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Gender relations and self-determination: Individual rights and individual property

Salem Kim HICKS

Abstract

Women's rights have been framed to be in conflict with collective cultural rights, thereby often marginalizing them within the Indigenous self-determination movement. This paper begins by outlining three relevant legal cases situated in the Canadian context, each of which involves a dispute centering on the federally legislated Indian Act and its resultant gender discrimination against Native women and their descendants. The cases richly illustrate the complexity of gender discrimination, especially as it relates to severe consequences in Indigenous women's cultural capacity, including the loss of ability to inherit or possess reserve property, to reside on reserve, transmit legal status, as well as other rights and resources. Drawing on Indigenous feminisms, this paper argues for the need for a feminist approach to self-determination, which sees a political focus on gender issues as being critical to the successful decolonization process and implementation of transformative self-determination.

Ⅰ. Introduction

Much of the scholarship on Indigenous rights in the Canadian context distinguishes Native understandings of land and its usage as being ontologically different (Bryan, 2000) from the Western-European idea of property, in which land is seen as a fungible commodity. Private property epitomizes individual rights and therefore seems antithetical to Aboriginal ways based on collective social structure. As private property is seen as a natural state within most of the Western world, divergent understandings of property within a culture can create cleavages that wreak havoc on community (Bryan, 2000, p. 4). Thus Stolzenberg (2000) argues, property law has a strong cultural function with "profound consequences for cultural relations" (p. 170). Using private property as a lens to explore the relationship between culture and equality, this paper explores how cultural changes, through the introduction of private property rights on reserve land, may affect women's equal access to culture and land. Since gender discrimination is rooted, cloaked and obscured in the beliefs and practices of culture, this paper attempts to disentangle culture, gender, and equality through a focus on group versus individual rights.

The most recent version of private property rights being proposed for Native reserve land is called the First Nations Property Ownership (FNPO) initiative. It is an opt-in legislation, which by its fundamental nature of ownership and possession, promotes the ideas of choice and preference, both of which are essential to liberal ideas of equality. If adopted, it is argued Native peoples would then have equal opportunity—as other Canadians—to join in the economic free market, to use land as a financial asset, as collateral, and have the ability to possess and transfer ownership. The FNPO is also promoted as enabling self-determination since underlying title of the land is transferred

from current ownership by the Crown, to the Band. It is also promoted as being in synch with traditional Native culture, which, according to proponents, has historically had systems of private ownership parallel to communal ownership (Manny Jules in Flanagan, Le Dressay, & Alcantara, 2010; see also Miller, 2001). On the other hand, the initiative has been criticized as being another policy tool of cultural and political assimilation (Pasternak, 2015), and as potentially disadvantaging internal minorities, specifically women (Altamirano-Jiménez, 2013). There has been little scholarly analysis of the recent proposals to enact and extend private property on Indigenous lands in the Canadian context (Egan & Place, 2013), and even fewer analyses on the potential impact of these proposals on Indigenous women. Worldwide, women own a negligible percentage of land compared to men. Studies show that ownership and control over real property improves women's economic, social and psychological well-being (Agarwal, 1994; Meinzen-Dick, Brown, Feldstein, & Quisumbing, 1997) and several United Nations conventions advocate it as a way to increase women's equality and autonomy. Agarwal (2013) argues that the "gender gap in ownership and control of property is the single most critical contributor to the gender gap in economic well-being, social status and empowerment" (Agarwal, 2013, p. 192). Thus the need for understanding how this policy might impact not only the community as a collective, but as individuals, is of importance.

However, framing of women's rights as individual human rights, has situated women's rights to be at odds with collective cultural rights, thereby marginalizing them within the Indigenous self-determination movement. Although there has been divisive tension in the past regarding the perceived incompatibility of self-determination and gender equality rights, as well as the rejection of parts of feminist ideology, some Indigenous scholars have made challenges to this perceived incompatibility between self-determination and gender equality (see for example Gunn, 2014; Ladner, 2009b; Smith, 2006b; St. Denis, 2007a). Drawing on Indigenous feminisms, this paper argues for a feminist approach to self-determination, which sees a political focus on gender issues as being critical to the successful decolonization process and implementation of transformative self-determination. In this way, Indigenous peoples may be able to better utilize, as well as better protect themselves from assimilationist aspects of state policies such as private property on reserve land.

Following in the theoretical vein of Indigenous feminists, I argue that in order to re-establish the relatively elevated political and social position of pre-contact Indigenous women, substantive intervention and recognition of gender issues in the decolonization process and struggle for self-determination must occur. Attention and action to eradicate gender discrimination should not be made secondary or subordinate to sovereignty. It must be made salient, proactive, embedded in the discourse and actions of self-determination as it will not emerge naturally, from the legacy ashes of colonial policy and practice. I concur with scholars like Brenda Gunn (2014) who call for increasing the legitimacy of gender rights through more substantive inclusion in sovereignty, as well as Kiera Ladner (2009) who calls for decolonizing gender through reutilizing gender-respectful Indigenous constitutional orders[1] which recognized self-government, Aboriginal customary law, land rights and land-based rights that were in place long before colonization. She writes, "women, and indeed all genders, fared so much better under Indigenous constitutional orders than they have under colonial structures" (Ladner, 2009b, p. 73).

This paper begins by outlining three relevant legal cases situated in the Canadian context. Each of the cases involves a dispute centering on the federally legislated Indian Act and its resultant gender discrimination against Native women and their descendants. The cases richly illustrate the complexity of gender discrimination, especially as they relate to severe consequences in Indigenous women's cultural capacity, including the loss of ability to inherit or possess reserve property, to reside on the reserve, transmit legal status, as well as other rights and resources. Next, the belief in, as well as the contestation of, "incompatibility" of self-determination and gender equal rights is presented. This is followed by a discussion of how cultural recognition is theorized to impact on gender equality

through for example cultural relativism. Finally, the paper ends with a discussion of cultural traditionalism, and the need for recognition of individual gender rights within cultural collective rights.

Ⅱ. Self-determination and gender justice

Indigenous peoples have been struggling for recognition of their inherent right to self-determination over their traditional lands, territories, and natural resources; to self-government and autonomy from political domination; and to respect for their distinct cultures and spiritual world views (Turpel, 1992, p. 580). The concept of culture is a foundational concept in the international understanding of the collective rights of Indigenous peoples. Individual rights of Indigenous peoples, and of women in particular, are protected in legal frameworks both internationally in Article 44 of the United Nations Declaration of the Rights of Indigenous peoples (UNDRIP), generally in CEDAW, as well as domestically within the Canadian Charter of Rights and Freedoms. However, although women share equally in the struggle and hope for self-determination they have been subject to gender-based discrimination from both state policies, primarily the Indian Act, and community practices, struggling "since 1967 to have their right to identity and their civil and political rights recognized" (McIvor, 2004). Cunningham (2006) and others write about the necessary fusion of self-determination and gender rights:

> Gender justice for Indigenous women must be rooted in Indigenous self-determination...Indigenous self-government means collective decision-making regarding economic, social and cultural policies. These decisions should be made in a way that is inclusive, egalitarian and pluralistic, which entails changes in the traditional distribution of power and authority. (p. 56-57)

Women's rights are marginalized and contested across societies, geographies and cultures, and are often in opposition to the male heteronormative status quo. For Indigenous women, equality is inextricably tied with, and further complicated by, issues of race and dispossession via colonialism. So much so that "within the context of land and settler colonialism, the issues facing Indigenous women, as inseparable from the issues facing Indigenous peoples as a whole, are resolved via decolonization and sovereignty, not (just) parity" (Arvin, Tuck, & Morrill, 2013, p. 10).

The following three legal cases involve challenges to gender-based discriminatory policies in the Indian Act, as well as internal discrimination via Indigenous governance. These cases illustrate in what ways culture can be problematic for gender equality when utilized as a political tool. The aim is to unravel the intersections of culture and gender equality in order to explore the gendered implications of the introduction of private property tenure on reserve land.

Ⅲ. Three legal cases: Lovelace, Sawridge and McIvor

Ⅲ. 1. Background

Neither the Canadian Federal government nor many Indigenous governments have adequately legislated and ensured the protection of Aboriginal women. Because of the strong fight for recognition by Canada's Aboriginal peoples, Section 35 was added to the patriation of the Constitution from the authority of the United Kingdom to that of the Canadian government in 1982. Section 35 of the Canadian Constitution states:

(1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.
(2) In this Act, "aboriginal peoples of Canada" includes the Indian, Inuit and Métis peoples of Canada.
(3) For greater certainty, in subsection (1) "treaty rights" includes rights that now exist by way of land claims agreements or may be so acquired.
(4) Notwithstanding any other provision of this Act, the aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons.

While the right to self-determination for Indigenous peoples is recognized in Section 35, it is seen by Indigenous advocates as a *sui generis* right, meaning that it exists outside of the Canadian and British legal traditions and within the Indigenous traditions naturally. By virtue of its very dominant and overarching legal nature, many Aboriginal advocates criticize section 35 as interfering with Aboriginal ways of being and knowing, and that, "everything has to be adjusted to fit the terms of the dominant system" (Turpel, 1989, p. 151).

Central to the conflict for each of the cases presented here is the federal legislation of the Indian Act that governs matters pertaining to Indian status, bands, and reserve land. Specifically pertinent is the 1951 discriminatory amendment—section 12(1)(b) which stated that Aboriginal women who married a non-Indian were not entitled to legal "Indian status" registration under Canadian law. Historically, people with Indian status have had rights to live on Indian reserve land, share in band finances, vote for band council and chief, and inherit band property. However, in 1985, an amendment to the Indian Act split Indian status from band membership. Bands were granted the right to develop their own membership codes, and thereby determine who can participate in band politics and society, as well as who can access band resources such as band property. However, the granting of legal Indian status was retained by the federal government.

Section 12(1)(b), dubbed the "marrying-out rule," had severe consequences on many Indian women including the loss of the ability to: transmit legal status; reside on the reserve; inherit or possess reserve property; receive treaty benefits; participate in band councils and other affairs of the Indian community; be buried in cemeteries with their ancestors; and partake in many other rights and resources (see Dick, 2011, p. 198 for full list). Section 14 of the Indian Act provided that even if status women married an Indian man from another band, the woman would lose her band membership and be forced to join her husband's band. However, men who married out did not lose status or any other rights and Section 11(1)(f) actually ensured that men could transmit their legal status and band membership to their non-Indian wives and any resultant children. After section 12(1)(b) was challenged in Canadian court, the government instituted Bill C-31, which attempted to reinstate Indian status and band membership of Aboriginal women who had been expelled from their reserve communities by the Indian Act's marrying-out rule.

Ⅲ. 2. Lavall, Bédard and Lovelace v. Canada

Jeanette Lavall, an Ojibwa woman and Wikwemikong Indian Band member, lost her Indian status in 1970 because she had married out to a non-Indian man. In the supreme court of Canada the judge's decision was that the Indian Act did not violate Lavall's equality before the law as it treated all Indian women equally the same. In another case, Yvonne Bedard, a Six Nations Iroquois woman who married a non-Indian in 1964, moved back to her reserve with her two children after leaving her husband years later. She moved into a house that she had inherited but had no legal right to because of the marrying-out law. She got permission to stay in the house from the band leadership but after some time when they asked her to leave the reserve, she brought them to High court in Ontario.

Both Lavall and Bédard lost their court cases however, a similar case filed by Sandra Lovelace, a Maliseet Indian,

challenged the marrying-out rule before the Human Rights Committee of the United Nations, making her case much more prominent in the public forum. She argued that the marrying-out legislation violated two articles of the International Covenant on Civil and Political Rights (ICCPR): Article 26, which guarantees equality before the law; and Article 27 which prohibits states denying members to be in "community with the other members of their group, to enjoy their culture, to profess and practice their religion, or to use their own language" (cited in Dick, 2011, p. 11). The ICCPR Committee decided that "denying Ms. Lovelace access to live on the reserve was neither reasonable nor necessary to preserve the group's identity, therefore, stripping her of Indian status denied her Article 27 rights and was a violation of the ICCPR" (Lovelace, 1977, para 3). As of June 1995, the amended Indian Act allowed for the reinstatement of 95,429 persons, more than half of whom were women (57.2%)(Lovelace, 1977, para 4). Unfortunately, several Native band leaders refused to follow the Canadian government legislation Bill C-31, which intended to rectify the marrying-out rule, by reinstating women's Indian status and their children if they had married non-status or non-Indian men (Deveaux, 2000, p. 132). This was a loss, sometimes permanent, for many Indigenous women to their identity and cultural membership, but also to many types of material resources such as housing and land. Some Native women charged Aboriginal governments that Native leaders "sought Charter immunity precisely so that they could reinstate sexually discriminatory criteria for band membership" through Bill C-31 (Deveaux, 2000, p. 132).

Ⅲ. 3. Sawridge Band v Canada

In 1996 the Sawridge Band[2], a Cree community, challenged Canada's decision to reinstate membership to women via Bill C-31. The band cited they had the right under the Canadian Charter of Rights and Freedoms to determine who would be allowed to be a member of their band and therefore were justified in excluding these women. They justified doing so on the basis of Cree laws and traditions (Ladner, 2009a). Since the federal government had allowed bands to determine their own memberships, anyone wanting to join had to apply directly to the band. Even though the federal government had reinstated legal Indian status to women affected by the marrying-out rule, the government no longer held jurisdiction over band membership. Thus, first by virtue of discriminatory state legislation, and then by virtue of Aboriginal self-determination, women were, in what Isaac and Maloughney (1991) lament, dually disadvantaged. Some women waited years before their Indian status was reinstated and some are still waiting for their children or grandchildren to be accepted as band members[3] in some areas. Children of women born of Indian mothers and non-Indian fathers can still be denied the right to Indian status.

Dick (2011) identifies the three levels of interactions of the dispute: the relationship between the Aboriginal community and the Canadian state; the relationship between the Aboriginal community and the women petitioning to have their rightful membership reinstated; and the relationship between the women and the Canadian state (p. 2). This clearly shows the complex association between the contested rights of the individual, the assertion of group autonomy, and state authority and responsibility in conflict.

Ⅲ. 4. McIvor v. Canada

Sharon McIvor regained her Indian status pursuant to the 1985 Bill C-31 amendments to the Indian Act. However, she filed suit against the Canadian government due the generational discrimination that was written into C-31. Some of McIvor's children inherited Indian status, even though their father is "non-Indian". However, as a result of what has been dubbed the "second generation cut-off," some of McIvor's grandchildren could not inherit Indian status because their father, McIvor's son Charles, married a non-Indian woman. Conversely, the children of Charles' sister

have status because their father is a status Indian. McIvor claims that the denial of status to Charles'children is discriminatory on the basis of gender. The second-generation cut-off therefore functions differently for those who map their Indian heritage maternally as opposed to those who have paternal lineage. McIvor's family provides a stark manifestation of this inequality, as some of her grandchildren are status Indians, because of their father, and some are not. Sharon McIvor (2004) argued that under the Canadian Charter, the Indian Act and Bill C-31 continue to discriminate against women on the basis of sex. McIvor won in the British Columbia Supreme Court in 2007, and the BC Court of Appeal in 2009.

Ⅲ. 5. Politicized gender relations

As has been described in the cases above, the political nature of the rights to self-determination and equal protection based on gender have resulted in Indigenous women's exclusion from Indian status as well as band membership—which has resulted in women, and some of their descendants, being denied access to community membership, legal status, material resources, and ultimately equality. In light of the gendered impacts of colonial legislation on Indigenous women, some Indigenous women have been wary of self-determination (Ladner, 2009b), while others have questioned whether sovereignty and self-determination would indeed improve the situation of Indigenous women (Nahanee, 1992, p. 17). For example, in 1994, negotiations in pursuit of increased Indigenous self-government in Canada were challenged and in part stopped because of the fears by Indigenous women of losing formal protection of their sex equality rights as guaranteed by the 1982 *Canadian Charter of Rights and Freedoms* (Deveaux, 2000). The Native Women's Association of Canada (NWAC) challenged the Canadian government for specifically not including them in the funding to participate in the constitutional reform negotiations. NWAC feared the proposals advanced for constitutional amendment would not include the requirement that the *Canadian Charter of Rights and Freedoms* be made applicable to any form of Aboriginal self-government which might be negotiated. Thus, Native women contributed to the demise of the Charlottetown constitutional reform, which would have facilitated a broader range of Aboriginal sovereignty stipulating Aboriginal people's inherent right to self-government, as well as self-determination. In contrast to NWAC, the main Aboriginal associations agreed that they wanted a self-government that was beyond the reach of Canadian law, including the *Canadian Charter of Rights and Freedoms*. In the end, broad-based Aboriginal leadership also rejected the Charter, not because of the issues raised by NWAC, but mainly because traditional laws and customs were excluded, and future amendments to the Charter were prohibited (Deveaux, 2006).

In 1973, the Supreme Court of Canada held that the status provisions of the Indian Act were not in violation of Indian women's right to "equality before the law" (Green, 1992). The Canadian government at that time did not consider it a violation of sexual equality to treat Indian women and men differently under the terms of the Canadian Bill of Rights. Many Indian Chiefs and their political organizations stood opposed to reinstating band membership for women[4] who had lost their status due to marrying a non-status man. Several Indian bands "managed to resist recognizing and re-settling fewer than 2 percent of persons who obtained legal reinstatement" (Green, 1992, p. 113).

Treaty rights have been instrumental in promoting the positive gains of self-determination for Indigenous peoples. However, the tension between self-governance and gender equality becomes clear in the gaps between the Canadian constitution and Aboriginal treaty rights. Aboriginal treaty rights are guaranteed equally to men and women in some sections of the Constitution Act of 1982, but it is not clear that all sections of the Act clearly support gender equality since the Act is argued to include the protection of Aboriginal self-determination which can in theory override issues of individual rights. As has been illustrated in the Sawridge case, some members of Indigenous communities have

leveled cultural claims against equality at times. Therefore, "it is conceivable that an abuse of gender equality rights could be insulated from judicial remedy by invoking s. 35 inherent rights as legitimating gender discrimination" (Green, 1992, p. 113). As Indian status is directly connected with resource allocation and legitimate political power-related status within the Aboriginal community, as conferred by the state, Indian status is very political in nature, and thus any gender equality rights that are related to Indian status have become very political in nature, as opposed to those like violence against women, or poverty issues, which are not viewed as political to the same extent.

Ⅳ. Incompatibility of sovereignty and women's rights

As has been seen above in the various cases against gender discrimination, there has been much resistance to the inclusion of women's rights in the sovereignty movement for several related reasons. First, it is argued that the problems of gender discrimination and other social issues in Indigenous communities can be traced to the patriarchal and assimilationist colonial policies imposed by the state. Thus, the need for gender equality has been perceived to be a colonial construct, laden in Western-European ideals, and feminism is seen as only pertaining to white women, with neither being compatible with Indigenous sovereignty. Secondly, the focus on individual rights is further framed as a Western ideology, which is in opposition to the collective nature of Indigenous ways of being. This is thought to potentially fragment the efforts to re-establish the strength of communities and the traditional cultural values. Sovereignty, it is argued, should be prioritized, and any internal problems best dealt with, not via the colonial state, but through traditional, autonomous governance. In these ways, gender discrimination including violence against women, is seen as being important but subsumed in the process of decolonization and sovereignty. Ladner (2009b) warns that this conflict between sovereignty and women's rights is not just academic but "continues to define and divide the Indigenous women's movement and Indigenous politics in Canada" (p. 63).

Ⅴ. Challenges to incompatibility between women's rights and self-determination

In contrast, several Indigenous scholars have argued against the incompatibility of women's rights and self-determination (Barker, 2008; St. Denis, 2007b). Jo-Anne Fiske (1991) writes that this accusation of incompatibility between women's rights and self-determination is a constructed discourse invoking cultural relativism. Fiske disagrees with the rationale or logic of this common argument that says:

> Any appeal to an outside authority diminishes the autonomy of the community/nation, imperiling the struggle for self-determination and diminishing the traditional culture and decision-making processes. The narrative continues: Human rights, being a Western concept cannot be unilaterally imposed upon Indigenous peoples; to do so violates principles of cultural integrity, abrogates inherent rights of self-determination and weakens the collective in favour of the individual. (Fiske, 1996, p. 69)

Joanne Barker (2008), agreeing with Fiske, states, "the idea that by affirming Indian women's rights to equality, Indian sovereignty is irrevocably undermined affirms a sexism in Indian social formation that is not merely a residue of the colonial past but an agent of social relationships today" (p. 149).

Vera St. Denis (2007b) argues that all Aboriginal peoples in Canada have undergone socialization to different degrees by "Christianity as well as incorporation into the patriarchic capitalist political economy and education system, and are therefore subject to western ideologies of gender identities and relations" (p. 41). Indigenous people,

have been continuously subjected to patriarchal ideas and practices that permeate the current modern Canadian landscape. Authors such as Lina Sunseri (2000), Joyce Green (1992; 2000), Andrea Smith (2005b; 2006b) and Emma LaRocque (2007) argue that the band council's governments have been colonized and that this colonization has perpetuated a fissure between gender rights and sovereignty. Ladner (2000) found in her research in the traditional Blackfoot and Mi'Kmaw Indigenous constitutions that they were not based on the subjugation and domination of women or other genders (2003; 2005), consistent with Indigenous political traditions which are more inclusive and "predicated on ideas of inter-relatedness and responsibility rather than legitimization of power and violence" (Smith, 2006a, p. 78). Despite this history, Ladner (2009b, p. 71) writes that the "mere existence" of more egalitarian traditions and ideologies does not mean that therefore Indigenous culture is exempt from sexism or discrimination noting the improbability, "Given the normalization of state and individualized violence, sexism, heternormativity, racism and the institutionalisation of neo-colonialism" (2009b, p. 71). Furthermore, she cautions the lack of understanding of traditions by many Indigenous peoples due to colonialization, means the probability of colonial behaviours being perpetuated and entrenched is highly likely.

Thus, colonialization, seen as the foremost cause of the oppression of Indigenous women, both within and outside of their communities is critiqued by some Indigenous feminists as being "a simplistic and superficial explanation and a repudiation of responsibility" (Eikjok, 2007, p. 118). Reflecting on discriminatory practices and processes internal to culture and community, Eikjok (2007) writes:

> the colonization of Indigenous societies strengthened the original patriarchal structures and, in introducing modern, masculine power, over-rode any non-patriarchal elements within Indigenous society. (p. 116)

These feminists are not downplaying the colonial source of the violence and poverty inflicted upon Indigenous communities, governance systems and social relations by state imposed sexist and racist policies. However, they do acknowledge that Indigenous communities need to take some measure of responsibility otherwise it negates Indigenous cultural and political agency, and does not encourage critical reflection and a realistic portrayal of gender relations in pre-contact culture. In writing about how Aboriginal women were framed during the struggle for constitutional change in Canada, Joyce Green (1992) writes, "it is a painful thing to be labeled as a dupe of the colonizing society for undertaking to name and change women's experience" (p. 118).

Ⅵ. Incompatibility: Culture and women's equality

Susan Moller Okin's (1999) landmark essay, *Is multiculturalism bad for women?* was instrumental in fueling the examination of policies and ideologies of multiculturalism in terms of the potential impact of culture on the concept of equality in a liberal context of cultural pluralism. Subsequently, many feminist scholars have dealt with the dilemma of group cultural rights, as well as whether these make women more vulnerable to discriminatory treatment, and also whether claims to group cultural autonomy and preservation will be used to justify patriarchal power imbalances based in "traditional" cultural claims (see for example Benhabib, 2002; Deveaux, 2000; Phillips, 2007; Shachar, 2001). Okin was highly criticized for her insensitivity towards non-liberal cultures by post colonial feminists, (Geerts, n.d.), as well as lauded by others (see for example Nussbaum & Okin, 1999; Pollitt, 1999) for her insights into the "private" sphere of cultural autonomy within multicultural theory. For Okin it was apparent that the ideals of gender equality should outweigh the particularities of culture. In her essay, she was uncompromising and unsympathetic to cultural 'traditions', but her candidness arguably pinpointed and sparked the ensuing debate on the tensions between cultural

autonomy and gender equality, as well as a development in the feminist concept of equality itself.

Ⅵ. 1. Cultural relative critiques of feminism

The perceived challenge and threat that culture poses to the liberal-feminist conception of equality has brought about several related critiques. Cultural relativism launches the attack that liberalism does not see itself as a culture or even emerging from a culture but rather being culturally neutral. The concept of Western liberal rights emerged in response to particular historical and political circumstances, and in that light it is not clear whether rights will be suited to judging oppression in different kinds of settings (Parekh, 1999, p. 71). In this vein, Western feminism has been criticized for identifying culture as the root of much discrimination against women and therefore suggesting women in many non-Western cultures lack agency or the ability to make other types of choices. Others have given counter analyses of cultural differences explaining that this type of thinking potentially denies the "existence of agency within patriarchy" (Volpp, 2001, p. 1211).

This contested concept of choice complicates the feminism versus culture debate. It becomes, in its extension, a circular assault of accusations of what Martha Minow (2000) characterizes as the "dueling accusations of false consciousness" (p. 131) between liberals and cultural defenders. Because there is no neutral standpoint from which to understand culture outside of one's own bias, it therefore becomes merely an exercise in finger pointing and unfair, underinformed judgment. Cultures are constantly changing, bringing in outside influences that may be imposed on them or that they may appropriate and change to suit their particular needs, thus it might be more apt to think of cultures as "hybrid versions rather than pure manifestations of tradition" (Kapur, 2013, p. 51).

Ⅵ. 2. Beyond cultural essentialism

Recent anthropological understandings about culture have shifted scholarship more broadly to view culture as being a dynamic, changeable set of practices (Handler & Linnekin, 1984; Hobsbawm & Ranger, 2012) that are "invented", rather than a set of fixed, static behaviours and beliefs. However, culture does not change so easily when it comes to gendered practices and beliefs.

The legal case of *Lovelace v. Canada* is most often cited in feminist literature to exemplify the conflict between individual rights of women's equality versus group rights to determine membership and cultural traditions. In general, women's equality, or more specifically challenges to discrimination based on female gender is often criticized as being in conflict with group rights, cultural rights, and more generally the status quo. Sandra Lovelace argued in her case that the Maliseet traditionally, or pre-contact, was a matrilineal society, that colonial policies had changed the lineage and that recently some members of the Maliseet community had come to understand or accept their culture in this imposed, patrilineal way. In this way, Lovelace was using the "tradition as being invented" argument; and arguing through an outside influence or imposition of the colonial government of Canada, the traditions of the culture were dramatically changed. This mutability according to Minow (2000, p. 132), provides liberals with more justification for the necessity to protect the differences of internal individuals and in this way puts complex pressure on self-governance. As in the case of Lovelace, she went outside of the band governance and appealed her case to the United Nations.

Knop et al. (2012) present a different analysis from a strong to a weak "post-essentialist conception of culture" (p. 602). On the weaker end of the post-essentialist critique, they write that the invented tradition "lies in the authentic tradition" (p. 602) and, in the case of Lovelace, the colonizer tradition of matrilineal lineage to membership

was toppled by the imposition of a patrilineal lineage. On the stronger end of the post-essentialist critique of culture, all tradition is invented and therefore contestable. On such a view, any claim to equality based on cultural would be dubious and we come back to the problem of whose version of traditional or authentic cultural practice is even momentarily accurate.

This tension and opposition between culture and equality has been "undercut" (Knop et al., 2012, p. 604) by the anthropological viewpoint that culture is an invented tradition. Knop et al. identify two principal ways that this has been achieved. The first pertains to the idea that if culture is invented then it can be transformed and changed. Sally Merry (2001) writes, "Seeing culture as open to change emphasizes struggles over cultural values within local communities and encourages attention to local cultural practices as resources for change" (p. 9). Thus, as Knop et al. write, "there is room to transform a given culture while still paying respect to culture as a concept" (p. 604). This is really key to including gender issues into the struggle for self-determination. Furthermore, if tradition is invented, then it would be prudent to identify exactly who is doing the inventing and for what purposes. In this way, a more critical and nuanced understanding of what remains the normative understanding and lived experiences of what is referred to as "traditional cultural practices" is found.

If we return to the FNPO proposal for private property on Aboriginal reserve land, we then wonder how to effectively reconcile so many competing "authorities" over what is the authentic version of tradition. The promoters of the FNPO cite the long held tradition of forms of private property that have been misunderstood by colonialism. Indigenous feminists argue the pre-contact matrilineal culture allowed women more access to equal gender relations including participation in governance and ownership of material resources such as land. And many Native leaders argue that the right to self-determination of membership is imperative to preserve culture and tradition. These competing versions of tradition, autonomy and culture impact on the understandings and acceptance of gender equality.

The opposition of culture to equality has been further challenged by calling attention to the who in the process of reclamation and preservation, which has been exposed as being tied to powerful elite male privilege (Visweswaran, 2010). One set of responses has been to advocate the minimizing of the role of culture—or to replace it as a frame. For example, Anne Phillips (2010, p. 67) argues that culture should be "diluted" as promoting the notion of people as products of their culture "encourages the unhelpful distinction between traditional and modern cultures". However, Deckha (2004) cautions that alternative reframing of "cultural" practices is not always possible:

> Eliminating cultural claims at this historical moment would leave many vulnerable groups without any legal tool to guard against cultural disintegration, extinction, or exploitation . . . [S]ome essentialism in cultural claims must be tolerated. It will be a trade-off of potentially essentialising means for egalitarian ends. (Deckha, 2004, p. 38)

Another line of theorizing in respect to minimizing the overpowering cultural frame is presented by Phillips (2007) in her book *Multiculturalism without Culture*, in which her central argument is that it is crucial to recognize that culture is an essential part of our identity and lives but we must understand how power, opportunity, and status work as well as how class, gender, and race intersect with culture. She argues that the values of equality and autonomy are political rather than cultural in nature and cautions against the belief in the consensus of cultural values as this essentializes culture. She promotes the idea of agency and consent in choosing which parts of culture to utilize so in this way she employs what Gayatri Chakravorty Spivak (Spivak & Harasym, 1990) calls "strategic essentialism". Phillips writes, "It is time for elaborating a version of multiculturalism that dispenses with reified notions of culture, engages more ruthlessly with cultural stereotypes, and refuses to subordinate the rights and interests of women to

the supposed traditions of their culture" (2007, p. 72).

In order to deal with this seeming impasse, Spivak has outlined the idea of "strategic essentialism", which understands that culture and social relations are basically constructed and that it may be useful to intentionally choose to develop and identify a specific category "or essentialized community, such as 'Indigenous,' for the purpose of achieving particular political aims" (Knop et al, p. 604). According to Spivak, this type of strategy is empowering as it allows groups to name their own identities rather than being ascribed identities by others. However, strategic essentialism depends on "*who* is utilizing it, *how* it is deployed, and *where* its effects are concentrated" (Fuss, 1989, p. 20). This questions the validity and efficacy of what is deemed traditional culture.

Still, culture and equality are at a crossroads, as how we apply or interpret strategic essentialism is laden with cultural values. In other words, as culture is deeply embedded in the collective, and equality is associated with liberal individual rights, how we construct gender, race and social relations across cultures will impact greatly on the interpretation of what constitutes equality, how it is accessed and in what ways it is pursued.

Ⅶ. Cultural Traditionalism

Anthropological evidence shows that in some areas pre-contact North American Indigenous societies: were more egalitarian and some were even matrilineal; passed land through female lineage (Davis, 2003; Hann, 1998); had deeper kinship social relations; women were active in decision-making in governance (Barker, 2008); gender and sexuality were more fluid (Lugones, 2007; Smith, 2003); and roles were not as strictly tied to gender (Allen, 1992; Oyěwùmí, 1997). It is therefore understandable that the perceived incompatibility of sovereignty and women's rights is theorized by Indigenous scholars such as Mary Ellen Turpel-Lafond and Patricia Monture to be overcome by a return to Indigenous traditions, which put women more at the centre of life, reclaiming the relatively elevated status of women of pre-colonial times (St. Denis, 2007a) in which gender roles were complementary. This is in stark contrast to women's imposed status after colonization, which was modeled after the patriarchal family. In an excellent analysis of the origins of the nuclear/patriarchal family in relation to colonialism in Canada, Julia Emberley (2001) argues that European bourgeois and patriarchal domestic relations in the 19th and early 20th century "structured the proper meaning of the family" (p. 60) for Aboriginal cultures. The bourgeois patriarchal family ascended to hegemonic status during the 19th century (Poster, 1978) and, according to Emberley, the imposition of its structure on Aboriginal peoples during colonialism attempted to prove the "naturalness" and the civilized nature of it. This restructuring of the family relations, by placing men at the head and redirecting childcare and other domestic duties as the obligation of women, helped to usurp women from civic involvement and leadership positions. This critical difference in how Native women's status was maligned and devalued, in colonial practice, while simultaneously ensuring Native men's status was upheld and even elevated within the confines of the bands or on the reserves (Barker, 2008, p. 263), is important in understanding the continued sexism within Indigenous communities.

Gender complementarity is often seen by Indigenous writers in stark contrast to the Western patriarchy and Western notions of gender as a binary concept. The concept of gender complementarity has been used to think about decolonized relations in the effort to avoid essentializing notions of gender as male or female. However, the heterosexual model is usually reinforced through the idea of complementarity, which is problematic because it negates other possible relations and it is so dangerously fundamental to the colonial model of family relations. As Leigh (2009) notes, this mode of feminism is part of a wider Indigenous strategy of traditionalism, which promotes reclaiming Indigenous values and customs in order to resist assimilation and promote decolonization (see Alfred, 1999). However, as has been outlined earlier in this paper, several gender discrimination issues have arisen over the

past 40 years in Canada that have indicated that the marginalization of issues which directly affect women have not had a place of priority in the struggle for decolonization.

More recently, several Indigenous writers have become increasingly wary of such a strategy of cultural traditionalism. Reclaiming culture is complicated by the very different interpretations of equality that are found in historical renderings. For example, Vera St. Denis (2007a) cautions that although gender roles and understandings were much more flexible and fluid, women often worked more than men in their communities and had less choice about the types of roles they could choose (p. 41-50). Historical journals indicate that Iroqouis women often worked more than Iroquois men as evidenced by a Jesuit missionary who wrote that women "work without comparison more than men" and were "real pack mules" (Davis, 2003, p. 137). Although in some cultures childcare was more shared among kin (Wood & Eagly, 2002) women's role as nurturing mother was often valourized, indicating that women still held the majority of child care responsibilities. Radcliffe (2002) writes, "gender issues remain secondary to the cultural politics of the Indigenous movements, where the persistence of a complimentary dual model of gender underpins a traditional and symbolic role for Indigenous women" (p. 149). However, in the present day, what significance does this historical legacy have? Smith (2006b) argues, "The fact that Native societies were egalitarian 500 years ago is not stopping women from being hit or abused now" (p. 16-17). Green (2007) notes that the changes that have come about due to colonization cannot simply be ignored because that would imply that culture does not evolve and contemporary Indigenous life would be rendered less significant. Archuleta (2006) warns not to reclaim traditions that might "mimic patriarchal ways". . ."The constant focus on women as the backbone of the nation forestalls any discussion about men's roles and responsibility" (p. 7).

Ⅷ. Need for recognition of individual gender rights in cultural collective rights

The conflicts between individual and collective rights are not unique to the Indigenous context. The rights of women in general are arguably seen as challenging the status quo and thus seen as being inherently special interests of women (as a group). Violations of Indigenous women's individual rights put collective rights and the achievement of dynamic, transformative self-determination at risk (Kuokkanen, 2012; McKay & Benjamin, 2010). Kuokkanen (2012) argues, "not unlike governments around the world, the international Indigenous rights movement tends to turn a blind eye to the issue of Indigenous women's human rights" (p. 237-238). Recognition is understood as constituting a "vital human need" (Taylor, 1994, p. 26) and has been critical in the past 40 years to gain rights to Aboriginal self-determination. Recognition is also critical to eliminating discrimination against women and the ensuing equality. Gender needs to be recognized as not only affecting women but also affecting the cultural health of the entire community, including men.

Xanthaki (2011) writes that Indigenous women are often, "like women in many other communities, seen as carrying the honour of the community and, as such, they are encouraged to suffer in silence and put the 'wider rights of the community' above their own rights" (p. 421). Concerns or issues particular to women are seen, by some, as a threat to collective cultural solidarity and rights, and of course colonial tactics are often utilized to divide communities. Women's discrimination is used as a way to claim an undermining of collective cultural values. Xanthanki charges that States have used Indigenous women's rights "as an argument to restrict or deny control of Indigenous communities over their affairs" (p. 421), acceding that it is understandable why Indigenous activists are "reluctant to discuss the challenges that Indigenous women face within their communities" (p. 421).

Yakin Ertürk, the United Nations Special Rapporteur on violence against women wrote in his 2007 report:

> However, despite the fact that the international community has recognized the universality of rights, identity politics and cultural relativist paradigms are increasingly employed to constrain in particular the rights of women. Essentialized interpretations of culture are used either to justify violation of women's rights in the name of culture or to categorically condemn cultures "out there" as being inherently primitive and violent towards women. Both variants of cultural essentialism ignore the universal dimensions of patriarchal culture that subordinates, albeit differently, women in all societies and fails to recognize women's active agency in resisting and negotiating culture to improve their terms of existence. (Ertürk, 2007, para 68)

Some scholars evade dealing with the issue of oppression within their communities by focusing on blaming, rightly so, cultural and legal impositions that originate in Western colonial influences (Smith, 2005a). According to Xanthraki (2011), although the UNDRIP has articles which address gender equal treatment such as Art. 44, which states that 'all the rights and freedoms herein are equally guaranteed to male and female Indigenous individuals', the article was never "really discussed in depth during the elaboration of the Declaration and was the focus of very little attention. Indigenous female representatives repeatedly said, when asked informally, that this was not the forum to discuss the issue" (p. 422). If this is an accurate account of the lack of deliberation on the issue of gender discrimination, then it is worrisome and is indicative of the minimizing of the issue and how gender issues are seen in general. Thus Renya Ramirez (2007) argues in her paper that "race, tribal nation, and gender" [should be] "non-hierarchically linked as categories of analysis" in the decolonization process and calls for "both Indigenous men and women to adopt a Native feminist consciousness in the struggles for social autonomy" (p. 3).

In response to the legal cases that have been described in this paper concerning the discriminatory effects of the Indian Act regarding marital property and reserve membership against Aboriginal women and their children, the HRC expressed its concerns in its 2006 report stating:

> The Committee notes with concern that the Canadian Human Rights Act cannot affect any provision of the Indian Act or any provision made under or pursuant to that Act, thus allowing discrimination to be practiced as long as it can be justified under the Indian Act. It is concerned that the discriminatory effects of the Indian Act against Aboriginal women and their children in matters of reserve membership have still not been remedied, and that the issue of matrimonial real property on reserve lands has still not been properly addressed. While stressing the obligation of the State party to seek the informed consent of Indigenous peoples before adopting decisions affecting them and welcoming the initiatives taken to that end, the Committee observes that balancing collective and individual interests on reserves to the sole detriment of women is not compatible with the Covenant (arts. 2, 3, 26 and 27). The State party should repeal section 67 of the Canadian Human Rights Act without further delay. The State party should, in consultation with Aboriginal peoples, adopt measures ending discrimination actually suffered by Aboriginal women in matters of reserve membership and matrimonial property, and consider this issue as a high priority. The State party should also ensure equal funding of Aboriginal men and women associations. (United Nations. Human Rights Committee, 2006, para 22)

Ⅸ. Conclusion

Drawing on Indigenous feminisms, this paper has argued for a feminist approach to self-determination, which sees a political focus on gender issues as being critical to the successful decolonization process and implementation of transformative self-determination. In each of the legal cases described in this paper, it can be understood more

clearly how equality within state legislation and within self-determination is differentiated. In the Lovelace case, the tension and complexities between individual gender rights and collective autonomous rights became clear. The Sawridge case clearly illuminates the difficulties between self-determination and equality. Also, in the McIvor case the legacy of differentiated gender-based discriminatory legislation imposed by the state and the far-reaching effects and difficulty to control further discrimination became clear. Ladner (2009b) insists that decolonization needs to be reframed as a "gendered project" making gender the central consideration. She writes, understandings of respect need to be either "rediscovered" or "dusted off" or, I might add invented, but either way they must be "disentangled from the penetrating forces of colonialism" to be part of the "post-colonial ghost-dance" (2009b, p. 72). Ladner also recommends that predominant constructions of masculinity have to be decolonized and that the way to decolonization is through treaty constitutional orders as Indigenousness rights and responsibilities are vested there. Others have written that substantive reform:

> must involve and result in a radical, affirmative repositioning of the legal and social status of women with respect to men. They must be willing to give up the assumptions, privileges and benefits that they have inherited from a system based in sexism; take responsibility in their interpersonal relations for histories of discrimination and violence against women and children; and, work to (re)empower women and their children within their communities and families (Barker, 2008, p. 154).

The proposed adoption of private property on Native reserve brings again to the fore the issue of individual rights versus collective rights, as well as the issue of gender differential treatment and attitudes either via colonialism or other avenues. Referring to the adoption of private property tenure on Nisga'a land in British Columbia as an example, Graben (2014) rightly cautions, "Based on the historical preponderance of historical allocations to men under the Indian Act, it seems likely that Nisga'a men will more often receive entitlements for land where houses have already been built" (p. 423). As Ladner (2009a) so eloquently writes, "If Indigenous communities were to fully embrace their inclusive, gender-friendly political and legal traditions, then the federal government would appear as an unequivocal obstacle as its legislation forces communities to maintain the less women-friendly policies and norms of the settler society" (p. 12).

Notes

1. For a more detailed discussion of Indigenous constitutional orders see (Kelly & Manfredi, 2010, Ladner, 2009b, Peach, 2009, Timpson, 2009).
2. Sawridge Band v. Canada (F.C.A.), 2004 FCA 16, [2004] 3 F.C.R. 274. Retrieved at http://reports.fja.gc.ca/eng/2004/2004fca16.html
3. Affidavit of Elizabeth Poitras, In the Matter of Sawridge Band inter vivos, Filed Dec 7, 2011.
4. Not only women but their male descendants.
5. Article 22 of the UNDRIP further asks for protection against all forms of violence and discrimination.

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