

Conflicting Equalities? Cultural Group Rights and Sex Equality

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This article explores the tensions within multiculturalist theory between the aspiration to promote cultural recognition and the need to promote and protect women's concern with issues of sex and gender inequality. The article assesses the three main approaches to the reconciliation of sexual equality and group rights; according priority to the traditional values and practices of cultural groups; accepting collective and cultural rights but within a framework international human rights; and finally, the acceptance of group rights subject to respect for individual rights and freedoms. By focusing on the experience of aboriginal women activists in Canadian politics and their struggle to preserve constitutional sex equality, this article argues that only the third approach provides adequate safeguards for women in their public and private roles.

Could special rights and arrangements for cultural minority groups in liberal democratic states reinforce the subordination of women? Tensions between the goal of gender equality and calls for greater accommodation for ethnic, religious and national minorities have become increasingly apparent in recent years. Many worry that the practices of recent immigrants from so-called traditional societies – customary marriages, polygamy, segregated schooling for girls and boys, and female circumcision, are frequently cited examples – may violate liberal sensibilities and laws.¹ However, a different and in some ways more pressing source of concern has received much less attention. This is the uneasy relationship between claims for collective group rights by certain national minorities – including demands for forms of self-government – and liberal, individual rights, which are critical to the protection of sex equality. Below, I explore this tension as it relates to a recent case in Canadian politics in which Aboriginal (or native) women activists sought to preserve constitutional sex equality protections alongside proposals for self-government, in public defiance of native leaders. Their story reveals the challenges faced by communities seeking to move to a framework of self-government based on collective rights and responsibilities, and may also gesture towards some possible ways to reconcile the demands of group and individual rights.

In the period leading up to the referendum on proposed changes to Canada's constitutional arrangements in 1992 – known as the Charlottetown Accord – native women's groups expressed their support for the goal of self-government for Aboriginal peoples but insisted that they were not prepared to relinquish formal protection of their sex equality rights as guaranteed by the 1982 Canadian Charter of Rights and Freedoms. Leaders of the main Aboriginal associations countered that native people required full independence from the legal paradigms and political structures of the liberal Canadian state, and that future native governments would find their own ways of protecting their individual members. Concerned that future

Aboriginal group rights might not adequately protect them, native women demanded that their leaders and politicians negotiating the constitutional settlement take steps to secure their sex equality rights.

Focusing on the tensions between individual sex equality rights and cultural group rights as evinced by the Canadian case, I discuss three normative approaches to this problem which, while by no means exhaustive, correspond roughly to the positions articulated by native peoples during the 1992 constitutional dispute. One perspective calls for a return to traditional values and social arrangements and insists that collective, cultural rights provide the best framework for securing balance and harmony within native communities. A second approach also endorses claims for collective, cultural rights and treats the individual rights framework of liberal democracies with suspicion, but accepts international human rights as morally binding on all governments. A third view concedes the legitimacy of collective rights for certain national minorities (such as Aboriginal peoples) but attaches the proviso that self-governing groups must also respect comprehensive individual rights and freedoms, such as those guaranteed by the constitutions of many liberal democracies. Only this third approach, I suggest, gives adequate attention to the need for safeguards and protections that apply to women in both their public and private lives.

Gender Equality and Multiculturalism: Three Conflicts in One?

The fear that special rights and provisions for cultural minorities could jeopardize sex equality rights encompasses different concerns, not all of which apply to the case of national minorities. These issues are often unhelpfully collapsed together in discussions about the consequences of accommodating cultural minorities, making it difficult to conceive of calibrated solutions to distinct problems. It is worth taking up some of these concerns briefly here, if only to disambiguate them from the specific gender justice issues facing certain national minorities in general, and Aboriginal peoples in Canada in particular.

One commonly voiced concern is that cultural minorities may seek to preserve customary gender roles and social arrangements that restrict or subordinate female members. While liberal citizens might be willing to overlook traditional sex roles and social arrangements, presumably many would be reluctant to endorse explicit state protection (much less financial support) for practices deemed to institutionalize women's inequality. Some examples of the latter include sex-segregated, traditional religious schooling that specifically restricts the education of girls; customary (or arranged) marriages, as well as polygamous marriages; and customs preventing women from working outside the home or from taking up other public roles. Traditional initiation practices, notably female genital mutilation (FGM) – common among immigrants from many parts of Africa and the Middle East – are a further source of concern.

Liberal feminists have suggested that cultural controls such as these are primarily targeted at girls and women. Susan Okin, for instance, has recently cautioned defenders of multicultural rights that 'most cultures have as one of their principal

aims the control of women by men' (Okin 1997, p. 26). When limits are imposed on the educational, social, and economic opportunities of girls and women, so say liberal feminists, they are effectively prevented from acquiring the capacities, self-esteem, and resources necessary to resist pervasive inequalities and injustices in their communities, much less to lead lives of their own choosing. The response to demands for special cultural rights by feminists such as Okin has been to argue that liberal democratic states should ultimately restrict those customs and arrangements that conflict with basic liberal commitments to norms of individual autonomy and equality. Will Kymlicka also articulates this view with his suggestion that 'liberals can accept external protections which promote justice between groups, but must reject internal restrictions which reduce freedom within groups' – including, he adds, the freedom of girls and women (Kymlicka, 1997, pp. 29–30; and 1995, pp. 34–48). Other liberal thinkers, however, have stopped short of insisting that cultural minorities must embrace liberal conceptions of equality of the sexes within the private or domestic realm, fearing that this denies legitimate and perhaps innocuous differences in groups' beliefs and ways of life. Joseph Carens (1990, p. 239) asserts that 'a commitment to pluralism will require us to respect cultural differences between the sexes that emerge from the internal culture of a group'. Bhikhu Parekh (1996, p. 262) cautions that any outright sanctions on cultural practices should be preceded by concrete, respectful dialogue with the minority group whose customs offend, and that critical debate within such communities should also be encouraged. Whether and to what extent liberal societies can accommodate cultural groups whose norms and arrangements mandate starkly different roles for men and women, or which accord women members less respect and fewer life choices, is a matter that political theorists will no doubt be debating for some time to come.

A second way in which special accommodation of cultural minorities may conflict with the goal of gender equality concerns the introduction of cultural explanations in criminal law cases in some states. While no legal jurisdiction formally permits such strategies, defense attorneys and judges in the USA and Australia have pointed to what they perceive as mitigating cultural circumstances in order to suspend or reduce the sentences of minority citizens convicted of criminal offenses. Cultural arguments have pointed, for example, to the importance of avenging dishonor and infidelity in immigrants' home societies and the prevalence and alleged acceptability of male violence and rape in some cultures. Some cases in which cultural factors were crucial to the legal defense of the accused include that of a Chinese immigrant in the Bronx, New York, who readily admitted to murdering his allegedly unfaithful wife in 1988, and whose defense and subsequent acquittal hinged on the public shame associated with female adultery in Chinese society; that of an Australian judge who cited the prevalence and acceptability of violence, alcoholism, and promiscuity in Aborigine communities in handing down a suspended sentence to a man convicted of raping and assaulting an Aboriginal woman; and the 1981 rape trial in Los Angeles of an African American man, whose unsuccessful defense invoked cultural arguments about allegedly typical Black (aggressive) social behavior (Maguigan, 1995; Lambelet Coleman, 1996; Volpp, 1996). As these examples suggest, it is difficult to know when a 'cultural' legal defense helps to illuminate the social and cultural context in which a criminal act took place and

when it simply invokes stereotypes and assumptions which rationalize sexual subordination. While women accused of crimes have also appealed to their traditional cultures, the majority of cases in which such explanations have been employed in order to exculpate or reduce the sentences of those accused have involved men charged with the assault, rape, or murder of women, frequently their wives. This trend, and the propensity for distorting reports of the social acceptability of abusive behavior in certain communities, has led some feminist legal scholars to caution against the admittance of cultural explanations in criminal cases.

Neither of these two kinds of conflict between gender equality and special accommodation for cultural minorities accurately captures the central concerns at stake in the case of national minorities seeking self-determination. Instead, a third kind of dilemma is present here: the tension between the cultural, collective rights required for self-government and the desire by women in the collective to preserve their sex equality rights as protected by individual rights legislation. Native women in Canada, as I shall show below, sought gender equality protections because they feared that newly self-governing native communities might actively seek to discriminate against women, for reasons that will shortly become clear. Yet far from rejecting the norms, values and beliefs of traditional Aboriginal society, native women emphasized that the discrimination they most feared was rooted in specifically *contemporary* forms of inequality and oppression within native society. At the same time, native women cautioned that hasty attempts to return to customary values and forms of social and political organization might have the effect of reinforcing existing sex discrimination and oppression.¹

Collective Rights and Sex Equality: Aboriginal Canadians

Canada's Aboriginal peoples comprise a diverse population of native Indians (known as 'First Nations' peoples), Métis, and Inuit across the country, with different languages, customs, values and forms of governance. Native or First Nations peoples are especially diverse in this respect, encompassing diverse nations with distinct identities and ancestries. First Nations members are further differentiated by region and by whether they live on or off Indian reserves. Despite their diversity, Aboriginal peoples in Canada have long been unified in their quest for formal, constitutional recognition of their intrinsic right to self-government. While self-government could take many forms, constitutional recognition of this right would in principle accord Aboriginal communities as much political and legal autonomy as they require to govern themselves according to their own values and traditions. Nor is this an unrealistic goal in the context of recent Canadian politics, particularly since Aboriginal and treaty rights are already recognized by the state's 1982 Constitution Act (section 35 [1]). The 1992 Charlottetown Accord would have strengthened these claims, and paved the way for greater powers of self-government for Aboriginal peoples as well as for the province of Québec. However, dissatisfaction with aspects of the agreement and with the political processes surrounding the accord led Canadians to vote against the proposed amendments, including a surprising majority rejection of the accord by Aboriginal peoples living on reserves.

Agreement amongst Aboriginal peoples in Canada on the objective of constitutional recognition of the right to self-government has frequently been accompanied by serious disagreement on the form that self-government should take and the best political means of securing it. Both the processes of constitutional negotiation and the proposals and accords pertaining to sovereignty tabled in 1992 elicited diverse responses from native peoples and leaders, with some supporting and some rejecting the proposed amendments. One critical area of dispute was the precise relationship to Canadian law which Aboriginal peoples should seek to maintain within the framework of self-government. In negotiations with federal officials, it became clear that native leaders wanted their communities to have extensive powers of self-rule unfettered by Canadian law, including the Canadian Charter of Rights and Freedoms. The main associations were in accord on this point: the Assembly of First Nations (AFN) – the largest native organization, representing status Indians across Canada – the Native Council of Canada – representing non-status Indians – the Métis National Council, and the Inuit Tapirisat of Canada, all sought reassurance that future Aboriginal governments would not be answerable to Canadian law.

The reasons for seeking independence or indeed immunity from the Charter had more to do with the perceived inappropriateness of liberal democratic norms and principles and with the genesis of the document than with any explicit desire to challenge specific individual rights.² One of the best summaries of the central concerns of many Aboriginal leaders appeared in an article published three years after the failure of the Charlottetown Accord (Hogg and Turpel, 1995, p. 213):

Aboriginal leaders, and particularly the First Nations, leadership, have expressed reservations about the applications of the Charter to Aboriginal governments. The reasons are twofold. First, the *Charter* was developed without the involvement or consent of Aboriginal peoples and does not accord with Aboriginal culture values and traditions. Second, the *Charter* calls for an adversarial approach to the resolution of rights conflicts before Canadian courts and there is a concern that this confrontational mode will undermine Aboriginal approaches to conflict resolution ... This is not to say that Aboriginal peoples have no concern for individual rights and individual security under Aboriginal governments. The concern rests more with the *Charter's* elevation of guaranteed legal rights over unguaranteed social and economic rights, the emphasis on rights rather than responsibilities, the failure to emphasize collective rights, and the litigation model of enforcement.

The rights-based orientation of the Charter and the assumption of the superiority of an elected representative democracy are viewed by many as significantly at odds with native philosophy. As Ovide Mercredi, then Grand Chief of the AFN, wrote (Mercredi and Turpel, 1993, p. 102), 'Canada's idea of democracy is majority rule. Our idea of running governments is consensus by the people. Who is to say that Canada's principles are better than ours?' Aboriginal leaders insisted that they sought the suspension of the Charter *vis-à-vis* Aboriginal governments primarily 'to keep options open for traditional forms of government such as those based on clans, confederacy, or hereditary chiefs'.³

It remains unclear whether the Charlottetown Accord would have given future Aboriginal governments *de facto* immunity from the Canadian Charter in the absence of a formal agreement specifying such exemption. Section 32 of the Charter states that the document is meant to apply to 'the Parliament and government of Canada' as well as all provincial governments; yet no mention is made of the applicability or inapplicability of the Charter to Aboriginal governments, as it predates the era of negotiations for native sovereignty. Some legal scholars have suggested that '[d]espite the silence of section 32 on Aboriginal governments, it is probable that a court would hold that Aboriginal governments are bound by the Charter' (Hogg and Turpel, 1995, p. 214). Predicting this, native leaders sought to include specific language in the Charlottetown Accord that promised that future Aboriginal governments would not be bound by the Charter provisions. Federal government negotiators, unwilling to grant such full exemption from the Charter, proposed a compromise solution whereby Aboriginal governments would be granted access to section 33 of the Constitution Act (known as the 'notwithstanding clause'), which the province of Québec had already successfully negotiated on the grounds of its status as a 'distinct society'. Access to this clause would effectively enable Aboriginal governments to suspend those parts of the Charter that posed obstacles to self-rule and collective rights. Native leaders agreed to this concession, and the change was duly included in the final draft of the *Consensus Report on the Constitution*, or the Charlottetown Accord.⁴

In striking contrast to the position of male chiefs, many Aboriginal women, particularly native or First Nations women (as opposed to Inuit and Métis women) feared losing existing protections of their sex equality rights as guaranteed by federal Canadian law, specifically by the Charter.⁵ They expressed concern that Aboriginal governments might decide to suspend precisely those sections of the constitution designed to protect women's equality rights in order to override a controversial piece of legislation known as Bill C-31, which was opposed by many native leaders. Passed in 1985, Bill C-31 overturned a discriminatory provision in the Indian Act responsible for disenfranchising tens of thousands of native or First Nations women (and their children), who routinely forfeited their Indian status if they married non-status Indian men or non-Indian men. The converse was not true of men, whose white or non-Indian wives and children automatically gained full Indian status and privileges upon marriage. Without formal Indian status, native women and their children lost their treaty rights and numerous associated benefits, such as inheritance rights and permission to reside on reserve land. The practice of removing women's Indian status as a penalty for marrying non-Indian status men was not a long-standing native tradition, but rather a function of Canada's 1869 Indian Act, which introduced a number of patriarchal conceptions and arrangements into Aboriginal communities. Nonetheless, band council leaders used this legal device to prevent women and their non-Indian status husbands and children from sharing in the resources of native communities, and were among the staunchest opponents of the legislation that finally overturned the practice in 1985. The Charter was instrumental in defending Bill C-31, which was introduced in Parliament after a disenfranchised native woman, Sandra Lovelace, successfully brought her case before the United Nations justice committee, which deemed that removing a person's Indian status was discriminatory under international law. In

the years since this decision, an estimated 57,000 persons – the vast majority women and their children – have applied to be reinstated as full status Indians, but many band councils have refused to offer these individuals land, housing, and other benefits. Some of the wealthiest bands are also the biggest offenders in this respect: oil-rich band councils in the province of Alberta have managed to resist recognizing and re-settling fewer than 2 percent of persons who obtained legal reinstatement using the 1985 amendment (Green, 1993, p. 113 and p. 115).

In light of entrenched forms of discrimination against them by leaders of their own communities, some women argued that they could not trust their local band chiefs or indeed national leaders to guarantee their sex equality rights at the local reserve level or to include such protections in proposed Aboriginal constitutions (Platiel, 1992a; Green, 1993, p. 113). The question whether the Charter should continue to apply to self-governing native communities thus sparked a much-publicized rift between some native women's groups and mainstream Aboriginal bodies, and ultimately may have served to erode support for the Charlottetown Accord. In locking horns with the main Aboriginal associations over the issue of protections for women, native women's groups brought into sharp relief some tensions between cultural, collective rights and individual sex equality rights. As the president of the Native Women's Association of Canada (NWAC), the group leading the fight for equality protections, commented (Stacey-Moore, 1991, p. 7):

Our Aboriginal leadership does not favour the application of the Canadian Charter of Rights and Freedoms to self-government. The opinion is widely held that the Charter is in conflict with our notions of sovereignty, and further that the rights of Aboriginal citizens within their communities must be determined at the community level. As women, we can look at nations around the world which have placed collective and cultural rights ahead of women's sexual equality rights. Some nations have found that sexual equality interferes with tradition, custom and history. There are many, many nations around the world which have refused to implement United Nations guarantees of sexual equality ... Canada cannot exempt itself.

Suggestions by mainstream Aboriginal leaders that the Charter was merely a remnant of Canada's colonial relationship with native peoples and stood in conflict with the values and practices of traditional self-government were met with skeptical responses by native women's lobbyists, who demanded a serious review of the Charter issue. Led by NWAC – representing Indian or First Nations women – and supported by several provincial native women's groups and the newly formed National Métis Women of Canada, Aboriginal women pressed for assurances that their equality rights would be guaranteed in any constitutional settlement pertaining to Aboriginal self-government. Since the Charlottetown Accord seemed initially likely to succeed – it was, after all, supported by the main native organizations – NWAC argued that the accord should require future Aboriginal governments to be bound by the Charter. The group also demanded a place at the constitutional negotiating table for a representative of native women, so that women's perspectives could be heard. Not all who spoke out insisted on permanent Charter protection: some women left open the possibility that eventually adequate sex equality protections might be included in Aboriginal

constitutions, and even proposed an Aboriginal Charter of Rights. However, NWAC leaders, recognizing that Aboriginal governments could overturn or eliminate sex equality guarantees in their own constitutions with relative ease – in contrast to the constitutional amendments required to alter the Canadian Charter – argued for irreversible Charter protection (Platiel, 1992b).

In defending the continued application of the Charter, NWAC cited ongoing discrimination against native women by Indian band councils and the political quietude of national Aboriginal chiefs on sex equality issues as ample justification for their mistrust of the ‘wait and see’ approach urged by native leaders. As women who had themselves been reinstated to Indian status by Bill C-31, it is unsurprising that NWAC leaders were reluctant to trust that women’s equality rights would be safeguarded by Aboriginal governments in the absence of federal laws requiring them to do so. Moreover, some band councils readily admitted that they were looking for legal ways to override Bill C-31 and so disenfranchise recently reinstated persons of their Indian status, as well as forestalling future claims for reinstatement (Green, 1993, p. 115). Another reason many native women were skeptical of assurances that their equality rights would be respected in the context of self-government was that the dramatic increase in violence and sexual abuse in their communities had not been given the serious attention by native leaders that women felt it urgently required. Reports of rates of domestic assault against native women living on and off First Nations reserves that were several times the rate for non-Aboriginal women began to emerge the early 1980s, and the lack of a sustained, institutional response by band councils angered and alienated many women from mainstream native politics.⁶ While not necessarily seeking a constitutional solution to the problem of violence, many native women viewed their leaders’ poor track record on this issue as further reason to worry that access to the override section of the Charter for Aboriginal governments could mean a setback for women’s equality rights. In consultations with members of the Royal Commission on Aboriginal Peoples – announced amidst the ashes of the defeated Charlottetown Accord – native women spoke of male leaders urging them not to discuss publicly with commissioners their communities’ problems of domestic violence, alcoholism and sexual abuse, in part because of fears that this would detract from critical negotiations on questions of self-government. Commissioners meeting *in camera* with native women across the country were told of pressure tactics employed by band council leaders and chiefs to dissuade women from speaking out.⁷

A further reason for concern about Charter exemption for Aboriginal governments concerned the male-dominated character of the main native organizations, which groups like NWAC felt had the effect of blocking serious discussion of issues of sexual equality (and sexual violence). In connection with this concern, a pivotal part of NWAC’s strategy was the group’s launching of a legal challenge in the Federal Court of Canada in January 1992. To punctuate their opposition to the proposed exemption of Aboriginal communities and governments from the Charter to publicize the unwillingness of national native organizations to listen their concerns, NWAC representatives charged that federal agencies had failed to fund their association and other national Aboriginal women’s groups while funding mainstream,

male-dominated groups. NWAC claimed that the discrepancy in support for native associations prevented their dissenting views from being heard, especially on the Charter issue.⁸ On the eve of major political talks with Aboriginal leaders and provincial premiers on Canada's future, NWAC also sought formal participant status at the constitutional negotiating table. At the trial level, NWAC's case failed (in March 1992): the judge rejected the association's charges that government funding of the main native associations and denial of equal financial support to native women's groups compromised their freedom of speech or constituted sex discrimination.⁹ However, NWAC appealed to the Federal Court of Appeals, which ruled in August 1992 that native women's rights of political participation were negatively impacted by unfair government funding practices.¹⁰ Despite their initial moral victory, NWAC spokeswomen did not succeed in getting invited to the constitutional talks along with other Aboriginal leaders, because the issue of participation was deemed outside the court's power. The implications of the continued exclusion of women's groups from constitutional negotiations were far-reaching: the draft Charlottetown Accord barely made mention of native women's concerns, stating that 'the issue of gender equality should be on the agenda of the first First Minister's Conference on Aboriginal Constitutional matters', and granted future Aboriginal governments access to the controversial 'notwithstanding clause' (section 33).¹¹ Ironically, native women's demand to be included in constitutional talks was eventually heeded, albeit several months after the defeat of the Charlottetown Accord: in early 1993, NWAC was finally invited to participate in talks at an inter-governmental conference on constitutional issues.

Native women were by no means unanimous in their call for formal constitutional protection of their individual equality rights by means of the Charter, and disagreement continues today (Delacourt, 1992). Chief Wendy Grant, vice-chief of the Assembly of First Nations at the time of the original dispute, spoke out against NWAC's position and argued in favor of Aboriginal self-government free from the constraints of Canadian law. Like other native leaders, Grant characterized the conflict as fundamentally about different, even incommensurable legal and political systems, not about disparate commitments to women's equality: 'Your governments and laws are set up in such a way that it is a hierarchical government and – justifiably so – you've got to put protection in for the individual. But when you look at a traditional [native] government, it's the other way: the collective is the driving force and the individuals rights are enhanced and protected by the collective which looks after those individual rights'.¹² Some native women legal scholars, including Mary Ellen Turpel (1993), also disagreed strongly with NWAC's arguments. However, a significant number of native women went on record as supporting continued Charter protection for Aboriginal peoples precisely because they feared the erosion of women's rights. This is reflected not only in the positions taken by NWAC and provincial native women's groups, but also in the rejection (in the referendum vote) of the Charlottetown Accord by two thirds of native peoples on reserves. NWAC's position was considered sufficiently representative of native women to earn endorsement from mainstream national women's groups, including the largest and most influential organization, the National Action Committee on the Status of Women (NAC). Although NWAC and its supporters were only one of several interests opposed to the Charlottetown Accord, the publicity

surrounding this lobby's objections and the sense that it exposed a serious rift among Aboriginal associations was not insignificant to the accord's ultimate defeat.

The Clash Between Sex Equality Rights and Collective Rights

To some extent, the conflict over whether the Charter should apply to future self-governing Aboriginal communities reflected the already strained relationship between native women's groups and organizations with more political clout, especially the AFN. The different political priorities and strategies of these associations intensified the disagreement over the Charter's relevance to native peoples. Some who watched the debate unfold suggested that NWAC's demands for guarantees for sex equality rights was mostly a manifestation of growing schism between disenfranchised, disempowered members of native communities – a disproportionate percentage of whom are women – and the male elite leadership of band councils and national associations.¹³

While not minimizing the significance of antagonisms within Aboriginal communities and between different native organizations, it seems undeniable that NWAC's challenge represented a more fundamental clash in political values and legal frameworks. In particular, the debate over whether the Charter should apply to future Aboriginal governments highlights two critical normative tensions which I suggest arise from competing commitments to gender equality and special arrangements for cultural minorities. The first of these dilemmas concerns conflicting interpretations and evaluations of the norm of *equality* held by women's rights advocates and cultural groups. This in turn derives in part from a second tension, namely, that between collective rights and individual rights.

Native women activists and leaders of the main Aboriginal associations disagreed and continue to disagree on both the nature of social equality and the proper political priorities as concerns the goal of equality. Native leaders perceive self-government as the key equality objective, understood as the goal of securing formal recognition of First Nations, Inuit, and Métis peoples as self-determining; the political relationship to the rest of Canada which Aboriginal negotiators sought to establish in the early 1990s was expected to instantiate such equality. Individual equality and the ideal of sexual equality are viewed by some as an appropriate goal for native peoples. As native legal scholar Mary Ellen Turpel writes (1993, p. 180), 'Equality is simply not the central organizing principle in our communities. It is frequently seen by our Elders as a suspiciously selfish notion, as individualistic and alienating from others in the community. It is incongruous to apply this notion to our communities. We are committed to what would be termed a "communitarian" notion of responsibilities to our peoples, as learned through traditional teachings and our life experiences'. In response to their dissenting rank-and-file members and NWAC lobbyists, spokesmen for the AFN argued that sexual equality was a matter for native peoples themselves to work out in their own communities, altogether separate from issues of Aboriginal sovereignty. By contrast, NWAC and other native women's groups supported a broadly (but not exclusively) feminist conception of sexual equality and of the importance of legal protection for their individual rights.

The asymmetry between the account of equality advocated by many native women and that endorsed by mainstream Aboriginal associations was also a reflection of the tension between individual rights – which supply formal guarantees for women’s sex equality rights – and collective rights, which form the basis of proposals for Aboriginal self-government. Collective rights are also invoked in calls for policies aimed at the preservation of cultural minorities’ distinct identities, such as protective language laws, provisions for first-language education, and special dispensation for religious minorities. Native leaders and band council chiefs lost no time in characterizing the rift between their associations and native women’s groups as one of clashing legal systems and political norms. Not only did they try to convey the message that traditional native social, legal and political institutions were best protected by a framework of collective rights, but some suggested that NWAC’s sex equality concerns were proof of the extent to which European concepts and thinking had influenced native society. Arguing in the vein, Mercredi, then AFN Chief, stated that many native people ‘challenge the Charter’s interpretation of rights as weapons to be used against governments; we tend to see rights as collective responsibilities instead of individual rights – or at least see the strong link between the two’. Moreover, Mercredi argued (1993) that the legal system imposed by the Charter posed tensions with aspects of Aboriginal justice – ‘it doesn’t include our communal vision’ – and could pose obstacles to the authority of the traditional clan system and other institutions which Aboriginal communities might seek to reintroduce.

Despite the possible perils of collective rights for native women, NWAC and its provincial counterparts were somewhat less inclined than were Aboriginal leaders to portray the disagreement over the Charter as a conflict between collective rights and individual rights, for in principle they supported both. NWAC spokeswomen did however feel they needed to respond to attempts by national leaders to characterize collective rights as the only ‘authentic’ form of Aboriginal rights. To this end, they emphasized the importance of formal recognition of individual and human rights, which they warned should not be eclipsed by the quest for Aboriginal sovereignty (Stacey-Moore, 1991, p. 7). Rejecting intimations by native traditionalists that individual rights and collective rights were in some sense incompatible, native women argued that explicit protection of their individual rights could and should go hand in hand with the collective rights intrinsic to Aboriginal self-government.

Reconciling Gender Equality and Cultural Self-Determination

The political impasse created by disputes over the meaning of equality and the relationship between individual and collective rights was not adequately resolved during the 1992 constitutional crisis, and disagreement persists today. However, at least three different strategies for reconciling conflicting conceptions of equality and tensions between collective rights and individual rights emerged in the course of the Canadian constitutional debate. I suggest that these broadly reflect the main choices facing (autonomy-seeking) national minority communities as they grapple with the problem of how to accommodate competing commitments to sex equality and collective rights.

The View from Tradition

One initial response to NWAC's insistence on Charter protection for women's equality rights was the appeal by some native leaders to traditional Aboriginal models of family and society. In particular, some Aboriginal spokespeople invoked what is sometimes called the 'traditional Indian motherhood ideal' to suggest ways of reconciling demands for sex equality (whether internal or external to the community) with native cultural norms and social arrangements.¹⁴ Typically, proponents of this view offer reassurances that women are respected and valued in their capacities as wives and mothers, and as full members of the community; different roles, on this view, need not mean unequal ones. Moreover, customary Aboriginal family roles for men and women are thought to contribute to social harmony and the preservation of communities' traditional identities. By contrast, liberal democratic social and legal norms are seen to pose dangers to the Aboriginal peoples' aspirations for cultural self-determination. This thought was voiced by some native spokespeople during the 1992 debates, including one high-ranking woman leader, Chief Wendy Grant (then vice-president of the AFN), who commented that 'divisions between First Nations people based upon the non-native fascination with extreme individualism simply support the assimilation of our people into the non-native culture' (Platiel, 1992b). As this remark suggests, the 'view from tradition' rejects liberal notions of individual rights in favor of a reassertion of native cultural values and forms of social organization. While this approach clearly reflects native peoples' desire to direct the social, cultural and political life of their communities, it may also represent a backlash against dissenting members who demand social and political reform.

The Collective Rights/Human Rights Approach

A second strategy for reconciling individual sex equality rights with cultural group rights that emerged in the course of the debate on Aboriginal sovereignty and the Charter is what we might call the 'collective rights/human rights model'. Proponents of this view support the principle of self-government based on collective cultural rights, but concede that such governments are in turn morally bound to respect the basic human rights of their members, as specified by international covenants. Since the idea that 'women's rights are human rights' is gradually becoming a key aspect of human rights discourse, some protection for women's basic rights could be expected to follow from the collective rights/human rights model. However, extensive and legally binding sex equality rights are best secured by a state's own formal constitution, rather than by international human rights covenants, which are not always easy to enforce. But since those who support the collective rights/human rights approach maintain that self-governing cultural minorities should not be answerable to liberal democratic laws and norms, this model provides little assurance that female members will enjoy comprehensive equality protections.

During the 1992 constitutional negotiations, many heads of the main Aboriginal associations and band council chiefs espoused views about the legal and political requirements and constraints of native sovereignty that could best be characterized as fitting the collective rights/human rights model. Moreover, their position was

later adopted by Canada's Royal Commission on Aboriginal Peoples, whose final report contains perhaps the best articulation of this perspective; the commissioners endorse an approach which

[A]ccepts that Aboriginal governments are subject to international human rights standards in their dealings with people under their jurisdiction. However, it argues that an Aboriginal government cannot be held accountable in Canadian courts for alleged violations of the Canadian Charter of Rights and Freedoms unless the Aboriginal nation in question has previously consented to the application of the Charter in a binding constitutional instrument.¹⁵

Although Aboriginal leaders eventually accepted the federal government's compromise solution during the 1992 negotiations – access to the notwithstanding clause of the Charter as part of the native sovereignty package – they would have preferred complete amnesty from Canada's constitution. Native spokespersons however were careful to couch their claims for sovereignty with reassurances that they acknowledged the value of individual human rights protections.¹⁶

The Equality View

A third approach to the dilemma of reconciling sex equality rights with collective, cultural rights is encapsulated by the stance taken by many native women during from the sidelines of the constitutional negotiations, and advanced with considerable force by NWAC. This view endorses the goal of self-determination for native peoples but emphasizes the importance of sexual equality protections and other individual rights provisions. Some versions of this perspective regard women's equality rights and cultural self-determination as equal in importance. In the Canadian case, native women activists emphatically rejected suggestions that women should even temporarily set aside their equality concerns for the purpose of forming a united front for native sovereignty. Yet nor do advocates of the 'equality view' accept traditionalists' claim that individual rights and collective rights are incompatible, though they acknowledge numerous tensions between them. Fears that the application of the Charter to Aboriginal governments would merely prolong the colonial relationship between native peoples and the rest of Canada and obstruct traditional native forms of self-governance may well have been justified; however, native spokeswomen and NWAC leaders argued that these were risks that native peoples should be willing to take in order to secure the protection of the rights of all of their members, women included.

Of the different approaches to reconciling sex equality rights and calls for collective, cultural rights discussed here, only the final of these takes sexual justice claims seriously enough to consider the full range of ramifications for women of proposals for self-government. Moreover, it appears that the third approach alone challenges the assumption (central, I suggest, to struggles for cultural rights and self-determination) that legal and political protections should mainly protect cultural groups against the wider liberal society, and indeed protect individuals as members of the collective, but *not* extend that protection to individuals in their status as

private citizens. This may seem a curious point to raise in connection with Canadian Aboriginal peoples, whose extensive social infrastructure of clans, tribes, and nations stresses the importance of family kinship and harmonious social life. However, many native communities today are struggling with the breakdown of social support systems and the erosion of traditional ways of life, identities, and languages. These dramatic changes have resulted in problems of high unemployment, alcoholism, suicide and violence. Just as the Charter did not magically resolve these issues for native communities, it is not yet clear to what extent self-government based on collective rights and traditional native law could reverse these trends, or help to revive more harmonious and equitable social relationships in native communities.

Conclusion

Native women's struggle to maintain Charter protection of their sex equality rights brings into focus a few main reasons why women members of cultural minorities might want to treat proposals for constitutions based exclusively on collective cultural rights with some caution. First, groups that experience systematic forms of social, political and economic subordination within a state system are by no means immune from practicing their own internal forms of discrimination and abuse, as we know all too well. In the absence of enforceable protections for individual rights, a political framework of self-government based on collective rights may make it easier for powerful members to subordinate others within the group. In effect, such a system could potentially shore up the status quo by failing to identify and safeguard vulnerable persons. In Aboriginal communities torn apart by the loss of traditional social systems and ways of life, it is women who tend to face greater discrimination and powerlessness, and suffer higher rates of poverty, unemployment, and physical and sexual abuse. The diminution of native women's status and power has much to do with the dramatic shift in social roles and forms of political governance precipitated by European conquest and colonization. Patriarchal concepts and institutions introduced by British and French colonial authorities in Canada are widely credited with having compounded native women's loss of traditional status and authority in their communities, especially after the implementation of the Indian Act. However, native women are also quick to point out that men in their own communities have made little attempt to prevent the erosion of women's customary power base – their role in political life, for example – and that these same men are now reluctant to relinquish control of Aboriginal political bodies or even to share their power with women.

In the case of First Nations women seeking to overturn the provision in the Indian Act responsible for the discriminatory dual system of determining Indian status that had disenfranchised so many of them and their children (Métis and Inuit communities were not affected), many came to suspect that their biggest obstacle was the opposition of band councils and the heads of Aboriginal associations – *not* the federal government. While some native leaders conceded the unfairness of the Indian Act provision, they did not want to see it settled by means of a judicial decision. Resisting the imposition of Bill C-31, band councils and native organizations urged that any changes should be the result of political negotiation, and accompanied by guarantees from federal and provincial governments for increased

financial assistance and land, in part to accommodate large numbers of reinstated members. It was no secret that council chiefs feared sharing economic resources and the loss of their power to determine band membership more than they feared women's complaints of discrimination and second-class citizenship.

A second compelling reason why women of some national minorities have reason to be wary of constitutions based exclusively or primarily on collective rights is that such rights tend to collapse the distinction between individual and collective life in ways that are potentially disadvantageous to women. The operative assumption in much rhetoric for political self-determination is that what is good for the collective is also good for individual members. In some cultures, there are good reasons to think that this is often the case: Aboriginal communities in Canada, for instance, are often close-knit, and place great emphasis on the interconnectedness of family, generations, clans, and 'nations', and the importance of social harmony and 'healing'. Integral to traditional native conceptions of community is the idea that family and clan members have different, but equally important, roles. Historically, women in Canadian Aboriginal societies have held roles primarily as mothers, care-givers, educators, and transmitters of culture; crucially, their needs and interests are not viewed as separate or indeed separable from those of her family and clan. But while arrangements based on extensive integration of individual and social interests may work well in communities with vigorous systems of social support and solidarity, the erosion of such traditional structures in recent years has introduced a host of social problems. All too frequently, traditional roles and relationships that once helped to secure esteem and social power for native women have become sources of disadvantage and powerlessness for them.

If collective, cultural rights pose such formidable risks and obstacles to women's equality, should proponents of more equitable relations between the sexes seek to oppose them? Despite the cautions issued by my analysis of Canadian Aboriginal women's dilemma, I suggest that cultural self-determination and sexual equality rights are not incompatible. One way to help ensure that they are compatible in *practice* is to require national cultural minorities who seek forms of community autonomy and self-rule to include formal respect for the individual rights of their members as part of negotiated constitutional settlements. It may also be possible to combine protections for individual rights (including sex equality rights) with collective self-determination in a more synthetic way, by incorporating liberal and culturally specific legal traditions in developing alternative legal paradigms. Recent efforts by Aboriginal scholars to forge a vision which accommodates individual and collective rights by emphasizing the idea of multi-tiered 'responsibilities to kin, clan, and nation' as well as the importance of individual uniqueness are suggestive in this regard.¹⁷ Of specific interest here are native women's recent attempts to develop a vision of a more integrated relationship between collective rights and individual rights by grounding such an ideal in a reconceived conception of justice. The idea of re-thinking the non-native 'received' understanding of justice so as to make it correspond more directly to the realities of Aboriginal communities – their forms of social and political organization and their spiritual traditions – is an important part of this task. Justice is understood by many native people as a colonial, European idea; this is underscored by the absence in many First Nations languages of a precise word for justice. As one Aboriginal scholar notes, traditional

beliefs and elders' accounts of appropriate community practices suggest that *harmony*, not formal justice, may be the most important ideal in native society.¹⁸

Despite the potential that exists for retrieving egalitarian models of social and political relationships within Aboriginal culture, grounded in a (newly articulated) native conception of justice, many native women remain keen to preserve formal constitutional guarantees for their individual rights. Scarcely five years after the defeat of the Charlottetown Accord, the final Report of Canada's Royal Commission on Aboriginal Peoples was published, and to the satisfaction of many Aboriginal women scholars and activists the report contains definitive language urging the formal protection of native women's equality rights. While not legally binding, the document will serve as a roadmap for future negotiations on native sovereignty questions; as such, it makes it less likely that sex equality issues could simply be dropped from subsequent political talks on self-government, or indeed from Aboriginal government constitutions. The inclusion of specific language protecting native women's equality rights in the commissioners' report must be seen as at least in part a consequence of native women's highly publicized struggle for guarantees for their sex equality rights in the early 1990s. However, while the report reiterates the federal government's position that the Charter should continue to apply to native peoples, it confirms the view that future Aboriginal governments should have access to the controversial notwithstanding clause of the Charter. But in a partial concession to native women's groups, the commissioners emphasized that in no case should native communities use this discretionary power to suspend women's rights:

In our view, the Canadian Charter of Rights and Freedoms applies to Aboriginal governments and regulates relations with individuals within their jurisdiction. However, under section 25, the charter must be interpreted flexibly to account for the distinctive philosophies, traditions and cultural practices of Aboriginal peoples. Moreover, under section 33, Aboriginal nations can pass notwithstanding clauses for a period. At the same time, sections 28 and 35 (4) of the *Constitution Act*, 1982, ensure that Aboriginal women and men are in all cases guaranteed equal access to the inherent rights of self-government and are entitled to equal treatment by their governments.¹⁹

Native women's challenge to Aboriginal leaders on sex equality issues serves as a dramatic illustration of the ways in which the political priorities and strategies of women's equality advocates may differ from those of proponents of collective, cultural rights. The Canadian example is of special interest because it reveals the difficult decisions and trade-offs which those who advocate *both* equality rights and collective rights must make, and the far-reaching political effects of their choices. The defeat of the Charlottetown Accord in October 1992 in referenda in Québec and the rest of Canada was by all accounts a steep price to pay to protest the deferral of political and legal guarantees for native women's equality rights. Yet the support these women garnered from other citizens and advocacy groups suggests that many Canadians, women in particular, were concerned about the possible implications of collective rights for gender equality. As such, this case serves as a poignant reminder that less powerful members of national minority groups –

especially women – have good reason to press for explicit recognition of their equality rights amidst the struggle for collective cultural rights and self-government.

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Notes

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- 1 As one Aboriginal scholar notes (Beaty Chiste, 1994, pp. 38–9), '[A] return to traditional domestic and community relations may depend on a return to traditional economic practices – if not in the material sense, at least in the distributional sense ... [A]boriginal women traditionally received the most respect and autonomy in societies that were roughly egalitarian in nature. However, evidence suggests that 'rough egalitarianism' is not common in contemporary aboriginal communities, and the material basis that underlay formerly egalitarian structures is missing'.
- 2 Ovide Mercredi, former leader of the Assembly of First Nations, made the following clarification during hearing conducted under the auspices of the *Royal Commission on Aboriginal Peoples* (Government of Canada, 1992, p. 631): 'The official position of the organization I represent is that whatever governments we establish have to respect individual rights, but in a manner that does not destroy the collective identity, the collective mind of the people themselves. And the resistance we have to the Charter of Rights and Freedoms had nothing to do with women's rights. It has to do with the concern that we have about the Charter imposing a political structure on our people that our people may not want'.
- 3 *Overview of the First Round. Royal Commission on Aboriginal Peoples – Public Hearings*, 1992, p. 41.
- 4 Part IV (First Peoples), section 43, of the *Consensus Report on the Constitution (Charlottetown Accord)*, August 28, 1992, states: 'The Canadian Charter of Rights and Freedoms should apply immediately to governments of Aboriginal peoples... The legislative bodies of Aboriginal peoples should have access to Section 33 of the Constitution Act, 1982 (the notwithstanding clause) under conditions that are similar to those applying to Parliament and the provincial legislatures but which are appropriate to the circumstances of Aboriginal peoples and their legislative bodies'.
- 5 Métis, Inuit, and northern Aboriginal women were less concerned with Charter protection, as they had not faced the discrimination that Indian women had experienced at the hands of band council leaders (Beaty Chiste, 1994, p. 21).
- 6 A study by the Institute for Public Policy in Montréal suggests that as many as 80 percent of Aboriginal women in Québec report being the victims of domestic violence (Government of Canada, 1993, *Overview of the Third Round: Exploring the Options, Royal Commission on Aboriginal Peoples – Public Hearings*, p. 10). The Canadian Panel on Violence Against Women later confirmed these rates of violence against native women (Green, 1993, p. 112).
- 7 Government of Canada, 1993, *Overview of the Third Round: Exploring the Options, Royal Commission on Aboriginal Peoples – Public Hearings*, pp. 9–10.
- 8 NWAC received a small annual operating grant from the Assembly of First Nations, but the precariousness and inconsistency of this funding – and the suspicion that it was linked in some years to NWAC's political positions – prompted the group to argue that they needed their own direct government funding.
- 9 'Native women lose bid for spot at talks: Exclusion from constitutional negotiations doesn't violate rights, judge rules', *Globe and Mail*, 1 April 1992.
- 10 *Native Women's Association of Canada v. Canada* (1992), 4 C.N.L.R. (F.C.A.). The federal government appealed to the Supreme Court of Canada, which overturned the previous decision on October 27, 1994.
- 11 *Consensus Report on the Constitution (Charlottetown Accord)*, section 52, 'Gender Equality'.
- 12 Quoted in R. Platiel, 1992c.
- 13 See for instance Beaty Chiste, 1994, p. 22.
- 14 See Krosenbrink-Gelissen, 1991, p. 120.

- 15 *Report of the Royal Commission on Aboriginal Peoples*, 2, p. 228.
- 16 Ovide Mercredi issued such reassurances repeatedly. See for instance Delacourt, 1992.
- 17 Barsh, 1995, pp. 44–5.
- 18 Monture-Okanee, 1993.
- 19 *Report of the Royal Commission on Aboriginal Peoples*, 2, p. 168.

References

- Barsh, R. L. (1995) 'Indigenous peoples and the idea of individual human rights', *Native Studies Review*, 10 (2), 35–55.
- Beatty Chiste, K. (1994) 'Aboriginal women and self-government: challenging Leviathan', *American Indian Culture and Research Journal*, 18 (3), 19–43.
- Carens, J. (1990) 'Difference and Domination: Reflections on the Relation Between Pluralism and Equality', in J. Chapman and A. Wertheimer (eds), *Nomos* 32. New York: New York University Press.
- Delacourt, S. (1992) 'Natives divided over Charter: Women will not accept self-government without guarantees', *Globe and Mail*, 14 March.
- Government of Canada (1992) *Overview of the First Round. Royal Commission on Aboriginal Peoples – Public Hearings*.
- Government of Canada (1992) *Public Hearings, Rounds I–IV, Royal Commission on Aboriginal Peoples*, June 26.
- Government of Canada (1992) *Consensus Report on the Constitution (Charlottetown Accord)*.
- Government of Canada (1993) *Overview of the Third Round: Exploring the Options, Royal Commission on Aboriginal Peoples – Public Hearings*.
- Government of Canada, (1996) *Report of the Royal Commission on Aboriginal Peoples*.
- Green, J. (1993) 'Constitutionalising the patriarchy: Aboriginal women and Aboriginal government', *Constitutional Forum*, 4 (4), 110–20.
- Hogg, P. and Turpel, M. E. (1995) 'Implementing Aboriginal self-government: constitutional and jurisdictional issues', *The Canadian Bar Review*, 74 (2), 187–224.
- Krosenbrink-Gelissen, L. E. (1991) *Sexual Equality as an Aboriginal Right: The Native Women's Association of Canada and the Constitutional Process on Aboriginal Matters, 1982–1987*. Saarbrücken: Verlag Breitenback.
- Kymlicka, W. (1995) *Multicultural Citizenship*. Oxford: Oxford University Press.
- Kymlicka, W. (1997) 'Liberal complacencies', *The Boston Review*, 22 (5), 29–30.
- Lambelet Coleman, D. (1996) 'Individualizing justice through multiculturalism: the liberals' dilemma', *Columbia Law Review*, 96 (5), 1093–65.
- Maguigan, H. (1995) 'Cultural evidence and male violence: are feminists and multiculturalist reformers on a collision course in criminal courts?', *New York University Law Review*, 70 (1), 36–99.
- Mercredi, O and Turpel, M. E. (1993) *In the Rapids: Navigating the Future of First Nations*. Toronto: Viking/Penguin.
- Monture-Okanee, P. A. (1993) 'Reclaiming Justice: Aboriginal Women and Justice Initiatives in the 1990s', in *Aboriginal Peoples and the Justice System, Royal Commission on Aboriginal Peoples*, 121–25.
- Okin, S. (1997) 'Is multiculturalism bad for women?', *The Boston Review*, 22 (5), 25–8.
- Parekh, B. (1996) 'Minority practices and principles of toleration', *International Migration Review*, 30 (1), 251–84.
- Platiel, R. (1992a) 'Native women fear loss of rights', *Globe and Mail*, 13 July.
- Platiel, R. (1992b) 'Aboriginal women divide on constitutional protection', *Globe and Mail*, 20 January.
- Platiel, R. (1992c) 'Gender issue sparks native disunity: women's group charges constitutional proposals will undermine female equality', *Globe and Mail*, 20 July.
- Stacey-Moore, G. (1991) 'Aboriginal Women, Self-Government, the Canadian Charter of Rights and Freedoms, and the 1991 Canada Package on the Constitution'. Unpublished manuscript, address to the Canadian Labor Congress, Ottawa, December 3.
- Turpel, M. E. (1993) 'Patriarchy and paternalism: the legacy of the Canadian State for First Nations Women', *Canadian Journal of Women and the Law*, 6 (1), 174–92.
- Volpp, L. (1996) 'Talking "culture": gender, race, nation, and the politics of multiculturalism', *Columbia Law Review*, 96 (6), 1573–617.