermore, the exclusion of women may be more common than these numbers indicate: the data come from a written survey that was sent to “the authorities” in the 412 original customary-rule

studies from other parts of Mexico describe female participation in indigenous assemblies as the exception, rather than the rule. Here then are two prominent examples (judicial proceedings and female participation) in which *usos y costumbres* clearly diverges from respect for individual liberties.

Nevertheless, if Kymlicka is correct to argue that respect for minority cultures is required so that members of those cultural groups can make use of their own individual rights, a certain degree of divergence between liberal principles and customary rule might be tolerated (see for example Kymlicka 1995, Ch. 8). But the claim the minorities need to access their own cultures in order to use (and find meaning in) their own liberal rights is itself open to empirical confirmation. I expect that a satisfactory investigation of this relationship would be much more complicated than the preliminary thoughts I am about to present. Still, we should be able to get some purchase on this by studying how indigenous people themselves view and contest their cultures.

Here too the status and political activity of women is one of the most obvious places to begin the discussion. Undoubtedly, indigenous women benefit from cultural membership, and use their membership to support their individual liberties, just as often as their male counterparts, and in similar ways. For example, having government documents printed in indigenous languages gives both men and women in indigenous communities enhanced access to the state. But on the other hand, indigenous women actively contest the norms and standards of their own cultures. This suggests that indigenous cultures can restrict, rather than empower, the exercise of individual liberties for women. Let me offer two prominent examples just to illustrate the point, while

municipalities. To the extent that these authorities have an incentive to conceal the exclusion of women, the rate of female participation may be overestimated.

admitting that the process of internal resistance to cultural norms, and changes in these norms over time, is far more complicated than I have portrayed it here.

One clear case in which women contest their own cultural framework is with respect to political participation. Mattiace (1997) reports that women have been critical of their treatment in post-rebellion Chiapas:

Zapatista and indigenous women throughout Chiapas have been consistently vocal in pointing out the need to be critical of those undemocratic practices within indigenous communities. While consensus is the basis upon which decisions are typically made in indigenous communities, the 'voters' are, in the overwhelming majority of communities, males. Women are typically not allowed to be members of the communal assemblies nor are they allowed to legally inherit land (Mattiace 1997, 62).

As I mentioned above, a similar struggle is evident in Oaxaca, where women are formally excluded from public assemblies in about one quarter of the autonomous municipalities, and are often informally excluded or discouraged from participating elsewhere (Stephen 2005). In a variety of ways, women have fought against this type of exclusion, which suggests the obvious point that they do not agree with, nor are they content to "find meaning in," their own cultures' patriarchal practices.

This contentious dynamic is also evident in some judicial matters, where women have a relatively high tendency to "venue-shop." Some scholarship suggests that women are likely to fare worse in the indigenous court system, especially when their complaint is against a husband or a male relative.¹⁸ In response, women often attempt to have their cases heard in (non-customary) municipal or district courts, where they believe they will receive more sympathetic treatment. This type of behavior is not particularly noteworthy, in the sense that venue shopping is common in many countries, cultures, and legal

¹⁸ I need to offer a citation on this point.

jurisdictions. But, as with conflicts over female participation, it reveals that indigenous cultures are much more than a static ideational framework that indigenous people use (or even *need*) to make their individual liberties meaningful. In fact these two examples suggest precisely the opposite: indigenous people use their individual liberties to recreate and find meaning in their cultures, rather than the reverse. If further investigation bears out this assertion, it would present a serious problem for Kymlicka's argument in favor of multicultural toleration.

An Additional Theoretical Puzzle: Does Legalization Promote Preservation?

Thus closer empirical attention to how *usos y costumbres* is practiced can shed some light on the normative arguments in favor of local autonomy regimes in Oaxaca, and on recognition of group rights for indigenous minorities more generally. But the characterization of local autonomy as a positive development for indigenous communities faces an additional problem, more subtle but potentially much more serious. Let us set aside questions about the appropriateness of indigenous autonomy and the potential conflict between customary rule and liberal democracy. Instead, let us assume that protection of indigenous cultures in places like Oaxaca is a desirable end on its own terms. Even if this is true, it is far from clear that the establishment of legal autonomy should be viewed as a positive development. The adoption of local autonomy regimes in Oaxaca, like many of the political gains made by indigenous social movements and political parties throughout Latin America, is usually framed as an indigenous victory in a conflict between multiculturalism and liberalism. But here I will sketch a theoretical argument according to which formal recognition of autonomy will further erode

distinctively indigenous cultural and political practices. If my argument is correct, the formalization of autonomy regimes will offer to liberal activists, indigenous dissenters, and the state, tools that can be used to force liberalizing changes in autonomous municipalities. Thus, the “victory” of legal recognition will sow the seeds of defeat for indigenous cultural practices, at least to the extent that such practices conflict with liberal principles.

Yashar (2005) offers the most intriguing account of the ironic and counterintuitive aspects of the conflict between indigenous cultures and (formally) liberal states in recent Latin American history.¹⁹ The story she describes can be separated into three general stages. In the first, both democratic and authoritarian regimes in Latin American attempted to address problems of social order and organization by constructing corporatist citizenship regimes. At first glance, these corporatist structures do not appear to have favored traditional indigenous forms of governance or cultural practices, because citizens were organized by class and occupational sector, and autonomous forms of organization were discouraged or even repressed. However, Yashar points out that corporatism “unwittingly institutionalized autonomous spaces for indigenous peoples,” by granting indigenous people liberal rights while delegating (formally or informally) local authority to corporatist organizations (like peasant cooperatives) run by indigenous people. The result was a *modus vivendi* under which “many indigenous communities survived and grew beyond the de facto reach of the state” (Yashar 2005, p.60). This is certainly an accurate description of Mexico in the mid-1900s, where the central government was not intimately involved in local affairs in the periphery of the country, as

¹⁹ The next two pages or so all follow closely from Yashar (2005).

long as it could avoid it. Rather than assert direct control, the central government delegated authority through corporatist channels.

The second stage of the story can be described as the (neo)liberal²⁰ challenge to local autonomy. Primarily in the 1980s and early 1990s, the neoliberal policy reforms of many Latin American governments began to present a direct challenge to the corporatist social structures that had shielded and even nurtured de facto autonomy in many indigenous communities. The neoliberal shift led to the “emasculat[i]on of corporatist organizations, and the promotion of free markets in land and labor,” and to “increased uncertainty about property regimes,” specifically regarding the legal status of communal land holdings, which are common in many indigenous communities (Yashar 2005, pp.65-68). Most counter-intuitively, the neoliberal “withdrawal” of the state actually resulted in further state intrusions into local affairs, primarily in the domain of land tenure but in other ways as well. Faced with the disintegration of corporatist forms of interest representation, increased state intrusions into local affairs, and a rupture in the *modus vivendi* of the previous era, peasants began to mobilize along ethnic lines and to challenge the new liberal order.²¹

This “postliberal challenge,” posed by indigenous movements against neoliberal citizenship regimes, forms the third stage of Yashar’s narrative. Two factors are particularly important to highlight here. First, the mobilization among indigenous groups

²⁰ This challenge is both “liberal” in the political sense that it attacked corporatist forms of organization in favor of pluralist forms, and “neoliberal” in the economic sense of the state’s shifting (and relatively *laissez-faire*) policy reforms.

²¹ This paragraph summarizes only one part of Yashar’s more complicated explanation of the rise of indigenous social movements. Most obviously, I omit her emphasis on the necessity of preexisting organizational networks and the political opportunity provided by (re)democratization.

was seen, by both outside observers and by the groups themselves, as a direct challenge to neoliberal economic policy and to liberal political ideologies. Second, this challenge has met with a significant (though varied and far from total) amount of success, in terms of forcing both constitutional amendments on paper, and increased recognition of indigenous rights in practice. Indigenous movements

are challenging the homogenizing assumptions that suggest that individuals unambiguously constitute the primary political unit... They call instead for more differentiated forms of citizenship... that grant individuals rights as citizens but that also grant collective rights and political autonomy... By advocating a differentiated kind of citizenship regime, they are pushing to redefine democratic institutions in dramatic ways. And where states have already incorporated these claims formally into constitutions, legislation, and statutes, they are working to implement and enforce these changes... (Yashar 2005, p.298).

This is roughly the point at which Yashar's narrative ends.

I would like to suggest an additional development that to my (limited) knowledge has not been anticipated in the literature. Recall Yashar's counterintuitive finding that indigenous autonomy was most secure under corporatist citizenship regimes. The main advantage that indigenous communities had under corporatism was that most Latin American states (including Mexico) were agnostic about indigenous self-governance at the local level, and in any event relatively powerless to micromanage local politics. This unique combination of structural conditions (corporatist citizenship regimes, elite ambivalence about indigenous affairs, and low state capacity) no longer exists.

Even though indigenous groups have been successful in carving out autonomous spaces, they have done so by asking the state to extend its legal reach into the local sphere. Of course, the original intent of this invitation was the protection of indigenous autonomy. But once codified, customary rule fell under the jurisdiction of federal and state constitutions, giving the state much more leverage in negotiations over the content

and practice of customary rule. In Chiapas, for example, the most recent indigenous rights law clearly stipulates that indigenous practices must conform to “fundamental rights enshrined in the Constitution of the Republic and... human rights” (quoted in Speed and Collier 2000, p.886). Speed and Collier show that the state government in Chiapas is willing and able to use this conditionality as a political tool, and have arrested indigenous authorities from some communities on human rights violations. “Authorities in other indigenous communities clearly recognize their vulnerability” (Speed and Collier 2000, p.900).

The “postliberal challenge” has succeeded in creating some space for indigenous cultural practices, including legal recognition of local autonomy (at least in Oaxaca). But it has not challenged the underlying liberal framework common to most Latin American nations. This is a partial victory at best for indigenous communities, and at least in Mexico, it is one that is clearly vulnerable to reversals in the form of increased legal scrutiny of indigenous customs that are deemed to conflict with liberal principles and human rights. Thus, I suggest that the preservation of indigenous cultures Mexico will depend on their ability to incorporate significant liberalizing changes, most obviously with respect to traditional judicial practices and the participation of women. Indigenous autonomy may survive, but it will be forced to adapt and homogenize in significant ways.

Conclusion

This paper began with a claim that *usos y costumbres* in southern Mexico should be subject to greater empirical scrutiny, as a means of improving our ability to evaluate theoretical arguments regarding the rights of minority cultures and the appropriateness of

indigenous autonomy regimes. I have outlined several ways in which such empirical investigations might be carried out. And while I have not yet completed the research I recommend, the available evidence from the secondary literature clearly suggests that the conflict between customary rule in Oaxaca, on the one hand, and individual rights and liberties, on the other, is sufficiently common and serious to warrant further investigation. Finally, I have expressed an additional concern about the relationship between legal recognition of autonomy regimes and the ability of indigenous communities to protect and preserve their distinctive cultural practices. Even with the advances achieved by indigenous groups in southern Mexico (and elsewhere in Latin America), it is far from clear that a homogenizing liberal hegemony is a thing of the past.

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