8. On the Rights of Indigenous Peoples: The Case of Chiapas

MARÍA HERRERA LIMA

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As a result of the Indian rebellion in Chiapas—or rather, one might say, as one of the achievements of the Chiapas Indians as a social movement—the debate over Indian rights has been firmly introduced into the political agenda of Mexico, in spite of political shifts and the fact that this debate has been overshadowed by more urgent concerns. Of course, it is not possible to give any final assessment of these problems, since they are changing constantly—so the possibilities of political or legal arrangements are still quite open—but it is nevertheless, in the context of the development of these problems that I want to consider some implications for political and moral theory of the idea of indigenous rights.

I will attempt to bring together two potentially controversial proposals: on the one hand is respect for cultural differences and a defense of special legal protections and guarantees for indigenous peoples in the country, justified as a remedy to past and present injustices. On the other are arguments for restrictions on the possible forms of self-government of these communities from the perspective of the principles of a constitutional democracy and a human-rights political culture.

I

The Indian rebellion in Chiapas has presented a challenge to the Mexican state at a time of transition toward democratic institutions (more credible and freer elections, political reform, and so on). This challenge is two-sided: on the one hand, the state has to justify itself to a more demanding and politically diversified domestic public opinion; on the other, because of the globalization of information and a generalized human-rights culture, the state's actions are also open to international scrutiny and criticism in ways unknown in the past.

Chiapas represents an anomalous case in the Mexican nation-state in many ways:[1] it has not had regular elections until very recently (instead, it has had a succession of substitute governors), and its political officials and local government posts exhibit a peculiar lack of independence with respect to the powerful landed oligarchy. The effects of agrarian reform in post-revolutionary Mexico were mini-

mal in Chiapas, and the policy of linguistic assimilation of the Indians (*indigenismo*) as a tool for their gradual incorporation into the Mexican nation, through the introduction of bilingual rural teachers, was either reduced to a system for getting laborers for coffee plantations and cattle ranches, or opposed from the perspective of a conservative conception of the separation of ethnic groups. On the other hand, Chiapas also has one of the longest traditions of Indian resistance in Mexican history; in recent times, rebel groups have been present in the state since the seventies.[2] The government had known of the Zapatista rebellion since at least 1993, but it was not made public so as not to endanger the signing of the NAFTA treaty. From the beginning, the Zapatistas included in their demands not just "cultural" rights (which were already more or less contemplated in the Constitution and in local legislation in some states) but also economic rights and a concern about the anti-communal measures and privatization policies adopted by recent governments.

In spite of the fact that many proposals for legislation on these matters were discussed, only one of which—the one presented by the COCOPA (the official Commission for Peace and Reconciliation)—was consistent with the signed San Andrés agreements,[3] the one that was finally approved was an initiative of the executive branch. It amounts to a recognition of cultural rights and of the existence of indigenous groups within the nation, and it includes some welcomed provisions against discrimination (in any form), but it lacks any effective guarantee for the fulfillment of these newly recognized rights.

In the years before the presidential elections of 2000, the conflict was transformed into a situation of war, with thousands of displaced people (from eleven thousand to fourteen thousand, depending on the source), an overwhelming army presence that disrupted civilian life and interrupted agricultural work. There was a constant climate of violence caused by the growing number of armed civilian (or paramilitary) groups, which in fact, with the complicity of local and state authorities and financial support from landowners, formed a significant counter-revolutionary force that at times outnumbered the Zapatista rebels in weapons, equipment, and resources. This has changed somewhat with the new government (at the local level, a coalition of opposition parties) so some of the displaced people are beginning to return to their towns and political tensions are not as strong, but the main problems remain unsolved.

If one were to follow the logic of the past government's attempt to redefine the conflict as a simple case of insurrection that could therefore be solved by military force, why is it that this could not be done? A plausible answer is that these successive redefinitions of the Indian rebellion as, among other things, an inter-ethnic conflict, local disputes over land, or religious conflicts between Catholics and some of the Protestant groups—the evangelical church—or the characterization of the Zapatistas simply as masked guerrillas have not succeeded. This is because there is a symptomatic lack of confidence in this type of official rhetoric, and also because presenting the Zapatistas as terrorists is not supported by the facts, since their use of violence has been minimal, rather symbolic, and a way to get attention

for their cause. And they continue to enjoy the support of civilian organizations and of a significant segment of public opinion, nationally and internationally.

So, in spite of the urgency of other problems, the question of Indian rights has not disappeared from public debates. If one thing is now clear, it is that peace will not be achieved unless there is recognition of the nature of the conflict—and as a consequence, an acknowledgment that the question of indigenous rights will profoundly affect power relations among the local elites, and between these groups and political parties. What makes the Zapatistas' rebellion different from previous demands by other Indian groups in Mexico is that they want to remain independent from political parties (including the left), and the form of self-administration that they are demanding is not restricted to "cultural" rights. They include what we may call, following Henry Shue, "basic rights" (subsistence and security),[4] and they are presenting these as demands to the state; they are not separatist, but they want political autonomy within the nation-state. In addition, in the San Andrés agreements the Zapatistas committed themselves to respecting human rights, especially those of women. This means that they are not as vulnerable to the usual objections that, for instance, they are not interested in respecting and upholding the gains of political liberalism.

Why is it, then, that the Zapatistas are perceived as a threat by local and central governments? After all, in the past they were largely ignored as they continued practicing their traditions and local forms of self-government, and as recently as 1998, some legislation on Indian rights—which was as radical, in some ways, as that proposed in Chiapas—was approved at the state level in Oaxaca. One might say, with Michael Walzer, that "toleration fails when the others look dangerous,"[5] and the danger here comes from the fact that these demands are presented not as grievances, resolutions for local conflicts, or calls for development aid and the like, but as demands that claim generalized validity for and implicitly reformulate the social contract with indigenous peoples in the Mexican nation-state.

This perhaps explains the reluctance on the part of the previous governments to continue the dialogue with the rebels that they had accepted and even promoted in the beginning, and the regressive character of the new law for indigenous peoples recently approved by the Senate (2001). The government could accept Indian communities and their ways as "private-collectives" (Walzer) but not as "public-collectives," so they could not be allowed "to organize autonomously and exercise jurisdiction over their fellows," as Walzer says about regimes of toleration[6]—and, I might add, they could not be expected to have privileged access to natural resources in virgin land that is potentially rich and attractive to foreign investors in the global market economy.

However, even if we can explain the reluctance to grant special rights to Indian communities, for it is indeed a thorny issue considering that there are other social groups in need of assistance in the country, what cannot be justified and is entirely at odds with the process of democratic changes in the country is the strategy of counter-revolutionary war against those communities and violations of the human rights of displaced people. After dialogue with the rebels was interrupted and the

government failed to comply with the signed San Andrés agreements and with the new national legislation, it has become clear that the central government is refusing to grant legitimacy to the Indian cause, so there is no longer much room for a discussion on autonomy. Consequently, the conflict is reduced to a question of economic development to be decided by the logic of the market, without local participation in decision-making processes, and the "Indian question" becomes, once again, a matter of assimilation for the federal government. These changes in public perception have had an effect on the debates; there is a certain feeling of frustration among politicians and business people, who see the rebellion as simply an irritation, an obstacle to be overcome by military means (openly or covertly), and it has forced even the local conservative elites to accept some readjustments in power relations and the need for economic change in the region.

But all of this makes the situation of the Indians more critical, as they are increasingly divided among themselves (those who accept government aid in exchange for opposition to the rebels, and divisions among dissident religious groups), while it seems that no peace can be achieved unless some form of legislation on Indian rights is proposed and accepted by all groups—which is not the case with the new law. There is, however, continued controversy among legislators on the question of possible revisions, so the debate must go on.

II

Now, I will look at the ways in which the question of indigenous rights can be conceptualized. Indigenous rights have been characterized in several ways, including as civil and political rights of previously neglected peoples, as legal protection from external threats (landowners as abusive employers, intolerant neighbors), and as a legitimate demand to the state for survival. There may also be rights to protection *from* the state, as an instance of negative liberties, directed against forced assimilation. Both types of rights require special attention from and impose special duties on the state. In addition, in the Mexican case, these rights are now regarded as constituting a condition of democratic legitimacy for the nation-state, for the Indians were excluded from the founding political pacts of the Republic, even after their rhetorical inclusion in post-revolutionary Mexico.

Cultural rights can be understood as forms of toleration that can be accommodated within the legal framework of liberal democracies, or as legal protections for traditional ways of life that go beyond what is usually accepted in Western democracies. In the latter case, they can also be considered historical rights, or rights of restitution that apply to colonized peoples who were conquered by force.

In a more radical version, indigenous rights go beyond toleration of cultural differences and become a demand for self-government or some form of political autonomy. This is seen as an attempt to reach a form of inclusive political agreement within the nation-state by previously excluded communities. According to Will Kymlicka, we must distinguish individual rights, first, from the rights of other mi-

norities and "stateless nations" (such as the Basques in Spain or the Québécois in Canada).[7] Even if indigenous peoples share with other national minorities a resistance to "nation-building policies" (imposition of the language and other traits of the dominant culture) and may fight for some form of self-government, they differ from other groups in that they can make an appeal based not only on their unjust incorporation into the state, but also on the fact that their cultural differences are more radical, and for that reason their marginal status and social disadvantages are greater than in the other cases. Although there is some overlapping between these two kinds of ethnic minorities, there is now a tendency in international law to consider them as distinct groups, because, as Kymlicka says, "Stateless nations would have liked to form their own states, but lost in the struggle for political power, whereas indigenous peoples existed outside the system of European states."[8]

In terms of existing international law, there are two options for indigenous minorities; however, these are either too weak or too strong to provide an adequate response to their needs. They are, respectively, Article 1 of the United Nations Charter, which states the right to self-determination, and Article 27 of the International Covenant on Civil and Political Rights, which has to do with cultural rights. Most indigenous peoples are not separatist—they do not want to form their own state—but nor are they satisfied with the reduction of their claims to a more or less arbitrarily defined gray area of "cultural" practices. For that reason, in Kymlicka's words, "Most national minorities need something in-between, and recent developments in international law regarding minority rights are precisely an attempt to codify certain standards in between articles 1 and 27."[9]

This is certainly not an easy task for many reasons. To begin with, it is not very clear what autonomy status may imply in terms of the relationship of indigenous peoples to the nation-state. On the one hand, there are demands for economic assistance and services, in the Mexican case, to aspire to be at the same general level of welfare as are all other Mexican citizens—so they require an active role from the state and not merely negative rights of non-interference—but, on the other hand, they want to be exempted from the laws of the nation in many important respects, as well as to enjoy special protections and privileges. As has been the case in other countries, this is further complicated by the problem of the criteria for inclusion in these groups, especially when there are no clear territorial limits for the traditional communities. All of this still needs to be worked out with greater precision, but assuming that some form of local self-government that is not in contradiction with constitutional principles can be found, it would have to be a new political arrangement at the national level. However, this new social contract would have to take the form of some "constitutionally mixed regime" or, in Charles Taylor's words, an "asymmetrical federalism,"[10] since these communities are not just one among many minority groups, they are not part of the Western liberal tradition; thus, their inclusion presents a different set of problems.

Defending the possibility of preserving cultural differences that include forms of local self-government and restrictions to individuals subjected to communal rule compels us to look for the kind of autonomy that could be seen as compatible

with the fundamental principles of a constitutional democracy. The most serious objection to the idea of indigenous self-determination comes from its potential incompatibility with the principle of impartiality under the law, as well as from possible human-rights violations inflicted on some members of these traditional communities.

In connection with this argument, Michael Walzer discusses the problem of aboriginal peoples (in the case of Canada) as one of the complicated issues for regimes of toleration. For Walzer, "It isn't at all clear that their way of life can be sustained, even under conditions of autonomy, within liberal limits: it isn't historically a liberal way of life." The problem that he is addressing here is that of potentially intolerant practices, or of important discrepancies with civil rights and liberties. He asks regarding these non-liberal communities, Can they be tolerated as autonomous communities with coercive authority over their members?[11]

This is indeed a serious problem. In the case of indigenous groups in Mexico, there have already been instances of questionable practices, such as religious intolerance between Catholic and Protestant communities in Chiapas, and disputes over public services and facilities elsewhere. In one case, in the central area of the country (the town of Ixmiquilpan), politically dominant groups attempted to impose forced communal work for their church, denying access to municipal services, such as roads, water, and the town's cemetery, to the members of a religious minority living in the town. In this case, ethnic or cultural differences were not the issue—it was a mixture of politics and religion—but in any case municipal authorities invoked "traditional customs" (*usos y costumbres*) in their defense.

To Walzer, this would be sufficient reason to deny special protections to aboriginal peoples, since in the case he is discussing, they are Canadian citizens, so their communal authority must be limited by the higher laws of the country. He nevertheless accepts that these peoples are different from other religious or ethnic minorities: "Because of their conquest and long subordination, the Aboriginal peoples are given, and should be given, more legal and political room to organize and enact their ancient culture."[12] In spite of his recognition of old grievances that justify special treatment, this in fact amounts to a restriction of indigenous rights to cultural rights, or to those practices that can be assimilated into one of the existing liberal provisions—such as that of voluntary associations—or to other practices that may be seen as part of the exercise of private choices, or as non-harmful social (collective) activities. Most liberals would agree with this restriction, for in this way it would seem that the risk of violations to civil liberties and equal rights of citizens are avoided. This is, no doubt, something that should be part of the agenda of reasonable political pluralism, or of any multicultural regime, but it is not clear that this restriction—of indigenous rights to cultural practices—does justice either to the indigenous peoples' historical claims of restitution or to their present demands for social and political justice. This is not to say, of course, that granting special status of autonomy to some people within a nation-state may not have unintended undesirable effects. So, in case of the acceptance of such a

regime, it would be reasonable to ask as well for some legal provisions to prevent abuses of minorities—indigenous peoples do not constitute a homogeneous, monolithic community—and special forms of arbitration for the resolution of conflicts among different groups.

However, we must also take into account the fact that so-called cultural rights are not so easily distinguishable from other practices that may not be regarded as acceptable—as exemplified in the above-mentioned cases in Mexico—so the restriction proposed by liberals (and assumed in the recently approved law in Mexico) is not a good solution after all. In addition, considering indigenous peoples simply to be regular citizens only masks the conditions of extreme inequality and social disadvantage in which they actually live.

This is consistent with the explicit declarations of leaders of the indigenous movement in Mexico, who have insisted that toleration is not enough. Solving security problems and eliminating extreme forms of intolerance, while necessary, is not sufficient to meet their demands for justice. We might say that these demands have to do mainly with two issues: that of public recognition, and a solution to their precarious conditions of material existence. The first has to do with the idea of a new social pact (or contract) with the nation-state; the second, with welfare demands that are not exclusive to these communities.

1. Historical Rights and the New Social Pact

The idea of a social contract has had enormous symbolic power in the political imaginary as the source of legitimate authority of the state. For liberal theory, the founding moment of the state must include an implicit agreement among the actors involved, in the form of a rational compromise, a "pact" of self-restraint and submission to a political ruler, or a voluntary "contract" in which the parties agree under conditions of equality to submit themselves to a common social order sanctioned by law. In contrast, when none of these conditions has been met historically, we have found a situation of at least potentially contested legitimacy.

Historical rights, as a sort of continuity right, are one of the oldest forms of claims over land, as well as an implicit questioning of the violence of conquest and appropriation of foreign lands by force. These rights can be stated as a morally justified demand, although they have seldom been recognized as such. We could point to cases of reparations or compensations—as in some cases of war—elsewhere, but this demand has never been accepted as valid by any Mexican postcolonial government. So, "historical" rights had to be rephrased as "traditional" rights, placing the blame for the conquest of indigenous lands in the remote past of an overthrown colonial regime. In the present context, they are seen, rather, as a de facto acceptance of cultural difference within Mexico; in turn, the existence of such radical differences is seen by some Mexicans as a failure of assimilation—this was until recently the official position—and by others, now a larger group, as justified demands that require legal codification. In part, what the Zapatistas

achieved was a process of cultural "translation": to present in the language of rights their traditional beliefs about justice. In this way, their claims gained force and legitimacy as "rights," since a right, as Henry Shue remarks, is not merely a request, a plea, or a petition; it is, rather, "something that can be demanded or insisted upon without embarrassment or shame."[13] For Indian groups in Mexico, this could mean to go from asking for "gifts and favors," in Shue's words, to a position of power and recovered dignity. This is something of great value for these communities; in fact, they have not emphasized as much the idea of restitution as that of public recognition. In the San Andrés agreements the figure of "*entidades de derecho público*" (to be given a legal status as "peoples" with authority to negotiate with the state) was proposed, but in the end what was adopted was the weaker figure of "*entidades de interés público*" (public-interest groups or communities), which has no legal force. In a sense, we can say, following Shue, that these are not truly rights, for the proclamation of a right is not sufficient: it is not the fulfillment of the right, it may be at times only a promise "in the place of the fulfillment."[14]

So, even if restitution is not a possibility in the Mexican context, and the need for new legislation still has to be addressed, the idea of historical rights should be preserved as a part of a "politics of memory" that can be very important for a critical reconstruction of a national history.[15] To understand the Indian groups' contemporary demands as justified because of past injustices may contribute to creating a more favorable climate of public opinion for the solution of their problems, as well as to improving inter-ethnic relations in the country.

2. General Welfare Demands

From the perspective of those "basic rights" (subsistence and security) that Henry Shue considers the "moral minimums" that must be guaranteed by any democratic regime, and "whose possession is essential to the enjoyment of other rights"[16]—such as physical security and minimum conditions for a dignified existence—the moral deficit as things stand now with indigenous groups in Mexico falls on the side of the nation-state. The following quotation by Shue could easily be seen as a description of the situation of Indians in Chiapas: "To be more likely than other people to suffer forms of abuse—by the police or the army, or other members of privileged groups in a society."[17] Indians do not enjoy the same opportunities for free assembly or forms of self-organization as do the rest of Mexican citizens. For example, the schools and public libraries in Chiapas, small and modest community centers built with the help of civilian groups and international organizations, have been destroyed by the army; these actions can hardly be justified as acts of war. There are other cases of abuse of authority in Mexico, mostly in rural areas; although not all the groups affected are indigenous peoples, they can still be considered the most vulnerable social group. Thus, the first task in order for the Mexican state to be minimally consistent with its proclaimed liberal credo will have to be facing and correcting these abuses; for that, a change in power re-

lations will have to take place. So, a plausible argument could be made in favor of a form of political autonomy for these communities as the only way to effectively change the balance of power and thus create the conditions for fair inter-ethnic relations.

This is also the case with "subsistence rights," or second-generation human rights. Poverty, a problem that affects groups and not only individuals, is an effect of social relations and of the unequal distribution of power and resources; it cannot be solved unless those conditions are altered, as is evidenced by the failure of governmental aid and anti-poverty programs. It is not something that can be solved by administrative means. In fact, the monumental failure of one such program (Pronasol) prepared the way for the Indian uprising in Chiapas. The problem of poverty is not exclusive to the Indians; it also affects other peasant communities and the urban proletariat—who may be part Indian—but the Indians have suffered more extensive forms of systematic abuse because these are also related to forms of cultural and racial discrimination.

In connection with this issue, I could mention the UN optional protocol on civil and political rights (1976) and the International Convention on the Elimination of All Forms of Racial Discrimination, in force since 1969. In accordance with this text, the systematic violation of the human rights of Indians in Mexico can be seen as a form of racial discrimination. This can be shown in a reconstruction of their condition from colonial times (when they were considered "minors" incapable of owning land or signing contracts) to the various redefinitions in post-colonial republican regimes, to the present day, when formal equality in the Mexican constitution is not matched by an actual recognition of their equal status as members of the polity.

It is clear that when we defend the inclusion of all the different groups in a nation-state—be that difference ethnic, religious, or other—under the protection of constitutional rule, we do so by appealing to a conception of equality that can be regarded as just by all. However, from the perspective of constitutional law, this may involve different, and even divergent, conceptions of equality. In the debate over Michael Walzer's conception of "complex equality," David Miller observes that there is no single conception of equality, not even of "simple" equality: if it is defined as the "equal possession of advantage X . . . there are as many notions of simple equality as there are possible contenders for the X in this formula: candidates include property, income, opportunity, rights, resources, capacities, and welfare."[18] Rather, the most serious problem with the idea of simple equality is the reduction of the core idea of equality to any single good, because it would not be possible to realize it empirically without the possession of some of the other goods in the above list. In other words, the interdependence or mutual imbrications of ideas of freedom with at least minimal conditions of material welfare, and of these, in turn, with opportunities and skills and the like, means that the debate cannot be decided in favor of any of these once we think of them as "goods" or, in Miller's terms, as "actual possessions" and not only as principles.[19]

Thus, the debate in political philosophy, as Miller says, is often expressed as, Equality of what? As a matter of principle? Or as a condition to achieve certain goals (freedom) or to have access to certain goods (welfare)? As we know, in most societies, and especially in multicultural or pluri-ethnic ones (following Kymlicka's distinction), we start with conditions of extreme inequality, and the challenge is that of achieving minimum conditions of distributive justice without compromising individual freedom or sacrificing cultural differences. In the case of multicultural societies, the debate has to go beyond the limits of the problem discussed by Walzer, because the problem is not only that some social goods (say, money or power) dominate over others, leading to conditions of inequality (in violation of relevant criteria for distribution), but that some social actors are not participants in the game of distribution at all. Walzer, to be sure, argues in favor of fair distribution of political power, but at the same time he understands equality as equal citizenship. For the reasons expressed above, this does not seem an adequate solution to the problems of economic and cultural segregation of indigenous peoples.

Some other solutions, such as the one proposed by Joseph Raz, seem more amenable as a conception of distributive justice for these types of societies. As reported by David Miller, Raz "argues that many so-called principles of equality are better construed as principles of entitlement [that is, as] principles asserting that everyone has a right to a certain level of X."[20] The notion of entitlement fits well with the language of traditional communities, and it is indeed used this way by members of indigenous communities in expressions such as "indigenous rights." These are understood as the conditions required for a life worth living, not just as economic conditions, but as the enjoyment of social respect for their persons and communities and for their traditional ways of life. It would not be too difficult to maintain that any social arrangement or political "pact" between culturally different social groups presupposes some form of "complex equality."

III

What, then, may be the sort of political and legal arrangement that can meet both conditions—first, respect for a human-rights culture and equality under the law (even as some version of functional or complex equality) and second, sufficient guarantees for respecting cultural differences, and an answer to the legitimate welfare demands of indigenous peoples and other vulnerable groups? These two types of demands are not easily distinguishable in practice, and they are frequently a source of conflict. Depending on the reasons given to justify demands for special rights we find different underlying conceptions of rights, in both nature and scope. One possible way of understanding special rights may be a version of what Kymlicka calls "remedial" rights—that is, legal protections aimed at correcting past abuses, or as some form of restitution that is, nevertheless, temporary, for it would cease to be required when conditions of equality (welfare) are

achieved. These are sometimes called "transitional" rights; from this perspective, forms of territorial autonomy or privileged access to natural resources would not seem justified. This is in fact the position of conservative political parties in Mexico. If, on the other hand, we accept the need to grant some special legal protections to indigenous peoples as historically and morally justified, we will have to find some legal formulas that could, at the same time, meet the previously stated conditions of respect for basic freedoms.

In other words, we have to confront the problem of equality versus difference in some way other than the usual irreconcilable opposition. To do this, we have to see our constitutions as historical agreements that can be revised, and as social pacts that can be broken. The Italian jurist Luigi Ferrajoli states that a broken or a nonexistent pact amounts in fact to a return to a "state of nature,"[21] a form of political violence that may justify forms of political resistance, as was accepted, for example, in the Universal Declaration of 1789. When violence comes from those who have been excluded from protection under the laws of the country, a reworking of the national "pact" in the form of a constitutional reform may be in order. We cannot consider Ferrajoli's argument in detail here, but a few remarks on his proposal may suggest some interesting possibilities for the solution of problems of excluded minorities.

An important innovation of modern constitutional democracies that affects the very structure of the legal institution consists in the establishment of juridical limitations to legislative production—that is, "the juridical regulation of positive law itself."[22] For Ferrajoli, this affects not only the form or procedures of legislation, but also the content of what is produced. So, some substantive content is added to the procedural program in the form of binding principles and values embodied in the constitution. What is of special importance for Ferrajoli is that this requires the establishment of legal guarantees that must be satisfied. He is a critic both of legal positivism and of some versions of procedural justice in legal theory, for he wants to maintain a strong internal connection between formal and substantive aspects of rights, something that, in turn, has important consequences for the theory of democracy. To him, this means that in addition to negative limits generated by the right to freedom of individuals, democracy also gives rise to positive duties—social rights—that require guarantees for their fulfillment. These should take the form of constitutionally binding political agreements.[23] In addition, these principles establish the limits of that which is no longer the object of negotiations and is thus subtracted from the logic of the market. For Ferrajoli, these constitute the sphere of "fundamental rights" that comprises negative freedoms as well as basic social rights, in a way consistent with Henry Shue's mentioned above. As for the role of legal guarantees, Ferrajoli says that these are none other than legal provisions designed to reduce the structural distance between normativity and effectiveness, adding to the usual protections of liberal freedoms, a chapter of social rights with the rank of constitutional duties. Beyond the debate between formal versus substantive conceptions of democracy, what is interesting for us now is that

the question of the compatibility between negative liberties and positive duties of the state (with the possibility of special rights) has to be worked out at the level of constitutional principles and rules, and not only as political negotiations. There are also questions of normative validity and justice.[24] For example, if subsistence and security (Shue) were included in the chapter of fundamental rights (Ferrajoli), to protect them would become a question of justice, a duty for the state, rather than a question of political compromise. However, Ferrajoli accepts that this is only a (perhaps utopian) proposal; in our times, this is indeed a political question rather than something to be solved by the theory of rights.

Nevertheless, this is an area in need of work as well, so Ferrajoli offers a theory of legal guarantees that introduces a distinction between "fundamental" and "patrimonial" rights, seeing the first as "the law of the weaker" and as an alternative to the "law of the strongest" that is at work in the absence of substantive justice. In turn, the absence of this distinction can be explained by the history of liberal theory, according to Ferrajoli: the intermingling of heterogeneous categories, such as freedom on the one side and property rights on the other, responds to an early juxtaposition of natural right doctrines against the Roman civil law tradition. This has marked, to our day, the entire liberal theory of rights, and shaped the conception of the modern constitutional state.[25] Fundamental rights (life, personal freedom, participation in public decisions) are universal in a way that patrimonial rights cannot be; that is, the latter affect subjects in differentiated ways, and they can be alienated, whereas the former cannot be renounced or taken away under any circumstances. This categorical confusion has also influenced debates in political theory and philosophy; thus, we have on the liberal side a conflation of democracy and the market, and on the side of former Marxist critics (and some contemporary left positions) an unfortunate rejection of private property together with civil liberties and moral universalism.

Fundamental rights set limits to the state but also to the exercise of popular sovereignty, since not even majority rule could decide over those matters. To Ferrajoli, "No political majority could dispose of fundamental freedoms and rights."[26] So, in the case of indigenous peoples this would also be binding; we might say that these fundamental rights are a "condition of entry" to the political pact as members of a constitutional state. They are not negotiable in the way that almost anything else can be.

This could be argued in defense of the possibility of criticizing a culture that is not our own—avoiding the standard suspicion of cultural imperialism—for this entrance into a new political agreement with the nation-state implies access to rights as well as *voluntary* acceptance of duties on both sides.

In addition, those who demand the acceptance of conditions (respect for human rights and basic freedoms) must pass an additional legitimacy "test." That is, in order to consider the imposition of requisites that are foreign to the other culture as legitimate, it must be demonstrated that this imposition is not to the advantage of those who dictate them (be that the state, or legislative bodies, or the critics of non-Western cultures). There should be no hidden "agenda" of domina-

tion in their motives, and the only way to prove that would be to open these decisions to public scrutiny. There are no guarantees for this process, to be sure, but it seems that some conception of public morality as "protection" is urgent in our globalized world; in Henry Shue's words, public justice has to be, among other things, "an attempt by the powerless to restrain the powerful."[27] In addition, international (or transnational) institutions must be designed so as to secure conditions for fair arbitration—under common, binding rules—in cases of conflict, and at the nation-state level, to assure governance.

From the perspective of the public policies of Mexican government, the obvious contradiction rests in their appeal to a global market economy while at the same time they attempt to contain the flow of information and the political effects of globalization. Just as liberals ask about the limits of what can be permitted to non-Western peoples living in a constitutional democracy, we can also ask, What are the limits for the legitimate use of violence against traditional communities in a democratic regime? Is political stability sufficient justification to induce forced assimilation? Or does it condemn these peoples to extinction? All these possible outcomes are the end result of human decisions and government policies, not, as some would like it, merely "natural catastrophes" of the era.

So in the final analysis, if we see the question of indigenous rights as a problem of the legitimacy of post-colonial regimes and as an unresolved self-contradiction of the professed egalitarian ideals of liberal justice, the question becomes part of the struggle for decolonization, and as such, it does not have to be set in opposition to ideals of freedom and equality—although, admittedly, these will have to search for new formulations, or inter-cultural translations.

There would be a need as well for undertaking historical reconstructions from the perspective of all the people in our lands. They are not something external to the linear development of Western civilization, as they are presented in the narratives of official history. They have always been there, and the new simultaneity of our global situation will make it an urgent task to look for new political arrangements for the peaceful coexistence of different peoples and forms of fairer distribution of world resources.

Finally, it is interesting to point out that the Zapatista movement differs from other rebel groups in that it professes an ideology of nonviolence and has made the language of human rights its own. In the first stages of the movement, when there was more active participation by Mexican civilian groups, there was also what we may call an intensive process of mutual learning. Among the most striking results of this process was the change in attitudes toward women—mostly by the women themselves, of course, but also by the leadership of the movement, which has included women since then, and has become more open to discussion of equal rights and other issues within Indian communities. So we must not think about the question of cultural rights always as a problem of incompatible or incommensurable belief systems. Learning is possible when actual dialogue takes place and the conditions of political negotiation are perceived as fair by all social actors involved.

NOTES

1. For historical information on the region, see Antonio García de León, *Resistencia y Utopía* (México: Ediciones Era, 1997). See also Enrique Florescano, *Etnia, Estado y Nación* (Aguilar: Nuevo Siglo, 1996).

2. See Hector Díaz-Polanco, *La Rebelion Zapatista y la Autonomía* (Mexico City: Siglo XXI, 1997). See also Carlos Montemayor, *Chiapas, La Rebelion Indígena de México* (Mexico City: Joaquín Mortiz, 1997).

3. The San Andrés Larráinzar agreements were signed by the Zapatista rebels and representatives of central government in February, 1996. However, they were never implemented as laws.

4. Henry Shue, *Basic Rights: Subsistence, Affluence, and U.S. Foreign Policy* (Princeton, N.J.: Princeton University Press, 1996).

5. Michael Walzer, *On Toleration* (New Haven, Conn.: Yale University Press, 1998), 30.

6. Ibid., 26.

7. Will Kymlicka, *Politics in the Vernacular: Nationalism, Multiculturalism, and Citizenship* (New York: Oxford University Press, 2001), 120.

8. Ibid., 122.

9. Ibid., 123.

10. Quoted in Walzer, *On Toleration*, 46.

11. Ibid.

12. Ibid., 47.

13. Shue, *Basic Rights*, 14–15.

14. Ibid., 15.

15. There are many interesting recent works on this topic in the U.S. See Thomas McCarthy, "*Vergangenheitsbwätigung* in the USA: On Coming to Terms with Slavery and Its Aftermath" (unpublished manuscript).

16. Shue, *Basic Rights*, 19.

17. Ibid., 20–21.

18. David Miller, "Complex Equality," in David Miller and Michael Walzer, eds., *Pluralism, Justice, and Equality* (New York: Oxford University Press, 1995), 197.

19. Ibid., 202.

20. Ibid., 202, n.7. See Also Joseph Raz, *The Morality of Freedom* (New York: Clarendon Press, 1986).

21. For an interesting and extended discussion of these issues, see Luigi Ferrajoli, *Derechos y Garantías: La ley del más débil* (Madrid: Trotta, 1999).

22. Ibid., 19.

23. Ibid., 21–22.

24. It would be important to compare this proposal for a normative theory of law with that of Jürgen Habermas (*Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* [Cambridge, Mass.: MIT Press, 1996]), but this is not attempted in this essay.

25. Ferrajoli, *Derechos y Garantías*, 45 (my translation from the Spanish).

26. Ibid., 51–52.

27. Shue, *Basic Rights*, 18.