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Self-Determination, Subordination, and Semantics: Rhetorical and Real-World Conflicts over the Human Rights of Indigenous Women

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SELF-DETERMINATION, SUBORDINATION, AND SEMANTICS: RHETORICAL AND REAL-WORLD CONFLICTS OVER THE HUMAN RIGHTS OF INDIGENOUS WOMEN

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Insofar as Indigenous women have advocated for a human rights-based approach to gender injustice, and insofar as Indigenous nations have posited collective human rights as necessary for the protection of cultural distinction, these projects should be reconcilable. It is possible, in fact, to conceptualize both as a single Indigenous self-determination project, grounded in human rights, which sees gender justice and cultural flourishing as coequal priorities. Arguably, this is exactly the project that Indigenous women's rights-based advocacy presents; tellingly, this is anything but the project that Indigenous nations' rights-based advocacy presents. The distance between these two positions is fruitful ground. On it, a strong argument for greater consistency in the rhetorical position of Indigenous nations in Canada vis-à-vis women and self-determination can be constructed. In the absence of rhetorical consistency (and the obligations that consistency entails), the political posture of Indigenous nations toward women's rights disturbingly mirrors that of Settler states toward Indigenous rights.

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I. INTRODUCTION: SELF-DETERMINATION AS VISION AND PROJECT

While the language of “sovereignty” is decreasingly employed by Indigenous peoples, having been strongly challenged for its imperial roots and statist notions of coercive power,¹ successor terms retain the core idea of political autonomy and national legitimacy that gave the original concept its normative appeal. Although sovereignty is still found in academic and activist discourse (particularly in the United States), its conceptual successors have proliferated, and include the now dominant “self-determination”. Indigenous self-determination is a normative, aspirational undertaking, entailing both theoretical-ideological and practical work, which can (and does) take a number of forms. Under this rubric a diverse array of proposed paths lead to a number of different, yet fundamentally related, end goals. As an outcome, self-determination can be pictured as a continuum that stretches from the most substantive expressions to the shallowest, most procedural forms. At the very least, at one end would be found Indigenous *self-administration*, connoting minimally devolved federal (or provincial) power in largely bureaucratic spheres; further up would lie Indigenous *self-government*, for which there is no single agreed upon definition, but of which the various negotiated arrangements (such as Nunavut) are examples. As the Royal Commission on Aboriginal Peoples noted, “Self-determination refers to the collective power of choice; self-government is one possible result of that choice.”²

¹ See e.g. Vine Deloria Jr & Clifford M Lytle, *The Nations Within: The Past and Future of American Indian Sovereignty* (New York: Pantheon Books, 1984); Vine Deloria Jr, “Self-Determination and the Concept of Sovereignty” in Roxanne Dunbar Ortiz, ed, *Economic Development in American Indian Reservations* (Albuquerque: University of New Mexico, Native American Studies, 1979) 22 at 26–28; Glenn T Morris, “International Law and Politics: Toward a Right to Self-Determination for Indigenous Peoples” in M Annette Jaimes, ed, *The State of Native America: Genocide, Colonization, and Resistance* (Cambridge, Mass: South End Press, 1992) 55 at 78–79; S James Anaya, *Indigenous Peoples in International Law* (New York: Oxford University Press, 2000).

² Royal Commission on Aboriginal Peoples, *Report of the Royal Commission on Aboriginal Peoples*, vol 2 (Ottawa: Canada Communication Group, 1996) at 175.

*Indian Act*³ governance structures, although often referred to colloquially as “delegated self-government”,⁴ are properly expressions of Indigenous self-administration—yet these groups (both individually, as nations, and collectively, through the Assembly of First Nations) invoke historical/traditional models of Indigenous societies in asserting an inherent and human right to self-determination. For this reason, although they cannot be characterized as contemporary *expressions* of self-determination, they can be seen as advocating a self-determination *project* (however limited) that entails rights-based advocacy and appeals specifically to human rights instruments. Barker, in fact, argues that band governments and prominent Indigenous organizations have “mobilized a specific discourse of rights . . . [that reflect] human rights principles of self-determination and Native agendas for decolonization and social justice against ongoing structures and practices of colonialism”.⁵ Of course, the specific self-determination project shaped and steered by *Indian Act* governments is problematic for its very foundation: it is highly unlikely that scaling up or unfettering governance structures forged in the crucible of colonialism will yield the decolonized nations that populate normative visions of substantive Indigenous self-determination. Band councils typically press for greater autonomy vis-à-vis the Canadian state, rather than pursuing alternative visions of governance altogether. As Smith warns, there is a need to consider how the effects of colonization affect the decisions Indigenous polities make in a way that, ironically, undermines the very decision-making freedom that they pursue.⁶

These political-discursive visions of Indigenous self-determination differ from normative-theoretical accounts in a number of key characteristics, yet they share several important features. Both posit traditionalism as a fruitful

³ RSC 1985, c I-5.

⁴ Yale D Belanger, *Ways of Knowing: An Introduction to Native Studies in Canada* (Toronto: Nelson Education, 2010) at 247.

⁵ Joanne Barker, “Gender, Sovereignty, and the Discourse of Rights in Native Women’s Activism” (2006) 7:1 *Meridians* 127 at 129.

⁶ Andrea Smith, “Native American Feminism, Sovereignty and Social Change” in Joyce Green, ed, *Making Space for Indigenous Feminism* (Black Point, NS: Fernwood, 2007) [Green, *Making Space*] 93 at 99–100 [Smith, “Native American Feminism”].

resistance strategy and appeal to traditional law in making their claims (though the form and function of tradition are highly contested and diverge significantly between these camps). Both characterize Indigenous nations as integral and historically continuous polities. Both question the state's claim to authority over Indigenous Peoples and their governments. More importantly though, neither engages in a gendered analysis of contemporary colonialism or of the persistent, essentialist divisions and oppressions induced by colonization—even the most popularly acclaimed accounts, with the greatest influence in both academic and non-academic circles, are conspicuously ungendered.⁷ Thus *Indian Act* (colonial) governments and Indigenous (anticolonial) theorists may actually work in tandem to “[normalize] and [perpetuate] an irrelevance of gender and the disenfranchisement of Indian women in Native sovereignty struggles.”⁸ Accordingly, it is this last sympathy between normative-theoretical and political-discursive self-determination projects that Indigenous women's critiques, analyses, and advocacy have targeted.

II. BACKGROUND: (NEO-)COLONIALISM AND THE TRANSIT OF INDIGENOUS WOMEN'S STATUS

The literature on pre- and peri-contact Indigenous societies shows near-consensus on the fact that women enjoyed significant influence on decision making in their nations, thriving under a unique form of gender balance in which the sexes were distinct yet equal, with power manifesting laterally.⁹ These societies are described as substantively incorporating

⁷ See e.g. Taiaiake Alfred, *Peace, Power, Righteousness: An Indigenous Manifesto* (Don Mills, Ont: Oxford University Press, 1999); Taiaiake Alfred, *Wasáse: Indigenous Pathways of Action and Freedom* (Toronto: University of Toronto Press, 2005); Taiaiake Alfred & Jeff Corntassel, “Being Indigenous: Resurgences against Contemporary Colonialism” (2005) 40:4 *Government and Opposition* 597; Jeff Corntassel, “Toward Sustainable Self-Determination: Rethinking the Contemporary Indigenous-Rights Discourse” (2008) 33:1 *Alternatives: Global, Local, Political* 105.

⁸ Barker, *supra* note 5 at 128.

⁹ See e.g. Ellen Gabriel, “Aboriginal Women's Movement; a Quest for Self-Determination” (2011) 1:1 *Aboriginal Policy Studies* 183; Paula Gunn Allen, *The Sacred Hoop: Recovering the Feminine in American Indian Traditions* (Boston: Beacon Press, 1986) [Allen, *The Sacred Hoop*]; Kiera L Ladner, “Gendering Decolonisation, Decolonising

women's voices in politics and production, while also lauding their nurturing role both within and beyond reproduction.¹⁰ The power of Indigenous women waned as colonial power grew, depriving them of their status, participation, and autonomy in spiritual, sexual, economic, social, political, diplomatic, and military realms.¹¹ Most lost not only ownership of, but often access to, the land, as well as their customary maternity and inheritance rights.¹² Where inequality existed prior, colonialism furthered gender disparity by supporting an androcentric view of Indigenous societies, privileging the Indigenous male voice both on and off reserves, while Indigenous women were consistently either misrepresented in, or altogether omitted from, the colonial record.¹³ Anderson finds conscious intent in this trajectory, writing that "[i]n order to break down and destroy a culture, you have to get to the root of it. The heart of Aboriginal cultures is the women."¹⁴

Gender" (2009) 13:1 Australian Indigenous Law Review 62; Lina Sunseri, "Moving Beyond the Feminism Versus Nationalism Dichotomy: An Anti-Colonial Feminist Perspective on Aboriginal Liberation Struggles" (2000) 20:2 Canadian Woman Studies 143.

¹⁰ See Verna St Denis, "Feminism Is for Everybody: Aboriginal Women, Feminism, and Diversity" in Green, *Making Space*, *supra* note 6, 33 at 38; Devon A Mihesuah, *Indigenous American Women: Decolonization, Empowerment, Activism* (Lincoln, Neb: University of Nebraska Press, 2003).

¹¹ See Penelope Andrews, "Violence against Aboriginal Women in Australia: Possibilities for Redress within the International Human Rights Framework" (1997) 60:3 Alb L Rev 917; Carl Fernández, "Coming Full Circle: A Young Man's Perspective on Building Gender Equity in Aboriginal Communities" in Kim Anderson & Bonita Lawrence, eds, *Strong Women Stories: Native Vision and Community Survival* (Toronto: Sumach Press, 2003) [Anderson & Lawrence, *Strong Women Stories*] 242; Ladner, *supra* note 9; M Céleste McKay, "International Human Rights Standards and Instruments Relevant to Indigenous Women" (2008) 26:3-4 Canadian Woman Studies 147.

¹² See Lisa J Udel, "Revision and Resistance: The Politics of Native Women's Motherwork" (2001) 22:2 Frontiers: A Journal of Women Studies 43.

¹³ See Megan Davis, "A Reflection on the Limitations of the Right to Self-Determination and Aboriginal Women" (2011) 7:23 Indigenous Law Bulletin 6; Allen, *The Sacred Hoop*, *supra* note 9.

¹⁴ Kim Anderson, "The Powerful History of Native Women" (2000) 14:1 Herizons 15 at 18.

Indigenous women inherited the status of their Settler counterparts, dictated by negative comparisons to Victorian feminine ideals and encoded in Canada's original colonial legislation.¹⁵ The *Indian Act*, in defining "Indian" and setting out status criteria, applied European ideas about the natural patriarchal structure of family and society.¹⁶ Through antiquated laws that still wield effect, and which legislated gender inequality in suffrage, property, and membership, "Indian" is understood to refer to Indigenous *men* and their descendants.¹⁷ Because British Settler colonialism advances through a ratcheting effect, its evolution entailed the co-optation of Indigenous men and the reframing of gender as a site of competition over scarce resources. Indigenous women were defined as mere derivatives of their husbands' identity and status, so that "Indigenous men obtained recognition as subjects under European law in exchange for dispossessing Indigenous women of their power. . . . Indigenous women (but not men) lost their 'Indian Status' if they married a non-Indigenous person, and their band membership if they married a man from another band."¹⁸

Sexism in Indigenous societies did not originate with the *Indian Act*—its roots lie instead in the forced assimilation that both animates and is animated by colonial legislation.¹⁹ Gender inequity and patriarchy permeated communities via not only law, but also through the policies, practices, and doctrines of the state, society, market, and church.²⁰ These mechanisms disproportionately targeted the private sphere in Indigenous communities, if

¹⁵ See Alice B Kehoe, "The Shackles of Tradition" in Patricia Albers & Beatrice Medicine, eds, *The Hidden Half: Studies of Plains Indian Women* (Lanham, Md: University Press of America, 1983) 53.

¹⁶ Joyce Green, "Constitutionalising the Patriarchy: Aboriginal Women and Aboriginal Government" (1993) 4:4 Const Forum 110 at 112–13 [Green, "Constitutionalising the Patriarchy"].

¹⁷ Gabriel, *supra* note 9 at 183.

¹⁸ Darcy Leigh, "Colonialism, Gender and the Family in North America: For a Gendered Analysis of Indigenous Struggles" (2009) 9:1 Studies in Ethnicity and Nationalism 70 at 76.

¹⁹ See Barker, *supra* note 5; Ladner, *supra* note 9 at 65.

²⁰ See Ladner, *supra* note 9 at 65–66; Andrea Smith, "Not an Indian Tradition: The Sexual Colonization of Native Peoples" (2003) 18:2 Hypatia 70; Joyce Green, "Indigenous Feminism: From Symposium to Book" in Green, *Making Space*, *supra* note 6, 14 at 14.

not actually creating it in the specific form associated with modernity. The normalization of the nuclear family, with its male authority figure, was central to the growth and concentration of economic and political power throughout the colonial era; accordingly, it played an assimilative role in colonialism itself.²¹ Kinship, the central pillar of Indigenous political, economic, and social organization, was irrevocably altered, and altered in a way that furthered colonial ambitions in Indigenous territories.²² The patriarchal family was so powerful a metaphor that it was even presented as a model of treaty-making—seen, for example, in European characterizations of their relationship with the Haudenosaunee as one between “father” and “son,”²³ as well as the political recognition of male leaders only.²⁴

Green notes the extent of this cultural penetration, in that “[t]he European model of the patriarchal family is now normative in most Aboriginal communities; the dominant society’s low valuation of women and women’s work has been laid over Aboriginal values.”²⁵ Jaimes*Guerrero refers to this internalization as “trickle down patriarchy.”²⁶ Because European patriarchy tends toward oppression and violence even on its home soil, it also engenders violence through imperial propagation—indeed colonialism itself is a strongly and violently gendered project, a project in which Indigenous women bear the principal consequences.²⁷ A number of interlocking

²¹ See Friedrich Engels, *The Origins of the Family, Private Property, and the State* (New York: International, 2002) (see especially *ibid* at 142–44, 228–37); Marilyn Holly, “Handsome Lake’s Teachings: The Shift from Female to Male Agriculture in Iroquois Culture. An Essay in Ethnophilosophy” (1990) 7:3–4 *Agriculture and Human Values* 80.

²² See Leigh, *supra* note 18.

²³ James Wilson, *The Earth Shall Weep: A History of Native America* (New York: Grove Press, 1998) at 115.

²⁴ Akwesasne Notes, *Basic Call to Consciousness* (Summertown, Tenn: Native Voices, 2005).

²⁵ Green, “Constitutionalising the Patriarchy”, *supra* note 16 at 112 [footnotes omitted].

²⁶ MA Jaimes*Guerrero, “‘Patriarchal Colonialism’ and Indigenism: Implications for Native Feminist Spirituality and Native Womanism” (2003) 18:2 *Hypatia* 58 at 58.

²⁷ See Andrea Smith, *Conquest: Sexual Violence and American Indian Genocide* (Cambridge, Mass: South End Press, 2005); Paula Gunn Allen, *Off the Reservation: Reflections on Boundary-Busting Border-Crossing Loose Canons* (Boston: Beacon Press, 1998); Val Napoleon, “Aboriginal Self-Determination: Individual Self and Collective Selves” (2005) 29:2 *Atlantis* 31 at 34–35.

mechanisms, policies, and practices (including or especially residential schooling) brought this project into the current age, deforming men's psychological attitudes toward women.²⁸ That legacy today manifests in epidemic levels of domestic and sexual abuse in Indigenous communities, violence that renders Indigenous women vulnerable to myriad other human rights violations.²⁹ One of the other endowments of colonialism, this time authored by the *Indian Act* itself, was a nation-to-nation relationship unaffected by and unresponsive to women's knowledge or experiences.³⁰ Thanks to this sharply differentiated access to political leadership, Indigenous women have generally enjoyed limited influence on (or participation in) their nations' formal self-determination efforts,³¹ and have been grossly underrepresented in domestic and international Indigenous organizations.³² Within Indigenous nations, attempts have been made to shunt women's voices to the private sphere, out of politics (seen as a male realm) and into relief work or charity (viewed as essentially female undertakings).³³ Thus the effects of the trauma of colonization proper, and the fundamental social transformation wrought by colonialism, combine to give rise to what Davis refers to as a "highly masculinist indigenous politics".³⁴

²⁸ See Dawn Martin-Hill, "She No Speaks and Other Colonial Constructs of 'the Traditional Woman'" in Anderson & Lawrence, *Strong Women Stories*, *supra* note 11, 106.

²⁹ See Green, "Constitutionalising the Patriarchy", *supra* note 16; Lisa M Poupart, "The Familiar Face of Genocide: Internalized Oppression among American Indians" (2003) 18:2 *Hypatia* 86 at 93–94; McKay, *supra* note 11 at 147–48.

³⁰ See Kim Anderson & Bonita Lawrence, "Introduction to 'Indigenous Women: The State of Our Nations'" (2005) 29:2 *Atlantis* 1 at 2 [Anderson & Lawrence, "Introduction to Indigenous Women"].

³¹ See Eileen Luna, "Indigenous Women, Domestic Violence and Self-Determination" (1999) 4:25 *Indigenous Law Bulletin* 8.

³² See Foreword in Diana Vinding, ed, *Indigenous Women: The Right to a Voice* (Copenhagen: International Work Group for Indigenous Affairs, 1998) 12.

³³ See Gayle Binion, "Human Rights: A Feminist Perspective," (1995) 17:3 *Hum Rts Q* 509 at 526.

³⁴ Megan Davis, "The Globalization of International Human Rights Law, Aboriginal Women and the Practice of Aboriginal Customary Law" in Maureen Cain & Adrian Howe, eds, *Women, Crime and Social Harm: Towards a Criminology for the Global Age*

Because the gendered progress of colonialism renders Indigenous women's experiences both shared with and divergent from those of Indigenous men, Indigenous communities today represent a composite of these two basic sets of historical engagements. This "inharmonious plurality of . . . understandings"³⁵ has two implications for an Indigenous self-determination project (whether normative-theoretical or political-discursive). First, where women's experiences differ from those of men, it makes little sense to advocate for a reality other than the one they have experienced—to do so, as Green argues, opacifies the contemporary context of Indigenous life, making it impossible to diagnose and treat the ills of ongoing imperialism.³⁶ Second, it effectively obviates appeals to tradition that do not attend to the gender injustice wrought by colonialism, and appeals to national unity that posit Indigenous women's human rights as irreconcilable with (or at least detracting from) Indigenous Peoples' human rights, pursued collectively.

III. HUMAN RIGHTS, INDIGENOUS TRADITION, AND MASCULINIST POLITICS

The vocabulary of rights is well-suited to framing wrongdoing and justifying forward-looking change and/or backward-looking redress, while having the added benefit of being widely recognized and "spoken" as such. Accordingly, since the 1980s, human rights have become the lingua franca of Indigenous political advocacy,³⁷ as Indigenous representatives recognized and creatively exploited the fact that "the UN is full of productive contradictions and

(Oxford: Hart Publishing, 2008) 137 at 143 [Davis, "The Globalization of International Human Rights Law"].

³⁵ Ladner, *supra* note 9 at 65.

³⁶ Joyce Green, "Balancing Strategies: Aboriginal Women and Constitutional Rights in Canada" in Green, *Making Space*, *supra* note 6, 140 at 143–45.

³⁷ See generally Rauna Kuokkanen, "Self-Determination and Indigenous Women's Rights at the Intersection of International Human Rights" (2012) 34:1 Hum Rts Q 225; Karen Engle, "On Fragile Architecture: The UN Declaration on the Rights of Indigenous Peoples in the Context of Human Rights" (2011) 22:1 EJIL 141; Hilary Charlesworth, "What Are 'Women's International Human Rights'?" in Rebecca Cook, ed, *Human Rights of Women: National and International Perspectives* (Philadelphia: University of Pennsylvania Press, 1994) 58.

inconsistencies that have, often unwittingly, made room for visionary discourse and practices.”³⁸ In part, the decision to take up the language of human rights was strategic, as it allowed Indigenous peoples to take advantage of the architecture of the international legal system, including global fora that previously had been closed to them, in internationalizing their struggles *as peoples*. This provided important conceptual purchase, exemplifying the historical nation-to-nation relationship between states and Indigenous nations. Gabriel goes even further, asserting that the use of anything other than international law “dishonours our ancestors’ efforts and struggles to protect our nations and the territories that we are obliged, within our own laws, to protect for present and future generations.”³⁹ Human rights, by virtue of their interdependence, also permit Indigenous groups to simultaneously pursue multiple goals in overlapping spheres—social, political, cultural, and economic.⁴⁰

The bulk of this legal engagement has unfolded as a critical, normative challenge to statist interpretations of self-determination. From a statist perspective, the right to self-determination accrues either to individuals or to the populations of states, never to any definition of “peoples” under which Indigenous nations might fall. Reframing this internationally recognized principle, Indigenous activists articulated their belief that they could not enjoy the full range of human rights and remain distinct peoples without the recognition of a specific human right to *collective* self-determination.⁴¹ The unprecedented document that advocacy generated was the *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP),⁴² one of only two international human rights instruments negotiated with the very group

³⁸ Andrea Muchlebach, “What Self in Self-Determination? Notes from the Frontiers of Transnational Indigenous Activism” (2003) 10:2 *Identities* 241 at 246.

³⁹ Gabriel, *supra* note 9 at 186.

⁴⁰ See Kuokkanen, *supra* note 37 at 228.

⁴¹ See Dalee Sambo Dorough, “The Significance of the Declaration on the Rights of Indigenous Peoples and Its Future Implementation” in Claire Charters & Rodolfo Stavenhagen, eds, *Making the Declaration Work: The United Nations Declaration on the Rights of Indigenous Peoples* (Copenhagen: IWGIA, 2009); Muchlebach, *supra* note 38.

⁴² GA Res 61/295, UNGAOR, 61st Sess, Supp No 49, UN Doc A/RES/61/295, (2007) [UNDRIP].

whose needs and interests it is meant to address (the other being the *Convention on the Elimination of All Forms of Discrimination against Women*,⁴³ or CEDAW). As an important supplement to the existing International Bill of Rights,⁴⁴ the UNDRIP outlines a range of issues and goals specific to, and grounded in Indigenous perspectives, aspirations, and experiences, all of which attach to a unique, collective notion of self-determination.⁴⁵ Graham and Wiessner describe that, as captured in the UNDRIP, “Indigenous sovereignty or self-determination is perhaps an enhanced, different, or even sui generis concept but not a weaker or diluted one.”⁴⁶ At the core of the UNDRIP can be found an elegant integration—neither balance (as trade-off) nor reconciliation (as enfolding)—of individual and collective human rights, in which these are mutually constitutive, non-hierarchical, and fully compatible. Unfortunately, the powerful and persuasive, inclusive and integrative rhetoric Indigenous leaders and activists employed in the halls of the United Nations has not resounded in their own communities, wherein the collective human right to self-determination has been voiced at the expense of the human rights of Indigenous women—an obvious rhetorical inconsistency. In masculinist Indigenous politics in Canada, this inconsistency has taken shape as a tripartite argument on the non-priority of gender injustice and the irrelevance of a gendered approach to self-determination. According to one

⁴³ 18 December 1979, 1249 UNTS 13, Can TS 1982 No 31 (entered into force 3 September 1981).

⁴⁴ This is an informal name used to refer collectively to a United Nations General Assembly resolution and two international treaties: the *Universal Declaration of Human Rights*, GA Res 217 (III), UNGAOR, 3d Sess, Supp No 13, UN Doc A/810 (1948) 71, the *International Covenant on Civil and Political Rights*, 19 December 1966, 999 UNTS 171, Can TS 1976 No 47 (entered into force 23 March 1976) (including its two Optional Protocols), and the *International Covenant on Economic, Social and Cultural Rights*, 19 December 1966, 993 UNTS 3, Can TS 1976 No 46 (entered into force 3 January 1976).

⁴⁵ See M Celeste McKay & Craig Benjamin, “A Vision for Fulfilling the Indivisible Rights of Indigenous Women” in Paul Joffe, Jackie Hartley & Jennifer Preston, eds, *Realizing the UN Declaration on the Rights of Indigenous Peoples: Triumph, Hope, and Action* (Saskatoon: Purich Publishing, 2010) 156.

⁴⁶ Lorie M Graham & Siegfried Wiessner, “Indigenous Sovereignty, Culture, and International Human Rights Law” (2011) 110:2 South Atlantic Quarterly 403 at 413–14.

set of claims, Indigenous women's human rights can be pursued in and of themselves, as isolated initiatives; in a second, they are best pursued by proxy, through securing the undifferentiated human rights of the Indigenous community or nation; and a final argument asserts that the human rights of Indigenous women should not be pursued at all, since they detract from collective goals of self-determination that must, according to quasi-utilitarian reasoning, take priority. All three arguments have been addressed by Indigenous women, through decades of advocacy for their gendered human rights.⁴⁷

IV. TOWARDS AN (AUTO)BIOGRAPHY OF INDIGENOUS WOMEN'S HUMAN RIGHTS ADVOCACY

Indigenous women's rights-based advocacy reflects a politics of "intersectionality", an identity frame that describes a reality lived simultaneously within and between multiple social, political, and economic groups.⁴⁸ Because their identities are heterogeneous—they are both Indigenous and female, though other categories (such as class, age, minority status, and ability) cut across, attach to, reference, and reinforce these—they experience discrimination in multiple spheres.⁴⁹ Accordingly, Indigenous women engage in social justice work in various arenas, using diverse strategies and making an intersectional analysis essential for appreciating how Indigenous women self-locate within and beyond their nations (locally, nationally, internationally, and transnationally). Indigenous women have identified human rights as being uniquely suited to such complex expressions of identity, since by virtue of their interrelatedness they allow for multiple, overlapping understandings of injustice:

⁴⁷ See below.

⁴⁸ Kimberle Crenshaw, "Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory, and Antiracist Politics" (1989) U Chicago Legal F 139 at 141; Kimberle Crenshaw, "Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color" (1991) 43:6 Stan L Rev 1241 at 1245.

⁴⁹ See Andrews, *supra* note 11 at 918; Green, "Constitutionalising the Patriarchy", *supra* note 16 at 112.

Indigenous women face violations of their civil and political rights when they are marginalized or excluded from their communities and when their membership is denied. They encounter abuses of their economic and social rights in the intersections of racism, sexism, poverty, and discrimination, which lead to a lack of employment opportunities, and access to health care and social services. They are confronted with violations of their personal integrity and human dignity in the form of sometimes extreme physical and sexual violence.⁵⁰

Intersectional approaches, not surprisingly, require an intersection. Similar to the ways in which the international women's movement was instrumental in the drafting of the CEDAW, the UNDRIP was both a response to and recognition of the shortcomings of prior approaches.⁵¹ In both cases it was assumed that a framing of rights in universal language would provide protection (in the first case for women, and in the second for Indigenous Peoples) when the reality had repeatedly proved otherwise. Indigenous women have had difficulty negotiating these spaces, since neither feminist nor Indigenist movements have been fully accommodating. The effect is surprisingly straightforward: if Indigenous politics does not admit of issues related to patriarchy, and feminism does not admit of issues related to colonialism, the overlap wherein Indigenous women's concerns would lie simply does not exist. Accordingly, because the space wherein they would command attention is non-existent, Indigenous women have had to fight to create it.

Kuokkanen describes Indigenous women's strong preference for bypassing state mechanisms in favour of pursuing gendered human rights within the United Nations (UN) system.⁵² The reasons for this are complex, meshing theoretical and practical considerations into a considered rejection of domestic fora. To begin with, there is a reluctance to reveal community dysfunction to both an unsympathetic public and hostile authorities.⁵³ This is exacerbated by the counterintuitive tendency of

⁵⁰ Kuokkanen, *supra* note 37 at 249.

⁵¹ See *ibid*; Charlesworth, *supra* note 37.

⁵² Kuokkanen, *supra* note 37.

⁵³ See Andrews, *supra* note 11; Davis, "The Globalization of International Human Rights Law", *supra* note 34.

domestic legislative progress to diminish the urgency and increase toleration of violations of Indigenous women's rights by creating a false sense of their having already been adequately addressed. Ultimately, as Sarah Deer points out, "Native women . . . can hardly hope to find justice in a system that was developed to destroy them".⁵⁴ Indeed, they have not been well-served by recourse to their human rights in the mainstream legal system, either at the provincial or federal level.⁵⁵ This inattention—or perhaps "non-protection"—has not gone unnoticed. Within the past nine years alone, Amnesty International, the UN Committee on the Elimination of Discrimination against Women, and the UN Human Rights Council have called on Canada to formulate a comprehensive plan to address the human rights violations faced by Indigenous women.⁵⁶ To be fair, this is not solely a Canadian problem. The 2004 *Report on the Expert Seminar on Indigenous Peoples and the Administration of Justice* found that, globally, contemporary judicial practices disproportionately disadvantage Indigenous women and children.⁵⁷ Nevertheless, throughout the past several decades, over several changes in government, the Canadian state has maintained a "demonstrated reluctance to apply a rights-based framework to ensuring the security of Indigenous women."⁵⁸

In extensive consultations leading up to the National Aboriginal Women's Summit in 2007, women expressed a belief that a return to traditional teachings and resurrection of Indigenous law would best protect their rights.⁵⁹ Generally, Indigenous women posit sexism as a manifestation of the

⁵⁴ Sarah Deer, "Decolonizing Rape Law: A Native Feminist Synthesis of Safety and Sovereignty" (2009) 24:2 *Wicazo Sa Review* 149 at 154.

⁵⁵ *Ibid.*

⁵⁶ McKay & Benjamin, *supra* note 45 at 158.

⁵⁷ Commission on Human Rights, *Report on the Expert Seminar on Indigenous Peoples and the Administration of Justice*, ESC June 2004, UNESCOR, 56th Sess, Supp No 6, UN Doc E/CN.4/Sub.2/AC.4/2004/6, (2004).

⁵⁸ McKay & Benjamin, *supra* note 45 at 166.

⁵⁹ See Native Women's Association of Canada, *Matrimonial Real Property: NWAC Issue Paper* (Ottawa: Native Women's Association of Canada, 2007).

assimilation of their men, a sign of their ignorance, or rejection of tradition.⁶⁰ At one point this was a near-ubiquitous stance, as Udel notes:

Despite differences in tribal affiliation, regional location, urban or reservation background, academic or community setting, and pro- or anti-feminist ideology, many Native women academics and grassroots activists alike invoke models of preconquest, egalitarian societies to theorize contemporary social and political praxes.⁶¹

This is not a project of pure resurrection, though, but critical interrogation, uncovering where patriarchy masquerades as tradition, and confronting practices that may have been misogynistic as well as identifying those with liberatory potential.⁶² As Smith points out, putting appeals to tradition in focus: “The fact that Native societies were egalitarian 500 years ago is not stopping women from being hit or abused now.”⁶³ Recognizing the connection between political marginalization and physical violence, Indigenous women in Canada have led the effort to frame Indigenous rights as human rights, demanding that human rights standards be applied to Indigenous peoples from coast to coast; accordingly, it is Indigenous women who have been responsible for the bulk of amendments to the *Indian Act*.⁶⁴

⁶⁰ Anne Waters, “Introduction: Indigenous Women in the Americas” (2003) 18:2 *Hypatia* ix.

⁶¹ Udel, *supra* note 12 at 43.

⁶² See Fay Blaney, “Aboriginal Women’s Action Network” in Anderson & Lawrence, *Strong Women Stories*, *supra* note 11, 156 at 167; Emma LaRocque, *Violence in Aboriginal Communities* (Ottawa: Health Canada, 1994); Val Napoleon, Emily Snyder & John Borrows, “Gender and Violence: Drawing on Indigenous Legal Resources” (Paper presented at the conference *Our Way: The U.N. Declaration on the Rights of Indigenous Peoples and Indigenous Law-Making*, University of Saskatchewan, Saskatoon, 2012).

⁶³ Andrea Smith, “Indigenous Feminism without Apology” (2006) 58 *New Socialist* 16 at 16.

⁶⁴ These include 1985’s *Bill C-31*, which addressed the *Indian Act*’s gender discrimination, restored Indian status to those forcibly enfranchised by legislation’s discriminatory provisions, and provided bands with control over membership as a measure of self-government; and 2011’s *Bill C-3*, under which approximately 45,000 eligible individuals became entitled to regain Indian status lost through their grandmothers’ involuntary enfranchisement through outmarriage. See Aboriginal Affairs and Northern

made through insistence on adherence to the criteria laid out in the *Canadian Charter of Rights and Freedoms*.⁶⁵

The 2008 passage of *Bill C-21*,⁶⁶ which placed the *Indian Act* under the purview of the *Canadian Human Rights Act*,⁶⁷ allows Indigenous women to file claims against their band councils and/or the Crown (at least on issues relating to the *Indian Act*). This is not a straightforward human rights victory, though, as *Bill C-21* poses a potential threat to the entire *Indian Act*—a law seen as the greatest single bulwark of Aboriginal status. It additionally opens up Indigenous governments to lawsuits without concern for the communal goods (human and material) that such suits will consume, or for the fact that most communities have no grievance process in place and no resources with which to establish the necessary legal infrastructure. Further, granting the Canadian Human Rights Commission the power to interpret culturally divergent community practice, along with the ability to invalidate articulations of Indigenous law based on that interpretation, vacates self-determination and is extremely troubling in the context of ongoing Settler colonialism in Canada. For groups who already see Crown sovereignty as a legal fiction, the repeal of section 67 of the *Canadian Human Rights Act*⁶⁸ is nothing less than an assimilationist attack on Indigenous nations. Additionally, there is at least the potential for non-Indigenous Canadians to pursue their own claims for the discrimination

Development Canada, *Report to Parliament: Gender Equity in Indian Registration Act* (Ottawa: AANDC, 2012).

⁶⁵ *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [Charter]. See Gabriel, *supra* note 9; Napoleon, *supra* note 27.

⁶⁶ *Bill C-21, An Act to amend the Canadian Human Rights Act*, 2d Sess, 39th Parl, 2008 (assented to 18 June 2008).

⁶⁷ RSC 1985, c H-6.

⁶⁸ Section 67 essentially exempts the *Indian Act*, *supra* note 3, from the provisions of the *Canadian Human Rights Act* by stating that: “Nothing in this Act affects any provision of the Indian Act or any provision made under or pursuant to that Act.” This prevents persons (including—in fact, often—Aboriginal women) from making complaints of discrimination arising from actions taken or decisions made pursuant to the *Indian Act*.

they have suffered by being excluded from the “benefits” provided under the *Indian Act*.⁶⁹

The Native Women’s Association of Canada (NWAC) opposed *Bill C-21* for these reasons, while also highlighting the lack of consultation throughout the drafting process.⁷⁰ Further, the fact that nothing was in place at the time to deal with the problem of matrimonial property on reserve land meant that women remained exceptionally vulnerable before, during, and after exercising any right to file a claim against Indigenous governments. *Bill C-8*,⁷¹ the *Family Homes on Reserve and Matrimonial Interests or Rights Act*, was also opposed by NWAC.⁷² In the Association’s opinion, *Bill C-8* provided no means of actualizing rights, offering instead a long list of decontextualized prescriptions that treated reserves as entities akin to mainstream Canadian municipalities—again, drafted without attention to the systemic nature of the issues, the authority (or even the existence) of Indigenous legal traditions, and the importance of consultation with affected groups, including ignoring the extensive research and opinion offered by NWAC itself.⁷³ Oddly, the Minister of Canadian Heritage and Status of Women indicated that this move constituted “the deliverance of equality to women living on reserve as the solutions are now similar to those held by other women in Canada.”⁷⁴ Accordingly, former NWAC President Beverley Jacobs reported that, as an organization of Indigenous women, “we have not experienced our relationship with the federal Department of Indian Affairs as being one of partnership or even consultation but rather it feels like

⁶⁹ See Ladner, *supra* note 9 at 68.

⁷⁰ Native Women’s Association of Canada, “Repeal of S.67 Requires Consultations and Resources” (16 November 2007), online: <<http://www.nwac.ca>>.

⁷¹ *Bill C-8, An Act Respecting Family Homes Situated on First Nation Reserves and Matrimonial Interests or Rights in or to Structures and Lands Situated on Those Reserves*, 2d Sess, 40th Parl, 2009.

⁷² Native Women’s Association of Canada, “NWAC, AFN and AFN Women’s Council Unite to Oppose Bill C8 on Matrimonial Real Property” (14 May 2009), online: <<http://www.nwac.ca>>.

⁷³ Native Women’s Association of Canada, “‘Consultative Partnership’ a Sham” (4 March 2008), online: <<http://www.nwac.ca>>.

⁷⁴ *Ibid* at para 9.

another experience of colonialism, or at best piecemeal, individually based solutions that will not result in real equality for the women we represent.”⁷⁵

In Green’s opinion, “Native women need the *Charter*’s protection because they have no other.”⁷⁶ It is, they acknowledge, an imperfect and even dangerous instrument, and they have taken it up with considerable care. The *Charter* is itself an infringement on Indigenous self-determination as an inherent right.⁷⁷ This effect is hardly ameliorated in interpretation, either, as “the Court has tended to favour limiting the effects of [section] 25^[78] . . . of the *Charter* by balancing Aboriginal rights with the collective good of Canadians; and second, the Court has failed to read [section 25] as a ‘shield’ protecting native rights and freedoms.”⁷⁹ The critical resurrection of tradition Indigenous women call for would see their human rights protected outside of the *Charter*, which they view as an interim measure on the way to self-determination—a self-determination that, as currently framed by Indigenous nations, still needs to be gendered.⁸⁰ Speaking to the Royal Commission on Aboriginal Peoples in 1992, Doris Young of the Indigenous Women’s Collective of Manitoba stated that

[w]e believe that we have the inherent right to self-government, but we also recognize that since European contact, our leaders have mainly been men.

⁷⁵ *Ibid* at para 3.

⁷⁶ Green, “Constitutionalising the Patriarchy”, *supra* note 16 at 114.

⁷⁷ The *Charter*, *supra* note 65, is a bill of rights entrenched in the Canadian Constitution. The Royal Commission on Aboriginal Peoples claimed that, while section 25 of the *Charter* guarantees the existence of self-government, it limits the powers of Indigenous governments with respect to the Charter rights of individual Indigenous persons. See Kent McNeil, “Aboriginal Governments and the Canadian Charter of Rights and Freedoms” (1996) 34 Osgoode Hall LJ 61 at 73.

⁷⁸ Section 25 of the *Charter*, *supra* note 65, concerns “Aboriginal rights and freedoms not affected by Charter” and reads:

The guarantee in this Charter of certain rights and freedoms shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada including (a) any rights or freedoms that have been recognized by the Royal Proclamation of October 7, 1763; and (b) any rights or freedoms that now exist by way of land claims agreements or may be so acquired.

⁷⁹ Ladner, *supra* note 9 at 69.

⁸⁰ See Green, “Constitutionalising the Patriarchy”, *supra* note 16 at 118.

Men who are the by-products of colonization. . . . We, therefore, want the Charter of Rights and Freedoms enforced in Aboriginal self-government until such time as when our own Bill of Rights is developed that will protect women and children.⁸¹

Osenntonion (Marilyn Kane) and Skonaganleh:ra (Sylvia Maracle) concur, writing that “[w]omen have a responsibility to make sure that we don’t lose any more, that we don’t do any more damage, while we work on getting our original government system back in good working order.”⁸² Indigenous women have thus engaged in a sustained challenge of governance at every level—the community, the state, and the globe—in a manner consistent with their understandings of their own specific, encultured responsibilities.

Compromise (i.e., the empowerment of Indigenous legal orders under the Canadian constitution) may not be a practical or even a theoretically defensible option. From the perspective of Indigenous women, experiments in legal pluralism, inclusion of Indigenous perspectives in drafting or revising legislation, or the limited recognition of Indigenous legal traditions in Canada have been largely unsuccessful. To begin with, there has been a marked over-recognition of the Indigenous male voice in legal and policymaking circles within the state, which perpetuates the historical exclusion of the female voice.⁸³ Further, a kind of “colonial repugnancy clause” has been noted throughout the Settlement Commonwealth,⁸⁴ wherein competing claims are reconciled not according to their normative foundations but as an application of minimum standards of “civilization” and “normalcy.”⁸⁵ In Australia, for example, Povinelli has described an “invisible

⁸¹ *Ibid* at 112–13.

⁸² Osenntonion & Skonaganleh:rá, “Our World: According to Osenntonion and Skonaganleh:rá” (1989) 10:2-3 Canadian Woman Studies 7 at 14.

⁸³ See Green, “Constitutionalising the Patriarchy,” *supra* note 16.

⁸⁴ This term refers to former British colonies whose government, after formal political decolonization, remained in the hands of non-Indigenous persons. The “Settlement Commonwealth” is principally the countries of Australia, Canada, and New Zealand, but for the purposes of this essay the term has been extended to include the United States of America.

⁸⁵ Leon Shaskolsky Sheff, *The Future of Tradition: Customary Law, Common Law and Legal Pluralism* (London, UK: F Cass, 2000).

asterisk” marking every treatment of Indigenous law, “interpret[ing] specific instances of cultural practices and indexes where public reason no longer applies.”⁸⁶ In the Canadian courts, there is a similar preference for the “continuing forced erosion of . . . aboriginal conditions in favor of dominant societies.”⁸⁷ The perpetrators and beneficiaries of colonialism cannot be viewed as either impartial or uninvolved, as their position in the legal system that claims jurisdiction is not incidental. Article 5 of the UNDRIP indirectly references this fact in asserting that “Indigenous peoples have the right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions, while retaining their right to participate fully, *if they so choose*, in the political, economic, social and cultural life of the State.”⁸⁸ Indigenous women would seem to concur with Graham and Weissner’s reading of this proviso: that because the current emphasis on participation within the state serves to eclipse the perpetuation and elaboration of structures of Indigenous law and governance, it is ill-advised at best.⁸⁹ Moreover, if state-level legislation is incapable of impacting gender equality while being fully capable of undermining Indigenous sovereignty, then for Indigenous women, the choice between domestic and international human rights venues becomes academic.

While constitutionalism’s tendency to allow domestic law to override any other parallel (even pre-existing) legal system effectively negates legal pluralism, international law (specifically, human rights) does also limit the exercise of Indigenous law. The latter containment, however, is much more defensible. International human rights law can, and often does involve negotiation in both setting and interpreting standards, while pointing to mechanisms and processes for achieving balance (or at least a fruitful tension) between competing, compelling claims. Particularly in comparison to domestic legislation, international human rights law is “generally

⁸⁶ Elizabeth A Povinelli, *The Cunning of Recognition: Indigenous Alterities and the Making of Australian Multiculturalism* (Durham: Duke University Press, 2002) at 12.

⁸⁷ Richard A Falk et al, “Are Indigenous Populations Entitled to International Juridical Personality?” (1985) 79 Proceedings of the Annual Meeting of the American Society of International Law 189 at 190.

⁸⁸ UNDRIP, *supra* note 42, art 5 [emphasis added].

⁸⁹ Graham & Wiessner, *supra* note 46 at 412.

unencumbered by rigid, system-specific rules and formalities and can, therefore, lead to the initiation of a dialogue . . . about the best means by which to achieve meaningful recognition of the rights that are essential.”⁹⁰ It is perceived as being markedly less adversarial in orientation than the justice systems of many Western states, and thus “less tied to patriarchal, competitive paradigms of justice.”⁹¹ Of course, recourse to international legal fora is reserved for cases in which all domestic remedies have been exhausted—a situation that describes the quest for gender justice engaged in by Indigenous women like Sandra Lovelace and Sharon McIvor.

Indigenous women have been taking the issue of gender injustice in Canada (specifically as a violation of human rights) to the international community since at least 1975, when Mary Two-Axe Early and other Kahnawake women attended the International Women’s Year conference in Mexico City. The Native Women’s Association of Canada had just been founded, and was collectively mandated to “enhance, promote, and foster the social, economic, cultural and political well-being of First Nations and Métis women within First Nation, Métis and Canadian societies.”⁹² Early herself identifies the movement for Indigenous women’s human rights as originating almost 20 years earlier.⁹³ On the international stage, Indigenous women worked passionately to incorporate gender into the UNDRIP, so that it explicitly addressed the discrimination, oppression, and violence they experienced.⁹⁴ Article 22(2) of the UNDRIP⁹⁵—the “gender provision”—made it into the text of the declaration only through the intense advocacy of Indigenous women’s organizations, including the global Indigenous

⁹⁰ Matthew Chapman, “Indigenous Peoples and International Human Rights: Towards a Guarantee for the Territorial Connection” (1997) 26:3 *Anglo-Am L Rev* 357 at 366.

⁹¹ Charlesworth, *supra* note 37 at 66.

⁹² Native Women’s Association of Canada, “NWAC Profile”, online: <<http://www.nwac.ca>>.

⁹³ Mary Two-Axe Early, “Indian Rights for Indian Women” in Huguette Dagenais & Denise Piché, eds, *Women, Feminism and Development* (Montreal & Kingston: McGill-Queen’s University Press, 1994) 429.

⁹⁴ McKay & Benjamin, *supra* note 45.

⁹⁵ UNDRIP, *supra* note 42, art 22(2) (“[s]tates shall take measures, in conjunction with indigenous peoples, to ensure that indigenous women and children enjoy the full protection and guarantees against all forms of violence and discrimination”).

Women's Caucus (which includes Indigenous women from Canada) and NWAC itself.⁹⁶ Women's particular needs, interests, and aspirations, and the protection of their rights specifically, are made explicit in a further six articles of the UNDRIP,⁹⁷ recognizing Indigenous women's human rights as part of the bedrock of the rights of Indigenous peoples—and therefore as lying at the heart of Indigenous self-determination.

V. IN-COMMUNITY AND IN-NATION ASSAULTS ON INDIGENOUS WOMEN'S HUMAN RIGHTS

Culture is necessary to the protection of a distinct group identity. As Dick points out, though, this becomes a problem when rights claims proceed by delineating “authentic” shared characteristics that gloss intra-group difference and ossify the identity at risk.⁹⁸ Norms thus created serve to exclude as well as include—but more importantly, they fix relations of power so that the group identifying the authentic elements of culture is the same group positioned to oppress those who question or fail to exhibit them. When this assertion of identity is more than rhetorical, more than “strategic essentialism,”⁹⁹ it has important legal, social, and political implications. First, it plays a determinative role in identifying the rights to be pursued and the

⁹⁶ See Laura Parisi & Jeff Cornthassel, “In Pursuit of Self-Determination: Indigenous Women's Challenges to Traditional Diplomatic Spaces” (2007) 13:3 Canadian Foreign Policy 81.

⁹⁷ See UNDRIP, *supra* note 42, art 6 (which deals with the right to a nationality); *ibid*, art 7 (which deals with rights to life, physical and mental integrity, liberty, and security of person); *ibid*, art 9 (which deals with the right to participate in a community or nation, in accordance with tradition and without discrimination); *ibid*, art 18 (which deals with political decision making); *ibid*, art 21 (which deals with economic and social conditions, and their improvement); *ibid*, art 24 (which deals with equal rights to attainment of the highest attainable standard of physical and mental health). Arguably, *ibid*, art 17 (which deals with labour laws and conditions) and *ibid*, arts 13–14 (which deal with access to culturally-appropriate education, language rights, and the right to use, revitalize, and transmit culture) are also relevant here.

⁹⁸ Caroline Dick, *The Perils of Identity: Group Rights and the Politics of Intragroup Difference* (Vancouver: UBC Press, 2011).

⁹⁹ Gayatri Chakravorty Spivak, *In Other Worlds: Essays in Cultural Politics* (New York: Methuen, 1987).

ways in which those rights will be framed and articulated, after which it creates a binding precedent not easily influenced. The codification of difference, in other words, tends to both arise from and cement relations of power. This is certainly not to say that Indigenous identity is either fabricated or unworthy of investment, only to highlight that how a group characterizes and treats non-conformity is an important and often overlooked element in self-determination struggles.

Feminist legal scholars have noted that culture is produced as a foil to human rights only when gender relations (and particularly violence against women) are the issues under discussion, and that violations of women's human rights justified by appeals to tradition are distressingly common across cultures.¹⁰⁰ Both within and outside of Canada, the political marginalization and physical brutalization of Indigenous women has been abetted by corruptions of tradition. Aboriginal women in Australia have a pithy way of describing this tripartite division within the spectrum of rules and jurisprudence with which Indigenous women grapple: "white law", "traditional law", and "bullshit traditional law".¹⁰¹ The *Beijing Platform for Action* flatly classifies "traditional practices harmful to women" as their own form of gendered violence.¹⁰² It calls for the simultaneous recognition of "Indigenous customary laws and justice systems which are supportive of women victims of violence" and eradication of "Indigenous laws, customs, and traditions which are discriminatory to women," acknowledging that both are in play in communities today.¹⁰³ Similarly, the International Indigenous Women's Forum identifies "violence in the name of tradition" as one of six major manifestations of gendered violence, the conceptual equal of

¹⁰⁰ See McKay & Benjamin, *supra* note 45; Binion, *supra* note 33; Kuokkanen, *supra* note 37.

¹⁰¹ Melissa Lucashenko, "Violence against Indigenous Women: Public and Private Dimensions" (1996) 2:4 *Violence Against Women* 378 at 383; Davis, "The Globalization of International Human Rights Law", *supra* note 34 at 137.

¹⁰² United Nations World Conference on Women, *Beijing Declaration and Platform for Action* (Beijing: United Nations World Conference on Women, 1995) at para 113(a).

¹⁰³ NGO Forum, *Beijing Declaration of Indigenous Women* (Beijing: United Nations Fourth World Conference on Women, 1995) at para 36.

“state and domestic violence” and “militarization and armed conflict”.¹⁰⁴ In Canada, “Indigenous tradition” has been used to justify denials and egregious violations of the human rights of women and girls up to and including the rape of very young teens.¹⁰⁵ Kuokkanen extends this observation to assert that masculinist perversions twist even those Indigenous cultural principles and protocols that historically served to protect women and traditionally respected legitimate practices that are now “employed to re-inscribe domination and patriarchal structures.”¹⁰⁶

Despite the relevance of these issues to larger questions of self-determination and its pursuit, the link between violence and marginalization has been denied by shifting the question from the inclusion of women in political projects (addressing gender systematically and immediately) to the resurrection of cultural practices (addressing gender by proxy, at some later date). A removal from the legal or political to the cultural sphere is both misguided and misleading, since it depoliticizes claims while asserting that culture is somehow free of politics. Through this shift, Indigenous women become a special interest group (a subset of the wider community, with needs and concerns perceived as unshared) and gender injustice in Indigenous communities becomes a private issue (since it addresses and is contained within the household, rather than the nation). The rights of women thus become individual, and the pursuit of them is divisive, distracting, or diminishing of national goals—goals framed by a male leadership that universalizes its own needs, concerns, and ambitions. As a result, “collective rights” in effect become the rights of men and are used as such to ground Indigenous self-determination.¹⁰⁷ Similarly, “unequal power relations” are framed as those forces structuring the relationship between

¹⁰⁴ Mairin Iwanka Raya, *Indigenous Women Stand against Violence: A Companion Report to the United Nations Secretary-General's Study on Violence against Women* (New York: FIMI, 2006).

¹⁰⁵ Green, “Constitutionalising the Patriarchy”, *supra* note 16 at 117.

¹⁰⁶ Kuokkanen, *supra* note 37 at 239.

¹⁰⁷ See Anderson & Lawrence, “Introduction to Indigenous Women”, *supra* note 30; Green, “Constitutionalising the Patriarchy”, *supra* note 16 at 112–13; Davis, “The Globalization of International Human Rights Law”, *supra* note 34; Napoleon, *supra* note 27.

Indigenous nations and the colonial state, not between men and women in Indigenous communities. This goes beyond privileging the suffering experienced by men to render invisible that experienced by women, subsuming it within a monologue of coequal victimhood in which no individual is simultaneously oppressed and an oppressor.¹⁰⁸ Gendered violence and gender injustice become straightforward products of colonialism, predicted to disappear with the political empowerment of the male leadership;¹⁰⁹ further, they are really mere by-products—social or criminal side-effects rather than structural, political concerns. Green calls this the “wait your turn” approach to Indigenous women’s human rights.¹¹⁰ Political-discursive visions of self-determination thus maintain an idea of unity, a deliberate lack of gendered strategy. This essentialism runs counter to the intersectionality Indigenous women assert in both their socio-cultural identities and political work, while trading difference for recognition (even at some distance) has real fallout for women in Indigenous communities across Canada.¹¹¹ Anderson and Lawrence describe this fallout—the effects of a “continuous disregard for sovereignty violations when only women are affected”—as “staggering”.¹¹² The feminism/nationalism and sovereignty/gender dichotomies divide not only Indigenous men from Indigenous women, but Indigenous women from one another, thereby repeatedly impeding the movement for gendered justice.¹¹³

In their home communities, Indigenous women are rewarded for conceptualizing their issues as complaints against the state, and punished for painting them as having any significant internal dimension, particularly where their portrayals assert that Indigenous leaders have failed to uphold Indigenous women’s human rights. Women activists who have come forward

¹⁰⁸ See generally Kuokkanen, *supra* note 37; Lucashenko, *supra* note 101; Deer, *supra* note 54.

¹⁰⁹ This is a very common argument: see e.g. Smith, “Native American Feminism”, *supra* note 6 at 97.

¹¹⁰ Green, “Constitutionalising the Patriarchy”, *supra* note 16 at 117.

¹¹¹ See Ladner, *supra* note 9; Barker, *supra* note 5; Green, “Constitutionalising the Patriarchy”, *supra* note 16.

¹¹² Anderson & Lawrence, “Introduction to Indigenous Women”, *supra* note 30 at 3.

¹¹³ See Ladner, *supra* note 9.

to describe gender injustice, and particularly those who have engaged in legal battles like those over *Bill C-31*¹¹⁴ and related challenges to *Indian Act* governance, have “endured various forms of threats from both the public and from their own community members.”¹¹⁵ Many band councils—including Sawridge, Ermineskin, Musqueam, Sturgeon Lake, Enoch, Sarcee, and Tsuu T’ina—refused to accept the court’s decision as legitimate and went to extraordinary lengths to deny readmission of Indigenous women and children reinstated under the 1985 revisions to the *Indian Act*.¹¹⁶ In fact, from the 1970s well into the 1980s, the Canadian government and *Indian Act* Chiefs forged a bizarre consensus against Indigenous women’s status struggles. In 1974, when the Supreme Court of Canada upheld paragraph 12(1)(b) of the *Indian Act* (finding no merit in Yvonne Bédard and Jeannette Vivian Corbiere’s claims of gendered discrimination in the status provisions known as “marrying out”), the majority of band councils, the National Indian Brotherhood (the predecessor to the Assembly of First Nations), and many other Indigenous organizations concurred.¹¹⁷ Even legally unthwarted reinstatement was severely limited in practice. Indigenous women who regained status did not end up on par with those who had never lost it, and have yet to gain membership footing equal to Indigenous men (who have, at no time, been subject to disenfranchisement through outmarriage).

Other equally portentous concerns have arisen. In constitutional talks, the Crown and federally-recognized Indigenous leadership agreed that the *Charter* could be suspended in matters relating to “traditional practices in the exercise of self-government”—a point on which NWAC, representing the countless Indigenous women vulnerable to such

¹¹⁴ Bill C-31, *An Act to Amend the Indian Act*, 1st Sess, 33rd Parl, 1985.

¹¹⁵ Gabriel, *supra* note 9 at 184.

¹¹⁶ The bands argued that *Bill C-31* denied them the right to freely determine their own membership, as an act of self-government, by subjecting their decision making to the standards of the Canadian Bill of Rights. See Green, “Constitutionalising the Patriarchy”, *supra* note 16; Dick, *supra* note 98; Joan Holmes, *Bill C-31, Equality or Disparity? The Effects of the New Indian Act on Native Women* (Ottawa: Canadian Advisory Council on the Status of Women, 1987).

¹¹⁷ See Ladner, *supra* note 9 at 66.

suspensions, strongly disagreed.¹¹⁸ Dick, in her examination of status politics in Canada, concludes that

appeals to cultural authenticity and tradition can be potent weapons of in-group oppression. Accordingly, there are good reasons to be leery of the consequences of a legal approach to rights that involves the judicial sanctioning of certain values or identities as authentic and worthy of constitutional protection on that account.¹¹⁹

Thanks to a powerful combination of legal privilege and reinterpreted tradition, along with a characterization of the state system as the only legitimate ill, Indigenous women's legal victories against Indigenous leadership can actually be posited as creating martyrs to colonialism rather than punishing rights violators. The irony at the heart of contemporary status is that the *Indian Act* model of membership, along with all of the band council's "custom codes" that present a variation thereupon, are not representative of Indigenous traditions. Exclusivity of membership (i.e., limiting admission along genetic lines) is, by and large, a colonial construction internalized along with other patriarchal structures, with Indigenous models of citizenship a direct casualty of its adoption.¹²⁰ Martin-Hill writes, "[T]he fragmentation of our cultures, beliefs and values as a result of colonialism has made our notions of tradition vulnerable to horizontal oppression—that is, those oppressed people who need to assume a sense of power and control do so by thwarting traditional beliefs."¹²¹

This is just one example of a widespread and longstanding practice in Indigenous politics in Canada, wherein labelling and *realpolitik* substitute for meaningful discussion of gender injustice.¹²² Virtually any human rights-based advocacy by women produces accusations of disloyalty, corruption, and disunity, and in particular, betrayal of Indigenous culture

¹¹⁸ Green, "Constitutionalising the Patriarchy", *supra* note 16 at 113.

¹¹⁹ Dick, *supra* note 98 at 192.

¹²⁰ See Napoleon, *supra* note 27.

¹²¹ Martin-Hill, *supra* note 28 at 108.

¹²² See generally John Bowen, "Should We Have a Universal Concept of 'Indigenous Peoples' Rights? Ethnicity and Essentialism in the Twenty-First Century" (2000) 16:4 *Anthropology Today* 12.

and community in favour of alliance with Settler women and European feminism.¹²³ The label of “feminist” accompanies a charge of Indigenous women importing foreign ideologies antithetical to Indigenous philosophies, especially Western gender equality (versus Indigenous gender balance). This pejorative labelling of Indigenous women activists is an especially enervating assault because “the attackers deny the validity of their analysis as authentically Aboriginal. It is a painful thing to be labelled as a dupe of the colonizing society for undertaking to name and change women’s experience.”¹²⁴ Such practice is longstanding: when Mary Two-Axe Early returned from her 1975 trip to Mexico City, she and her fellow attendees found band council-served eviction notices waiting for them.¹²⁵ Other writers find such appeals to blind in-group loyalty to be little more than highly politicized semantics or cultural gainsaying. On such an account, Indigenous women’s human rights appeal to foreign authorities, value colonial pathways over the decision-making processes of traditional Indigenous societies, prioritize the interests of women over those of their communities, and undermine the quest for self-determination.¹²⁶ This is the principal view circulating, despite it being both opportunistic and

¹²³ See Kuokkanen, *supra* note 37 at 226.

¹²⁴ Green, “Constitutionalising the Patriarchy”, *supra* note 16 at 118.

¹²⁵ See Kathleen Hall Jamieson, “Multiple Jeopardy: The Evolution of a Native Women’s Movement” (1979) 4:2 *Atlantis* 157.

¹²⁶ See e.g. Barker, *supra* note 5 at 127–28; Janet Silman, *Enough is Enough: Aboriginal Women Speak Out* (Toronto: The Women’s Press, 1987) at 178–79; Holmes, *supra* note 116; Kathleen Jamieson, *Indian Women and the Law in Canada: Citizens Minus* (Ottawa: Minister of Supply and Services, 1978); Lillianne E. Krosenbrink-Gelissen, “‘Traditional Motherhood’ in Defense of Sexual Equality Rights of Canada’s Aboriginal Women” (1993) 7:2 *European Review of Native American Studies* 13; Sharon McIvor, “Aboriginal Women’s Rights as ‘Existing Rights’” (1995) 15:2-3 *Canadian Woman Studies* 34; Andrea Bear Nicholas, “Colonialism and the Struggle for Liberation: The Experience of Maliseet Women” (1994) 43 *UNB LJ* 223; Smith, “Native American Feminism”, *supra* note 6 at 96; Leigh *supra* note 18 at 80–81; Gabriel, *supra* note 9 at 184; Isabel Altamirano-Jiménez, “Nunavut: Whose Homeland, Whose Voices?” (2008) 26:3-4 *Canadian Woman Studies* 128.

reactionary, “a masculinist discourse derived from, and inextricably linked by emulation and hostility to a colonial European discourse.”¹²⁷

Indigenous women have found local non-accountability replicated at the national level. The Native Women’s Association of Canada was formed in response to a troubling political void: “the failure of [Indigenous] organizations to respond to or to validate women’s issues as defined by women’s experiences.”¹²⁸ Similarly, in its own attempt to provide legitimate representation on gender issues, the Métis National Council of Women has been obliged to struggle repeatedly against the “official” male leadership in the Canadian courts.¹²⁹ At the national level there has been a repeated assertion of the natural irreconcilability of the individual and collective, or a necessary hierarchy of women’s and Indigenous peoples’ human rights —directly contradicting Indigenous claims, made in global fora, that human and individual rights are not only fully reconcilable but properly interdependent. Speaking at the National Association of Women and the Law in 1993, Theresa Nahanee addressed the related accusation of Indigenous women’s human rights advocacy as “extreme individualism” by pointing out that the individual/group dichotomy is obviously false in this case, since “[t]he women have been trying since 1967 to erase the artificial, legal barriers which separate women from the collective.”¹³⁰ This kind of action is consistent with, and indeed operationalizes, Anaya’s description of human rights themselves, as “rights that human beings hold and exercise collectively in relation to the bonds of community or solidarity that typify human existence.”¹³¹

¹²⁷ Jo-Anne Fiske, “The Womb Is to the Nation as the Heart Is to the Body: Ethnopolitical Discourses of the Canadian Indigenous Women’s Movement” (1996) 51 *Studies in Political Economy* 65 at 79.

¹²⁸ Green, “Constitutionalising the Patriarchy”, *supra* note 16 at 111.

¹²⁹ See Anderson & Lawrence, “Introduction to Indigenous Women”, *supra* note 30.

¹³⁰ Green, “Constitutionalising the Patriarchy”, *supra* note 16 at 114.

¹³¹ S James Anaya, “Self-Determination as a Collective Human Right under Contemporary International Law” in Pekka Aikio & Martin Scheinin, eds, *Operationalizing the Right of Indigenous Peoples to Self-Determination* (Turku, Finland: Abo Akademi University Institute for Human Rights, 2000) 5.

Sharon McIvor herself has written that, “[a]fter 135 years of sex discrimination by Canada, we were afraid of self-government. Why would neo-colonial Aboriginal governments, born and bred in patriarchy, be different from Canadian governments?”¹³² Green expands this fear to include doubts about both the political will and the basic capacity of Indigenous leadership to deal with gender injustice and promote the human rights of Indigenous women.¹³³ The ways in which the political discourse of masculinist self-determination and the structures of sexism interlock retrenches colonialism, and those that benefit are not likely to vacate positions of (relative) privilege willingly—or easily. Further, “hierarchies of oppression” cannot be confronted so long as Indigenous politics (both practical and aspirational) denies “the power that may be held by individuals in contrast to their theoretical positions,” or the way that “the oppressed” may simultaneously be powerless in one context and yet able to wield considerable power in another.¹³⁴ The most sobering prospect, in the wake of generations of such experiences, may be a growing certainty that self-determination as currently framed holds little liberatory potential for Indigenous women. This is indefensible on any account, since as LaRocque relates, “[p]olitical oppression does not preclude the mandate to live with personal and moral responsibility within human communities.”¹³⁵

VI. INDIGENOUS NATION, COLONIAL STATE: A STUDY IN SIMILARITIES AND SEMANTICS

Questions of domination and violence have plagued Indigenous peoples’ challenges to the statist self-determination paradigm; now they plague women’s challenges to the masculinist national project and political-discursive vision of Indigenous self-determination. Similarly, spectres of a fatal disunity haunt both projects: for states, the amputation of territory through Indigenous secession; for Indigenous nations, the

¹³² Sharon D McIvor, “Aboriginal Women Unmasked: Using Equality Litigation to Advance Women’s Rights” (2004) 16:1 CJWL 106 at 128.

¹³³ Green, “Constitutionalising the Patriarchy”, *supra* note 16.

¹³⁴ Lucashenko, *supra* note 101 at 388.

¹³⁵ LaRocque, *supra* note 62 at 77.

alienation of reserve land through the “outmarriage” of the community’s women. Amnesty International’s assertion, that human rights violations against Indigenous peoples are typically justified through appeals to the protection of national security and common resources,¹³⁶ can be found reflected in Indigenous leaders’ appeals to the protection of the cultural and material resources of their nations (i.e., against “alienation” of various goods or benefits of the collective through outmarriage). Thus, as Ladner concludes, “[n]otions of Indigenous sovereignty and nationhood therefore share the same intolerance of women’s rights as the Western-Eurocentric tradition.”¹³⁷ Indeed, the very same argument that states made during negotiations at the UN Working Group on Indigenous Populations—that elevating women’s rights entailed the weakening of collective rights within the text of the UNDRIP¹³⁸—would be reiterated internally by many of the same Indigenous leaders who lobbied for adoption of the UNDRIP at the global level. Both nation-states and Indigenous nations demand that women deny their own intersectionality and choose one essentialized identity in pursuit of a monolithic citizenship—either “woman” or “Indigenous person”. Neither permits more than one political allegiance, or more than one sense of the “self” in “self-determination”.¹³⁹

The parallels extend further, travelling along social, economic, and political axes. Just as Canada opposed the UNDRIP because its implementation would either contravene or needlessly replicate domestic law, band council governments characterize Indigenous women’s human rights as variously a threat to customary law or redundant under traditional systems. The “definitional quibbling” that states used to discredit the Indigenous peoples’ movement for self-determination at the UN¹⁴⁰ finds its conceptual twin in the tendency of contemporary Indigenous leaders to reduce discussion of gender injustice to exercises in labelling.¹⁴¹ Indigenous

¹³⁶ Amnesty International, *500 Years On . . . Human Rights Violations against Indigenous Peoples of the Americas* (London, UK: Amnesty International, 1992).

¹³⁷ Ladner, *supra* note 9 at 64.

¹³⁸ McKay & Benjamin, *supra* note 45.

¹³⁹ Napoleon, *supra* note 27.

¹⁴⁰ Muchlebach, *supra* note 38 at 251.

¹⁴¹ Bowen, *supra* note 122.

nations also appear to have inherited, and now express the “general consensus at the state level that oppression on the basis of race is considerably more serious than oppression on the basis of gender.”¹⁴² Additionally, Indigenous peoples’ response to the “salt water thesis”, their claim that political decolonization has elements not addressed by offers of “internal self-determination”, echoes in Indigenous women’s assertions that substantive decolonization has elements not addressed by offers of masculinist neo-traditionalism. Ultimately, now that Indigenous nations have emerged into legal and political visibility at home and abroad, Indigenous women appear to have taken up their nations’ former positions: rendered invisible and contained within legal and social boundaries that devalue their perspectives, deny their experiences, absorb their rights, and downplay their needs. It seems that those asserting difference—further, those portraying it as worthy of celebration and demanding of nurturance—appear to have little tolerance for difference themselves. This happens despite the fact that it is a very similar and equally political idea of divergence at play in both Indigenous leaders’ and Indigenous women’s appeals: the right to be simultaneously *different from* and *equal to* the demographically superior or politically privileged.

These uncomfortable parallels accompany deliberate efforts at differentiating state and Indigenous positions, exposing a troubling inconsistency. Given that work on the UNDRIP was driven by recognition of the insufficiency of pre-existing frameworks to grapple with Indigenous peoples’ human rights (and violations thereof), the fact that revised approaches to human rights fail to adequately protect Indigenous women is disturbingly ironic. This irony deepens when considered alongside the fact that the bulk of recent Indigenous mobilization under the UNDRIP has entailed “count[ing] on UN expert bodies as allies whose progressive reports and recommendations they powerfully mobilize. . . . [to expose] and [embarrass] member states of the UN as *fundamentally inconsistent in their practice and interpretation* of the law.”¹⁴³ Pressuring states to sign or ratify the UNDRIP or criticizing them for failing to do so—activities in which both

¹⁴² Charlesworth, *supra* note 37 at 65.

¹⁴³ Muehlebach, *supra* note 38 at 254 [emphasis added].

the Assembly of First Nations and myriad of band councils from Canada engaged—comes with an obvious co-requisite that Indigenous nations themselves have already implemented or plan to implement the provisions of the UNDRIP. By definition, Indigenous leaders' critiques must have included government policy and practice that subordinates on the basis of gender, and therefore part of their accusation must have been that countries are condemnably disinclined to provide protection against the violence, oppression, and exploitation experienced by Indigenous women specifically. Article 22 of the UNDRIP elucidates the duty, incumbent upon states and Indigenous nations alike, to “ensure that indigenous women and children enjoy the full protection and guarantees against all forms of violence and discrimination.”¹⁴⁴

Indigenous peoples working within the UN system recognized and asserted that human rights standards apply universally—indeed, this was the conceptual foundation of advocacy work on behalf of their nations and peoples.¹⁴⁵ Similarly, they argued that the right to self-determination is not absolute, as it does not confer the right to oppress, to deny the human rights of others. The *Vienna Declaration and Programme of Action* asserts that, as the foundation of international law itself, all human rights are “universal, indivisible and interdependent and interrelated.”¹⁴⁶ Accordingly, the set of rights enshrined in international law do not constitute a menu from which empowered actors may select only the most palatable or affordable options. Both state and non-state actors, including Indigenous governments and institutions, have an obligation to uphold the entire spectrum of international human rights laws and standards, including those that speak specifically to gender concerns (such as CEDAW and the *Convention of Belém do Pará*). For these instruments, the UNDRIP provides an interpretive lens, and the UNDRIP itself must be read in light of these other instruments.¹⁴⁷ The fact that Indigenous leaders in Canada were staunch

¹⁴⁴ UNDRIP, *supra* note 42, art 22(2).

¹⁴⁵ See McKay, *supra* note 11.

¹⁴⁶ *Vienna Declaration and Programme of Action*, World Conference on Human Rights, UN Doc A/CONF.157/23 (1993) at 5.

¹⁴⁷ See McKay & Benjamin, *supra* note 45.

proponents of the UNDRIP, and used this stance as political leverage at home, creates an even greater responsibility to honour its principles and abide by its tenets. Appeals to the irreconcilability of tradition and international law, as a result of this overt support for human rights on the global stage, ring false.

Muehlebach characterizes the UNDRIP as “something of a sacred text,” one that Indigenous activists globally “vehemently protect.”¹⁴⁸ Moreover, she asserts that the UNDRIP “carries such moral weight that indigenous delegates have been able to argue convincingly that it means nothing if it is not supported and underwritten by indigenous peoples themselves.”¹⁴⁹ That moral weight now bears on the absolute duty of Indigenous nations to adopt an approach to the conceptualization and operationalization of Indigenous peoples’ human rights that protects the most vulnerable members of the collective. Such an obligation is not exceptional, but merely a logical (and just) extension of their own vision (and project) of self-determination—it is an application of the foundational international legal principle that all self-determining polities must, in both word and deed, uphold peremptory norms. As Green observes, “[T]he international instruments [are] universal standards for state behaviour. Presumably, Aboriginal governments would not be exempt nor would they want to be exempt from these standards.”¹⁵⁰

These inconsistencies in the rhetorical and actual positions of Indigenous nations in Canada provide insight into the issues brought forward by Indigenous women, highlight the tensions and impasses they have experienced, and even suggest some possible paths forward. The one certainty is that without sustained and careful attention to gender injustice, Indigenous women may become islands within their nations in much the same way Indigenous nations are currently islands within states. (This is a status referred to, in the American context, as one of “domestic dependent nations”¹⁵¹—a fitting enough phrase here, considering that it contains two adjectives that have historically been used to describe women’s position in the

¹⁴⁸ Muehlebach, *supra* note 38 at 248, 258.

¹⁴⁹ *Ibid* at 248.

¹⁵⁰ Green, “Constitutionalising the Patriarchy”, *supra* note 16 at 115.

¹⁵¹ This phrase is traceable to an early 19th century decision by Chief Justice Marshall. See *Cherokee Nation v Georgia*, 30 US (5 Pet) 1 (1831).

nuclear family and patriarchal household.) There is no theoretical and no insurmountable practical reason why Indigenous leaders should not be subjected to both internal and external tests of legitimacy involving the application of traditional metrics alongside the human rights standards enshrined in the UNDRIP (and other relevant instruments).¹⁵² Further studies on the relationships between international legal instruments and Indigenous laws are obviously necessary in order to better understand the harmonies between and possible co-advancement of Indigenous traditional and human rights.¹⁵³ These studies should be facilitated and funded by those states that hold specific obligations to protect and promote the human rights of the Indigenous peoples within their borders. The UN Commission on Human Rights goes even further, highlighting a state duty to help Indigenous experts resurrect their traditional legal systems, with an emphasis on how “custom” and human rights principles may be mutually reinforcing in the protection of Indigenous women’s human rights.¹⁵⁴

VII. COLLECTIVE AND INDIVIDUAL “SELVES”: INDIGENOUS SELF-DETERMINATION AS THE INTERPLAY OF HUMAN RIGHTS

The rights of the individual and of the community, instead of being necessarily in tension, are more accurately parts of a constellation of human rights capable of accommodating the needs, aspirations, experiences, and perspectives of both *women* and *peoples*. Individuals have a significant role in operationalizing, promoting, and protecting collective human rights; in the inverse, individuals hold rights by virtue of their place within the collective.¹⁵⁵ A human rights approach thus frames Indigenous self-determination and Indigenous women’s rights as coequal concerns;

¹⁵² See generally Lorna June McCue, *Treaty-Making from an Indigenous Perspective: A Ned’u’en-Canadian Treaty Model* (LLM Thesis, University of British Columbia, 1998), online: cIRcle <<http://circle.ubc.ca>>.

¹⁵³ See Lars Adam Rehof, “Human Rights and Self-Government for Indigenous Peoples” (1992) 61:1 Nordic J Int’l L 19.

¹⁵⁴ See McKay, *supra* note 11; Commission on Human Rights, *supra* note 57.

¹⁵⁵ See generally Robert N Clinton, “The Rights of Indigenous Peoples as Collective Group Rights” (1990) 32:4 Ariz L Rev 739.

moreover, Indigenous women themselves insist that their human rights and the collective right to self-determination must be pursued in tandem, as the dual aims of a single political project.¹⁵⁶ This belief is widely held, and has been repeatedly and unambiguously voiced. For example, the *Declaration of the International Indigenous Women's Forum*, made on the occasion of the tenth anniversary of the Beijing Conference, states: "We maintain that the advancement of Indigenous Women's human rights is inextricably linked to the struggle to protect, respect and fulfill both the rights of our Peoples as a whole and our rights as women within our communities and at the national and international level."¹⁵⁷ Further, by placing both self-determination and gender justice within the existing human rights framework, it is possible to conceptualize Indigenous self-determination and Indigenous women's rights as mutually supportive. The indivisibility of human rights is key to this formulation, since it is the assertion of *hierarchies* of rights, of greater and lesser rights *priorities*, that permits the flourishing of a situation in which key anchors of human dignity and security are cast off. A human rights framework also foregrounds the problems with cultural or political justifications for certain rights at the expense of others, along with the inconsistency in recognizing the rights of only certain kinds of Indigenous "selves".¹⁵⁸

Indigenous women can and do pursue multifocal, multilevel strategies in the cause of gendered justice—but this drives toward the promotion, not the erosion of Indigenous self-determination. The domestication of gender issues has been resisted, at every turn, by human rights activists; yet Indigenous women recognize that, when used alone in the current context, local (especially isolated or private-sphere) venues may not be able to catalyse social change. If conduits for systemic change in their Indigenous nations are closed to women—as they are in "trickle-down patriarchy"—gendered injustice becomes a self-perpetuating and likely steadily worsening phenomenon. Such a downward spiral must be forcibly interrupted. Appeals

¹⁵⁶ See McKay & Benjamin, *supra* note 45.

¹⁵⁷ International Indigenous Women's Forum, *Declaration—Indigenous Women Beyond the Ten-Year Review of the Beijing Declaration and Program of Action* (New York: IIWF, 2005) at para 8.

¹⁵⁸ See Kuokkanen, *supra* note 37; Muehlebach, *supra* note 38.

to international bodies have the potential to create the space for more effective participation in the short term, and thus to buoy social change in the long run.¹⁵⁹ This kind of participation in governance (as legal and political decision making) trains the focus on structures, instead of proximate causes of gender injustice. Johnston elaborates, describing that Indigenous women may feel

silenced or alienated because of their sex, and [may] also [be] left with an unresolved grievance. Disputes of this nature left unresolved can . . . affect the individual's on-going participation within the group . . . women may decide it is simply too hard to continue to participate in [traditional political] affairs, for instance, if she feels her opinion is not heard, or her role is not valued. . . . Recourse to an external body . . . on matters dealing with internal discrimination might, in the short term, provide an impetus for debate amongst [Indigenous] communities about the role and status of . . . women. In the longer term, this may lead to the revitalization and development of self-determined [Indigenous] mechanisms that satisfactorily resolve disputes within [Indigenous] communities, without recourse to external bodies.¹⁶⁰

Charlesworth calls this the “empowering function” of the rights discourse for women, and asserts that it is particularly potent at the international level.¹⁶¹ Indigenous women's own political project here runs parallel to, and often joins with, what MacKinnon describes as the broader feminist legal task, which is to reveal the harms women suffer as wholly illegitimate and thus unacceptable, and to do this in a way that actually transforms (at however glacial a pace) the gender relations throughout society.¹⁶² Because colonialism was a gendered and gendering process, gender must be a key consideration in any self-determination vision or project that aims for a decolonized Indigenous polity. Indeed, given the values with which inherent

¹⁵⁹ See Kuokkanen, *supra* note 37.

¹⁶⁰ Kerensa Johnston, “Maori Women Confront Discrimination: Using International Human Rights Law to Challenge Discriminatory Practices” (2005) 4:1 *Indigenous LJ* 19 at 59–60.

¹⁶¹ Charlesworth, *supra* note 37 at 61–62.

¹⁶² Catharine A MacKinnon, *Feminism Unmodified: Discourses on Life and Law* (Cambridge: Harvard University Press, 1987).

rights claims are suffused, sexism and substantive self-determination are wholly antithetical, such that where one exists, the other, by definition, cannot.

In the wake of these arguments some obvious hurdles remain. Arguably, Indigenous women's human rights cannot be asserted against Indigenous polities without in some sense undermining the self-determination of those polities, since claims are currently made under the ambit of the Canadian state. Without Indigenous nations having international juridical personality *as nations*, the domestic law of states has jurisdiction—a situation that reframes Indigenous women's rights and Indigenous self-determination as competing, even mutually antagonistic, concerns (realizing the fears of Indigenous nations), while eliding the intersectionality in both identity and oppression that Indigenous women experience. This is neither what Indigenous women have fought for nor what they have expressed as their goal for themselves, their communities, and their nations. Thus Indigenous women's struggle for gender justice dovetails with, instead of thwarts, Indigenous peoples' broader struggle for self-determination, as these endeavours provide separate motivations for recognizing the legitimate international legal personality of Indigenous nations. The system in place already grants personality to several non-state actors in a way that holds them accountable to international human rights standards.

VIII. CONCLUSION

Indigenous women have long been engaged in unambiguous advocacy for a human rights-based approach to gender injustice in their communities and nations. Indigenous nations, for their part, have repeatedly and passionately posited collective human rights as necessary for the protection of cultural distinction. These two projects, which both root in and enrich the discourse and practice of human rights, are fully reconcilable—given the political will to critically engage with historical and contemporary colonialism, and to address the internalization of patriarchy and sexism in Indigenous societies today. With such a will in place it becomes possible to operationalize a single Indigenous “self-determination” project grounded in human rights, one that sees women's concerns and cultural flourishing as coequal priorities. While this is precisely the project that Indigenous women are pursuing through their advocacy, it appears to be the antithesis of the project pursued by band council governments and national Indigenous political organizations in

Canada—official, ostensibly representative entities whose rhetoric belies their practice. This dual inconsistency creates indefensible ironies and hypocrisies that reveal the political posture of Indigenous nations toward women's issues as a disturbing mirror-image of the posture of Settler states toward Indigenous issues. Consistency requires that Indigenous leaders acknowledge the implications of and obligations entailed within their own discourse; that they reject fallacious appeals to perverted tradition and the brute exercise of *realpolitik* in favour of a substantive decolonization project that links ideas of individual and collective human rights, and which affirms the real possibility of securing both Indigenous self-determination and gendered justice for Indigenous women.

