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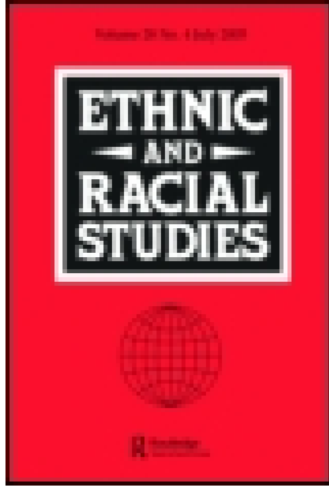

Ethnic and Racial Studies
Publication details, including instructions for authors and subscription information:
http://www.tandfonline.com/loi/rers20

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Published online: 13 Sep 2010.

To cite this article: Menno Boldt & J. Anthony Long (1984) Tribal philosophies and the Canadian charter of rights and freedoms, Ethnic and Racial Studies, 7:4, 478-493, DOI: 10.1080/01419870.1984.9993463

To link to this article: http://dx.doi.org/10.1080/01419870.1984.9993463

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Tribal philosophies and the Canadian charter of rights and freedoms

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Introduction

On April 17, 1982, the Canadian government proclaimed the Constitution Act incorporating the Charter of Rights and Freedoms. In introducing the Charter of Rights and Freedoms, the Canadian government was inspired by its liberal-democratic cultural and political tradition. From this perspective the provisions of the Charter are deemed to be progressive and beneficial for all Canadian citizens, but most especially for members of disadvantaged minority groups. It is ironical, therefore, that the Charter's severest critics have been Native Indians, the most disadvantaged of Canada's minorities (Boldt, 1982:488-91). In this paper we will probe into the philosophical, social and political ideas that underlie the objections raised by Indian leaders to the Charter's provisions. The thesis of this paper is that the western-liberal tradition embodied in the Canadian Charter of Rights and Freedoms, which conceives of human rights in terms of the individual, poses yet another serious threat to the cultural identity of Native Indians in Canada.[1]

Two theories of man and society

It is beyond the scope of our paper to deal fully with western-liberal and Native American tribal philosophies of the individual and the state. A brief review, however, is necessary.

In the western-liberal tradition the dominant conception of society is that of an aggregate of individuals, each with their own self-interest. The state is a product of collective agreement, an emanation from the individual will, created to perform functions necessary for the common good. As such, the state is an artificial creation, not based in any 'natural order.' Individuals within the state place themselves under common political authority and agree to a common political obligation to the state. The *individual* is considered to be morally prior to any *group* and, in relation to the state, individuals are viewed as acting for themselves, not as members of any collectivity.

The generic individualism of liberal political theory is illustrated by the political philosophies of Rousseau, Hobbes, Locke, Mill, and others. For

Ethnic and Racial Studies Volume 7 Number 4 October 1984
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example, Rousseau believed in the individual who is born free even though everywhere being in chains (Barker, 1960:106). The chains Rousseau referred to were created by the social group which superimposed itself on the individual. Hobbes conceived of society as reducible to individual wills in possession of certain natural and inalienable rights (James, 1968:14). An underlying premise for both Rousseau and Hobbes was that individual self-interest ought to take preeminence over group rights and claims. They saw no middle ground between the individual and the state. Their liberal political philosophy finds contemporary expression in the Universal Declaration of Human Rights which states, in part, that rights go to every *individual* '... without distinction of any kind such as race, color, sex, language, religion or social origin, property, birth or status.'

North American Indians had a very different conception of man and society. Society was conceived of as cosmocentric rather than homocentric. Robert Vachon (1982:7) states that their reference point was not the individual but the 'whole' which is the cosmic order. Their conception of the individual was one of subordination to the whole. This conception was derived from their experience of the interrelatedness of all life (human, animal, plants and things), and the need for harmony amongst all parts. The whole and the parts can survive only if each part fulfills its role. In the cosmocentric perspective animals, plants and things were regarded as having souls or spirits and were dealt with as 'persons' who had human qualities of thinking, feeling and understanding, and who had volitional capacities as well (Hallowell). Social interaction occurred between human beings and other-than-human 'persons' involving reciprocal relations and mutual obligations.

When the world of social relations transcends those which are maintained amongst human beings this holds implications for the way one sees oneself in relation to all else. Within this encompassing web of social relations the individual is characterized as the repository of responsibilities rather than as a claimant of rights. Rights can exist only in the measure to which each person fulfills their responsibilities toward others. That is, rights are an outgrowth of every person performing their obligation in the cosmic order (Vachon, 1982:7). In such a society there is no concept of inherent individual claims to inalienable rights.

In the Hobbesian political philosophy the exercise of authority was deemed necessary to protect society against rampant individual self-interest. But, in tribal society individual self-interest was viewed as inextricably intertwined with tribal survival. That is, the general good and the individual good were virtually identical (Mohawk Nation, 1977; Ortiz, 1979). Hence, the social relations which give rise to individuality did not exist. Peter Laslett (1963:167) provides an apt analogy to illustrate the mythical quality of individuality in traditional Indian society. To apprehend the individual in tribal society, he says, we would have to peel off a succession of group-oriented and derived attributes as layers of an onion skin. The individual turns out to be a succession of metaphorical layers of group attributes which ends up with nothing remaining. The structure of tribal Indian society inhibited

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the development of individual self-consciousness and the ability to conceive of rights in individualistic terms.[2]

Michael Melody (1980:2) proposes that, whereas western-liberal philosophies define man in terms of individualism, competition and self-interest, traditional Indian philosophies define man in terms of spiritual unity, consensus, cooperation and self-denial. In short, the western-liberal tradition and Native American tribal philosophies represent two very different theories of the nature of mankind. Each society has built its model of human rights on its conception of mankind.

Social structure and human rights

Conceptions of appropriate human rights that grow out of a face-to-face communal experience will necessarily be different from those that grow out of a society of individuals acting for themselves. Pollis and Schwab (1979) propose that indigenous economic, political, social and cultural arrangements bear a direct relationship to how human rights get to be conceptualized. In their cross-cultural analysis of human rights they make a convincing case that the liberal-democratic doctrine of human rights, as embodied in the Universal Declaration of Human Rights, is essentially a western capitalist ideology and is not relevant to societies with a non-western, non-capitalist cultural tradition. An urbanized industrial-capitalist society with an individualistic emphasis requires a different set of rules to protect its citizens against the arbitrary exercise of power than does a small face-to-face communal society. David Miller (1976:253–72) similarly subscribes to a thesis of cultural relativity on definitions of justice and morality. He has observed that ideas of justice and morality vary from one social context to another, depending on the social organization. That is, ideas on justice and morality reflect the nature of person-to-person relationships that operate within a society, and the manner in which responsibilities and benefits are distributed.

The western-liberal doctrine of human rights grew out of the European experience of feudalism and the associated belief in the inherent inequality of men. Concern with constitutionally guaranteed individual rights was, in part, a reaction to centralization of power. It reflected the need, in western societies, to protect the individual against the powers of the state, and various forms of personal authority. The doctrine of individual rights gained additional relevance in western societies because individual initiative and competition were deemed essential for economic development. The capitalist market economy thrived on competitive individualism. Thus, the doctrine of autonomous individualism served both as stimulus and justification for the idea of inherent individual rights in western societies. The modern western capitalist polity and economy produces a society in which the individual is in need of protection against forces that threaten to overwhelm him. In this context individualized rights have emerged as a response to existing objective conditions (Donnelly, 1982[a]:312–13).

North American Indian tribes, by contrast, did not have the experience of

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feudalism. Moreover, unlike European states, the foundation of their social order was not based on hierarchical power wielded by a centralized political authority. Power and authority could not be claimed by, or delegated to, any individual or subset of the tribe; it was vested only in the tribe as a whole. The tribal community performed all governmental functions in an undifferentiated fashion (Boldt and Long, 1984). While highly organized, the tribes did not undergo the separation of state and church, and both remained an integral part of the community. Social order was based on spiritual solidarity derived from the moral integration that came from acquiescence to tribal customs. By unreservedly accepting customary authority as their legitimate guide in living and working together Indians were freed from the need for coercive personal power, hierarchical authority relationships, and a separate ruling entity to maintain order. Because there was no state and no rulers, individuals had no need for protection from the authority of others.

Custom not only offered a well elaborated system of individual duties and responsibilities but was designed to protect human dignity.[3] If all members of the tribe obeyed the sacred customs then, as a logical outcome, each member would be assured of equality, self-worth, personal autonomy, justice and fraternity, that is, human dignity. Dignity was protected by a system of unwritten, positively-stated, mutual duties, rather than negatively-stated, individual, legal rights. Other than one's obligation to impersonal custom, the individual was unrestrained in his autonomy and freedom. Anything not proscribed by custom was 'permitted.' Because custom represented sacred and ultimate wisdom it was not construed as an infringement or threat to individual autonomy or freedom.[4]

In tribal society all members participated in decision-making as a collectivity, for the common good. In such a society there is less potential for offences against the individual and less need for individual protection from the abuse of authority. Tribal Indians, consequently, came to define rights in terms of the welfare of the group, not the individual. All rights must serve the common interest. Individual rights are perceived by Indians as working contrary to their common interest. Such rights are seen to jeopardize the collectivity and, by logical extension, jeopardize the individual member. What value, Indians ask, are individual rights when they threaten collective and individual existence?[5]

It should be emphasized that the concept of group rights does not imply any lack of respect and concern in Indian society for the individual member. Quite the contrary. Taking the governmental function as a case-in-point, traditionally Indian communities engaged in an extensive consultation process in the selection of their leaders, and all decisions affecting the group required a consensus by members. However, under the democratic representative electoral system imposed upon them by the Canadian government, leaders are generally elected by a minority of members, and the associated organization of delegated authority and hierarchical structures has relegated most members of the Indian community to the periphery of the decision-making

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process. Decisions are now made by Indian elites – elected and appointed (Little Bear, Boldt and Long, 1984:xi-xxi).

It is a matter of historical record that the enlightenment *philosophes* were influenced, it not inspired, by the North American Indians' practice of freedom of individual choice (liberty), denial of status differentials (equality), and rule by consensus (fraternity). Tribal communities conceived of social justice not as an abstract ideal or charter myth but in terms of actual social practice (Boldt, 1981).[6]

The charter and tribal traditions

The existence of the Indian community in Canada necessarily raises questions about the adequacy of western-liberal doctrine in dealing with their conception of rights. Native Indian leaders hold that the Canadian Charter of Rights and Freedoms with its western-liberal principles of legal, social, political and economic individualism not only lacks relevance but threatens the destruction of their cosmocentric philosophy, their spiritual unity, and the customary precepts of their tribal society. In their brief to the Parliamentary Subcommittee on Indian Women and the Indian Act, the Assembly of First Nations gave clear expression to their concern over the impact of the Charter's philosophy of individualism on their traditional way of life.

> 'As Indian people we cannot afford to have individual rights override collective rights. Our societies have never been structured in that way, unlike yours, and that is where the clash comes . . . If you isolate the individual rights from the collective rights, then you are heading down another path that is even more discriminatory. The *Charter of Rights* is based on equality. In other words, everybody is the same across the country . . . so the *Charter of Rights* automatically is in conflict with our philosophy and culture and organization of collective rights. There would have to be changes. We could not accept the *Charter of Rights* as it is written because that would be contrary to our own system of existence and government.' (Assembly of First Nations, 1982[a]:17-18)

Indian leaders have identified several potentially critical consequences should the Charter apply to them. They fear that disgruntled members of their communities will exploit the Charter's provisions to their individual advantage, thereby undermining existing group norms. They believe that a series of judicial decisions in favor of individual rights *versus* group rights will result in a 'snowballing' of individualism.

Indian leaders also perceive the Charter as potentially undermining their aboriginal right to self-government because the Charter specifies that Canadian law will apply to the conduct of band members. Thus, Canadian courts will have jurisdiction to apply the law to Indians in accordance with procedures spelled out by the Canadian Parliament. Furthermore, the Charter requires that Indian government be based on western-liberal democratic theory of individualism (one man, one vote), delegated authority, hierarchical structures

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and so on. These provisions will not allow Indians to develop a social organization and government built on their traditional values.[7] Indian leaders fear too that, legally, the Charter's prohibition of racial discrimination if applied to Indian bands could be interpreted by the courts as a mandate to racially 'integrate' tribal administration and service staffs. On the same grounds, the courts could also rule out Indian ancestry as a tribal membership criterion, or disallow involvement by the tribal government in religious ceremonies. Such judicial decisions would fundamentally and irreversibly alter, and inevitably destroy, their traditional institutions, thereby facilitating the assimilation of Indians. The prospect that assimilation will occur is enhanced by the fact that individual rights would be guaranteed by a judicial and political entity external to the Indian community.

Indians have good reason to distrust the Canadian government's stated good intentions in applying the Charter to them. Historically, Canadian Indian policy has consistently and rigidly been directed toward assimilation. Only the degree of coercion has varied. Before World War II Indian children were forcibly taken from their parents and placed in parochial residential schools, where traditional religious practices and languages were forcibly suppressed. Today, Indians are convinced the Canadian government seeks to achieve the same end under the guise of human rights legislation.[8]

Although Indians want constitutional protection from abuse by the larger society they believe their security lies in laws protecting their collective rights, not individual rights. They want to be protected as a group, not as individuals, from state violation of their human dignity and freedom (Assembly of First Nations, 1983[a], 1983[b], 1983[c]). They do not reject individualized conceptions of human rights on principle. Indeed they accept the need for such guarantees in western societies. But, they do assert that the doctrine of individualism and inherent inalienable rights, on which the Charter rests, is not part of their cultural heritage, serves no positive purpose for them, and threatens their integrity and survival as a unique people. By imposing highly individualistic conceptions of civil and political rights upon them the Canadian government will destroy their collective community. In the same way that the imposed democratic elective system of government effectively destroyed their traditional tribal political structures and practices.

Indians and other Canadians were recently given a preview of how the Charter's liberal democratic definition of human rights can be used by the government to undermine the Indians' capacity to act in accord with their perceived collective self-interest. Sandra Lovelace, a Mic Mac Indian, had lost her Indian status and band membership pursuant to S12(1) (b) of the Canadian Government's Indian Act, which stipulates that Indian women upon marriage to non-Indian men lose their Indian status and band membership, and all associated special rights and privileges. Ms. Lovelace submitted a grievance over her loss of Indian status to the United Nations' Human Rights Commission. The Commission found Canada in breach of Article 27 (Rights of Minorities) of the International Covenant on Civil and Political Rights,

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which guarantees that persons belonging to ethnic, religious or linguistic minorities:

> '. . . shall not be denied the right, in community with the other members of their group, to enjoy their culture, to profess and practice their own religion, or to use their own language' (6th Report of the Standing Committee, 1982:13).

In short, the Canadian government was found guilty of denying 'Indian rights' to those women who had married a non-Indian. Acutely embarrassed by this decision, the Canadian government moved promptly and cunningly to protect its international image as a champion of human rights.[9] Government politicians recast the Lovelace affair as a simple case of sex-discrimination and, with much fanfare, sought to invoke the Charter's provisions against sex-discrimination to restore Ms. Lovelace's Indian status. Indian leaders resisted the Canadian government's initiative because they saw broader implications in the judicial subordination of the Indian Act to the Charter. They feared that such a precedent opened the door to judicial undercutting of their special status and could render all of their group rights inoperational on the grounds of discrimination.[10] Moreover, Indian leaders with good reason are apprehensive that the Canadian government will not provide a sufficient land base or sufficient funds to cope with the increased costs of supporting the reinstated Indian women and their families. But, instead of dealing with these legitimate concerns, the Canadian government cynically portrayed Indian reticence as a case of opposition to female equality, and then blamed the whole scandalous contingency on Indian male chauvinism. Thus, the Charter was exploited to create a public perception that Indian leaders are insensitive to human rights.

The reality, however, is quite different. Since 1946 Indians have lobbied the government to remove the discriminatory sections of the Indian Act and allow individual bands to determine their own membership.[11] The Indian Act is a creation of the Canadian government, not the Indian people. The offensive membership criterion which defines band membership eligibility on the basis of sex, as well as the provision which stipulates de-registration of Indian women who marry non-Indians, were not derived from Indian custom. These provisions were derived from the general customs of patrilineal descent and patrilocal residence practiced by the colonizers. They were designed to facilitate assimilation of Indians and to prune the number of Indian wards which the Canadian government would be obliged, under treaty, to take responsibility for.

Discussion

The generalized imposition of western-liberal human rights legislation on Canada's Indians needs rethinking. With different historical experiences, different social structures, and different cultural patterns and ideas of human nature, Indians deserve a hearing of their claim that they have a different but not inferior approach to human dignity and freedom.

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Imposition of the Charter's provisions on Indians is being justified by the Canadian government on grounds of enhancing their quality of life. The same justification was given for forcing Christianity on Indians; for enacting the racist provisions of the Indian Act; for imposing an elective system and a hierarchical structure of government; and, for legislating a policy of assimilation. Implied in all of this is a deeply embedded ethnocentric assumption that Indian culture is inferior. Ethnocentrism is evident, also, in the government's contention that its version of human rights is the morally correct and best version for Indian people. To insist on imposing western-liberal conceptions of human rights on Indians is no less questionable than earlier initiatives to impose religious conformity to Christian beliefs.

Barsh and Henderson (1980:241–6) suggest that liberals who are persuaded that protection for the special status of Indians violates their anti-racist ideals are confusing racial and political issues. When the Canadian government enacted the Indian Act, giving Indians a special group status, they based it on racial criteria. Thus, for contemporary liberals Indians constitute a deprived racial group and they view their stuggle for special status as an impermissible racist movement. However, Indians do not seek protection for their *racial* characteristics, because being 'Indian' is for Indians a cultural and political identity, not a racial one. Indians seek protection for their identity as distinct nations of peoples; an identity which has its origins in their ancient history. Only in the eyes of the European colonizers were they seen as a racial group. By conceptualizing and legislating membership criteria in terms of racial attributes the colonizers redefined Indians as a racial community, and then proceeded to enshrine their racist conception in the Indian Act. Indians want to transform the negative racist philosophy of the Indian Act into a positive political-cultural guarantee, to be written into the Constitution. If the movement were viewed as a struggle for political-cultural self-determination then liberals could, in principle, accept special status for Indians as a valid objective.

Since the time of Hobbes and Locke political theorists have tended to conceive of rights in terms of individuals in relation to the state. Recently, however, Vernon Van Dyke (1969, 1974, 1975, 1977, 1980, 1982) has advocated a more complex paradigm in which rights for groups, distinct from those of the persons composing it, would be recognized on the grounds that human needs exist at various levels and that the existence of needs, whether at the level of the individual, or the level of the community, implies a right to meet such needs. Van Dyke holds that most discriminatory practices are directed against individuals because of their membership in groups. Equality, individually defined, is of little value when the group of which the individual is a member is unable to assert those rights. This, he proposes, implies a right by the group to address such anti-group sanctions. Van Dyke goes on to qualify that his point is not to downplay the importance of individual rights, but to promote the view that ethnic communities also have just claims to human rights.

Advocates of liberal democratic doctrine oppose the recognition of group

rights because they believe that group rights have a negative impact on individual rights; that group rights are likely to prevail at the expense of individual rights. The Canadian Human Rights Commission takes the position that, while individual and collective rights can coexist, individual rights must have priority over group rights.

> 'You cannot swallow up the rights of individuals in order to protect the collectivity . . . The fundamental principle has to be that you cannot have group rights if you do not have individual rights; that is the foundation of everything . . . The rights of Indian groups can only be enhanced by the protection of the rights of each Indian . . .' (From Report #22 to the Sub-Committee on Indian Women and the Indian Act.)

Is there a necessary conflict between individual rights and the Indians' claim to group rights?[12] Tension and conflict between group rights and individual rights are bound to occur when the criteria for each are developed in isolation from the other. And, this is precisely the effect of imposing the Charter's liberal-democratic, individual rights provisions on Indian groups. Individual rights as legally defined in the Charter by the Canadian government are inconsonant with group rights as culturally defined by Indians. To avert this conflict the definition of human rights must be allowed to grow out of Indian culture, politics and goals.

Although United Nations' declarations and covenants on human rights uniformly emphasize individual protection, the principle that certain collectivities have a right to preserve their culture and to survive as *groups* also appears in various contexts.[13] Essential criteria for U.N. recognition of claims to group rights, while vague, generally imply the historical possession, and wish, by a sufficient number of persons to preserve their cultural traditions. We have, then, under modern international law a consensus, on principle, that an ethnic group which meets the criteria ought to have the right to preserve its culture. Canada acceded to the International Covenant of Human Rights on May 19, 1976, and has itself adopted various measures to protect its own cultural traditions (e.g., regulations requiring Canadian content in broadcasting). Having taken such action Canada ought to consider itself morally committed to respect and fulfill the terms of the Covenant's provision for 'self-determination of peoples . . . to enjoy their culture, to profess and practice their own religion [and] to use their own language.' These are rights not of individuals but of peoples collectively, whether or not they are recognized as states.

Canada's Indians fully meet and, indeed, go beyond the criteria implied in the various United Nations declarations and covenants for a group to have a rightful claim to cultural self-determination.[14] Most members of Indian tribes share a culture and a history, they have signed treaties with the Canadian government; they have a geographically and legally defined land base; they are treated as a distinct unit within Canada; they live under a different law (the Indian Act); they are administered as a separate people; and, they are differently treated with respect to rights and property. Furthermore, Indians

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do not see themselves as fully participating Canadian citizens and have shown little interest in such participation. They do not participate meaningfully in the legislative or bureaucratic aspects of any level of government other than their own tribal governments. The Canadian government never has, and does not today, derive its power to govern Indians from the consent of Indian people.

Indians also constitute nations of peoples according to social science criteria. Walker Connor (1970, 1972, 1978) defines the essence of a nation 'as a psychological bond that joins a people and differentiates it, in the subconscious conviction of its members, from all other people in a most vital way' (1978:379). He adds in another context that 'national consciousness is accompanied by a growing aversion to being ruled by those deemed aliens' (1970:93). Other social scientists have defined a nation as 'a social group which shares a common ideology, common institutions and customs and a sense of homogeneity' (Plano and Olton, 1969). The very high level of cultural uniqueness and homogeneity of Indian societies not only strengthens their political integration as nations but, also, acts as a barrier to political integration into Canadian society. The fact that Indian cultural uniqueness has become politicised adds to their sense of historic nationhood.

There is a contradiction between Canada's idealistic commitment to individual rights and the seeming disregard and lack of respect it is showing for Indian group rights. The power to define rights and status within their communities is fundamental to the protection of Indian group norms and, hence, for their survival. The goals of justice and humanity are not served by imposing the Charter's liberal-individualistic provisions on Indian communities. Justice and humanity require that Indians be allowed to define human rights consistent with their philosophies and aspirations. This could be accomplished by entrenching in the Charter broad principles that would allow Indians to develop and enforce their own version of human dignity and freedom. This would enable Indians to guarantee the highest standards of human dignity and freedom that are appropriate to their cultures and the wishes of their people.

Our analysis of Indian rights in relation to liberal theory speaks to larger issues of human rights. Canadian Indians are not alone in rejecting the western-liberal human rights doctrine. Pollis and Schwab (1979) have shown that the majority of states of the world similarly reject the western-liberal doctrine. Not because they have contempt for human dignity, but because they lack a cultural heritage of individualism. Pollis and Schwab (1979: xiii–vi) infer from their findings the need for extensive empirical studies and theoretical reformulations aimed at achieving a doctrine of human rights that is more validly universal than the prevailing western-liberal tradition.

We would argue that pursuing a formulation of *universal* human rights is not a practical goal. Human rights, if they are to be meaningful to the members of a society, must represent a natural evolution from indigenous cultural-philosophical principles, socio-economic-political structures, and developmental goals. The existing cultural-structural diversity amongst the world's

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communities implies a need for a corresponding diversity of human rights approaches. In some societies the implied need is to give priority to the individual; in others, to the group. Some societies feel a need to emphasize political and civil rights; others, economic and social rights; and, for still others the need is to emphasize responsibilities of individuals, rather than rights. If a trans-cultural approach to human rights is deemed a desirable goal, then let those nations with shared philosophic premises, social structures and developmental goals cooperate voluntarily in developing such doctrines. But, there is no justification for using political and economic power, as was done by the American Carter administration, or moral pressure, as is the case with the United Nation's Universal Declaration, to impose western-liberal doctrines of human rights on resisting societies on the ground of ideological superiority.

Despite divergent attitudes towards individualized human rights, virtually all societies have cultural and ideological systems which deem that everyone is entitled to human dignity. Virtually all societies seek to protect their citizens from various forms of indignity. Why not, then, shift the emphasis from a universal doctrine protecting individualized human rights, to a universal doctrine that would guarantee human dignity? The concept of human dignity, as Donnelly (1982[a]) has stated, is more encompassing than that of human rights and could subsume all of the humane objectives implied in the Universal Declaration. For example, individualized human rights do not represent the only pathway to equality of the sexes. Some native Indian tribes achieved the same objective through positively-stated mutual obligations enshrined in sacred custom. The pathway to implementing a universal doctrine of human dignity could be uniquely plotted by each society to fit its cultural history and contemporary situation. Some societies would emphasize the individual; others the collectivity. Some would seek to achieve the goal of human dignity through guarantees of individual rights; others through an emphasis on personal responsibilities. Such a 'home-grown' charter would have relevance for the citizens and their government. Moreover, such a charter would be more realistic in terms of what a state is able to provide in the way of human rights. The expectation by the world community of each society would be that it strive to implement the universal doctrine of human dignity. Provision could be made for victims of violations of their human dignity, to take their case before the United Nations.

Today, more societies are in violation of, than in compliance with, the Universal Declaration's western-liberal principles of human rights. Our argument is not that a universal doctrine of human dignity and a culturally relative approach to implementing such a doctrine will guarantee human rights to all. But it would probably generate a more effective domestic and international moral-legal force for compliance with fundamental principles of human dignity and rights than is now the case with the current universalistic approach of the United Nations Declaration of Human Rights, which conflicts with the deeply held cultural values of many societies.

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Notes

1. Although we use the term 'Indian' we do not intend to imply that Canada's indigenous tribes constitute a single people in any socio-cultural-political sense. There continues to exist diversity in cultural heritage, political institutions and so on. At the same time there exist today, and have always existed, cultural traits and values which traditionally have been shared by most Indian tribes. These include: reaching decisions by consensus, spiritual unity, institutionalized cooperation and sharing, respect for personal autonomy and a preference for impersonal controls (Lurie 1971:443-8). It is these core values that are jeopardized by the New Charter.

2. Laslett asserts that a face-to-face society is not a political society in the contemporary sense, but a cohabitation of a number of people whose whole experience has been derived from immediate contact with one another. They are always present at whatever is going on. They share not only a language, a history, and so on, but they share all conceivable social purposes and a sense of spiritual brotherhood. It is a unified and internally consistent society.

3. Jack Donnelly (1982[a]:303) draws a distinction between human rights and human dignity. He conceives of human dignity as the more encompassing idea. That is, individualized human rights represent only one possible pathway to the realization of human dignity. Some societies choose other routes to human dignity, because individualized conceptions of human rights conflict with their concept of human dignity. Along the same line Charles Beitz (1979:45–63) holds that the concept of individualized human rights is a very limited one, because it is restricted largely to personal security and lacks an adequate concern for the broader issues of human dignity and collective well-being.

4. A. James Gregor (1968:16) quotes Franz Neumann 'A political theory based upon individualistic philosophy must necessarily operate with a negative juridical concept of freedom, freedom as absence of restraint.' In a society ruled by custom the expression 'it is permitted' is often used, implying a positive concept of freedom.

5. We want to stress here that in our discussion of traditional group rights we do not propose that Indians are currently uniformly and consistently practicing these traditions. However, contemporary Indians have embraced these traditions as their charter myth and as fundamental to their version of the 'good society'; much as western democratic societies have adopted equality and individual rights as their charter myth and version of the 'good society.' It is true that today Canada's Indians, largely as a result of federal government coercion, have moved a long way in the direction of differentiated and segmentary institutions. This may signal that Indians will in future become 'modernized' within their own societies. That is, they may voluntarily choose impersonal, centralized, hierarchical political systems on their reserves. If, and when, this occurs we can assume that individualized rights will take on greater relevance for them.

6. Walter Miller (1955:271–89) in his summary of the writings of traders, soldiers and missionaries proposes that the social organization of a society reflects that which exists in the pantheon. He suggests that, whereas the representative European pantheon is vertically organized, the representative North American Indian pantheon was organized along egalitarian lines. 'Persons' of the other-than-human class existed in scores of manitus, each experiencing momentary advantage *vis-a-vis* other manitus but none was permanently supreme. Furthermore, the manitus relationship to man was one of mutual obligation not superiority. Power was equally available to 'persons' of all classes.

7. Gordon Fairweather, Chief Commissioner of the Canadian Human Rights Commission, has asserted that the provisions of the Charter must extend to Indian governments, because Indians are Canadians protected by the Charter's constitutional guarantees of rights. An alternate opinion by Douglas Sanders, a recognized authority on Indians and the law, holds that Indian governments might not be subject to the provisions of the Charter, because Indian governments, unlike municipal and provincial governments, were not created by the constitution; they predate the federal and provincial govern-

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ments in this country. The Canadian government could also, for example, withdraw its jurisdiction over certain aspects of Indian governance thus freeing them from the applicable provisions of the Charter (for a fuller discussion of the legal relationship of the Charter to Indian rights see the 6th Report of the Standing Committee, 1982:18; Sanders, 1983; L. C. Green, 1983; and P. W. Hogg, 1983).

8. In *Federalism and the French Canadians* Canada's then Prime Minister Pierre Eliot Trudeau suggests that a state built on cultural and ethnic foundations cannot help but be autocratic, irrational and repressive. As a disciple of liberal-democratic doctrine Trudeau idealizes neutral, universal principles. His 1969 White Paper policy, a master plan for assimilating Indians, similarly implies opposition to the concept of special status for Canada's Indians.

In a letter dated October 30, 1980 Trudeau wrote to the National Indian Brotherhood stating, 'You will have to persuade the Government of Canada that the special rights you claim are reasonable and that they should be guaranteed in the Constitution' (Brief of the National Indian Brotherhood:18).

9. It is fair to say that the Canadian government was more concerned with appearance than substance in moving to amend the offending provision of the Indian Act. Had the government been motivated by a genuine concern for the substance of human rights it would have acted before the Lovelace case came to international attention, and it would be acting now to remove other racist provisions in the Indian Act. Instead, it has responded only narrowly, and minimally, to the ruling by the United Nations Human Rights Commission.

10. The question of how the Canadian courts will interpret the provisions of the Charter in relation to the Indian Act is currently a subject of debate. In a case that is being cited as a significant precedent (Regina v. Drybones – dealing with the provisions of the Indian Act prohibiting off-reserve liquor sales to an Indian by a non-Indian) the Supreme Court held that the Indian Act provision in this case represented discrimination based on race and, therefore, offended the Bill of Rights. The Court rendered a decision giving effect to the Bill of Rights over the Indian Act provisions in this instance (G. V. LaForest, 1983).

The Charter as it now stands includes a provision (S.25) guaranteeing Indians that the rights and freedoms contained in the Charter '... 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...' According to Kenneth Lysyk (1982:471–2) this section preserves the *status quo* in that it guarantees that the rights and freedoms in the Charter are not to be read as substracting from the rights and freedoms pertaining to aboriginal people. The question is, what are these rights and freedoms that pertain to aboriginal people? Barsh and Henderson (1982:79) hold that these rights and freedoms exist at the discretion of Parliament to suspend or restrict them. That is, the provision of S.25 is at bottom only a symbolic guarantee. When one takes this interpretation in the context of the government's liberal democratic orientation the future of collective rights and freedoms for Indians, as a special group, looks dismal indeed.

11. In 1946 a Special Joint Committee of the Senate and the House of Commons reviewed the Indian Act receiving submissions from Indians across the country. Almost without exception, the Indian bands and associations called for the abolition of involuntary loss of status, but the subsequent revision of the Indian Act (1951) continued the practice.

12. Clearly, there is a potential risk in passing legislation that extends group rights to Indians that such protective legislation may have negative implications from the standpoint of the individual members. However, a distinction must be made between negative implications for the individual member that derive from a violation of human dignity, or those that derive from the fact that the individual merely disagrees with the group's philosophy. If negative implications derive from an individual's dissatisfaction with the group's philosophy, this ought not to entitle one, on the grounds of individual rights, to jeopardize the group's protected status and survivial. The remaining group

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members, who want to retain their special group status and identity, and who constitute the large majority of that group, merit a guarantee of their right to preserve their community. No society can please all its members, nor is it obliged to do so. Where irreconcilable conflict exists between an individual's rights and the groups' right to survive, the individual can make a choice between leaving the group or submitting to it. At least in the case of Canada's Indians those who wish to give priority to individual rights over group rights have a ready alternative – they can integrate with Canadian society. But, if the Charter is imposed on all Indians, then those who want to practice their cultural values and customs will no longer have a space in which to do so.

13. The principle of collective rights appears in resolutions of: The General Conference of U.N.E.S.C.O.; the United Nation's Sub-Commission on Prevention of Discrimination and Protection of Minorities; the United Nation's Committee on the Peaceful Uses of Outer Space; the World Conference to Combat Racism and Racial Discrimination; and, the International Covenant of Human Rights.

14. For a fuller discussion of the legal foundation of Indian group rights, including the historical and operational dimensions, see D. Sanders (1972).

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