

Diversity and Equality: Three Approaches to Cultural and Sexual Difference*

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One of the leading issues in contemporary constitutionalism is how to adjudicate conflicts, which occur between communities that are ethnically or nationally different from each other, without being blind or insensitive to these differences. It is fairly safe to speculate that courts have always had to adjudicate conflicts in light of ethnic and national differences. But the more self-consciously post-national or multinational the state becomes (or the more the state is replaced by ‘complex-state’ entities¹), the greater is the need to develop a legitimate means of adjudicating conflicts when they arise between political communities that are different on the basis of ethnicity, nationhood or even religion.

The dilemma between protecting sexual equality and protecting cultural autonomy has recently attracted the attention of numerous legal and political theorists and practitioners partly because it vividly captures the challenges posed for adjudicating conflicts across ethnic, national or religious lines. Two dominant approaches have emerged to resolve conflicts that arise between measures to protect sexual equality and those that advance cultural autonomy. First, advocates of a **rights-based approach** frame debates about cultural autonomy and sexual equality in terms of a conflict between fundamental and irreconcilable values.² Second, advocates of the **process-based approach** emphasize the need for communities to resolve such conflicts themselves through internal decision-making procedures or at least through procedures that the community endorses (e.g. third party arbitrars). Here I examine each of these approaches and suggest a third approach which I call the **difference-based approach**. The difference-based approach provides a means by which adjudication can take place, when it needs to take place, without being blind or insensitive to the national or ethnic differences that exist between the communities in conflict. The approach asks that we view such conflicts

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¹ Thanks to Jo Shaw for this useful term.

² Despite more sound interpretations of rights, including interpretations that avoid the problems mentioned here, rights are pervasively used in public discourse and by some contemporary political theorists to invoke a discourse about fundamental and irreconcilable values. As explained below, the predominant understanding of the conflict between sexual equality and cultural autonomy as a *dilemma* is one indication that the conflict is understood in terms of irreconcilable claims or values. The first approach is called ‘rights-based’ in order to highlight this widely employed understanding of rights.

in terms of the identity-related differences at stake and that both rights and processes be examined in terms of the impact they have on these differences. As I show below, American and Canadian courts have, sometimes, employed the difference approach in cases that involve conflicts between cultural autonomy and sexual equality.

The three approaches examined here are distinct from each other primarily in terms of how each requires that we understand the relation between sexual equality and cultural autonomy and therefore, in terms of the different resolutions to the conflict that appear attractive according to each. But they are not mutually exclusive. Each of the approaches is employed in legal and political practice and all three can operate as parts of larger strategies of adjudication and negotiation.

This study argues that both the rights-based and process-based approaches lead to dead ends and that the difference-based approach provides a better way of resolving cases that involve conflicts between sexual equality and cultural autonomy. When the rights-based approach is used, conflicts appear to be dilemmas that are resolved by trading one set of values for another: e.g. sexual equality is traded for cultural autonomy or vice versa. Such trades will appear to be either arbitrary or unfairly biased in favour of one set of values. Process-based solutions promise less interference in community affairs, but end up requiring a great deal of interference in order to ensure that community processes are just. The difference approach stands out as better able to resolve conflicts between competing claims of sexual equality and cultural autonomy partly because it translates abstract normative commitments, such as rights, into the actual practices and values at stake in such conflicts. These practices and values are often ones that help to sustain the identities of those involved in these disputes. At the same time, the difference approach provides a non-arbitrary way of comparing the significance of conflicting practices and values. The difference approach is especially attractive when these conflicts exist amongst peoples who must coexist and wish to do so as equals yet require a fair means of adjudicating conflicts that arise amongst them. For this reason, something like the difference approach described here will be required by multicultural and, especially, multinational states (or federations of states) where the cultural values of one ethnic group are can no longer act legitimately as the background against which adjudication ought to take place.

The Rights-Based Approach

Rights are a powerful way to convey the primary significance of both sexual equality and cultural autonomy to human beings. The language of rights is attractive and often effective as a strategy to protect these and other important and basic values. Some of those who use the discourse of liberal rights to address the tension between cultural autonomy and sexual equality view the problem as, *prima facie*, a conflict between different kinds of rights. For instance, Monique Deveaux views the conflict as one between individual and collective rights.³ Several essays in a recent collection focus on a contrast between cultural rights and

³ Deveaux 2000.

equality rights.⁴ The question I wish to address here is not whether the claims at stake are what consequences follow from thinking about these claims in terms of rights? In particular, what consequences follow from framing the conflict between cultural autonomy and sexual equality in terms of conflicting rights?

The first consequence of the rights-based approach is that it presents claims as fundamental values. Particular values are designated as rights to ensure that they can withstand opposition from all sorts of counter claims and political pressures. In Ronald Dworkin's words, rights are trump.⁵ They trump the preferences of hostile majorities and the rival non-rights claims of other groups. We employ the language of rights partly because of the strategic power that rights have. This does not mean that rights are limitless. Most legal systems that take rights seriously limit rights when not doing so seems unreasonable.⁶ Nonetheless, the language of rights is often used to invoke a different and less flexible set of rules than are invoked in the market place or in the political sphere where interests compete for resources. If a particular claim is a right, the expectation is that it should be protected from other claims that threaten it regardless of who or how many people advance these other claims.

Given that rights are held to express fundamental values and commitments, conflicts between claims that are each considered rights are sometimes understood as conflicts between fundamental values. For instance, under the rights-based approach 'tensions between cultural, collective rights and individual sex equality rights'⁷ appear to be dilemmas between fundamental values. These dilemmas are difficult to resolve because there is no obvious or uncontroversial way to prioritize values that are each defended as fundamental ones. Either a claim is fundamental and therefore is a right or it is not. Therefore, one consequence of the fundamental nature of rights is that values protected by rights are viewed as incommensurable when they conflict with each other.

A second consequence is that, under the rights-based approach, institutions responsible for adjudicating conflicts amongst these fundamental values, for example, the courts, are often perceived as rendering their decisions in an arbitrary manner or according to cultural, gender-based, or other political biases. This perception often accompanies the rights-based approach because it rests in part on the belief that because there is not a more fundamental value to appeal to in cases where fundamental values – i.e. rights – conflict, judges simply choose one right over the other based on their own biases. In Canada, for example, the political battles between French and English communities and between Aboriginal and non-Aboriginal communities have historically been expressed in terms of a conflict between the individual rights favoured by one culture and the collective rights

⁴ Cohen et al. 1999.

⁵ Dworkin 1977.

⁶For example, the Canadian Charter of Rights and Freedoms entrenches a general limits clause that guarantees the rights set out in it 'only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.' The purpose of the clause is to acknowledge, what ought to be acknowledged one way or another in rights jurisprudence, that all rights are subject to reasonable limits. The key and controversial question in light of the need to adjudicate and limit rights, is not whether, but how, limits are placed on rights.

⁷ Deveaux 2000, p. 528.

favoured by the other. The Canadian judiciary and national political leaders are often criticized for imposing, in an arbitrary manner, or because of their biases, individual rights on communities that favour collective ones.⁸

The same problem arises in some liberal analyses of cultural rights and sexual equality. For instance, Monique Deveaux characterizes the struggle by Aboriginal women to advance sexual equality within their communities as ‘a *dilemma* of reconciling sex equality rights with collective, cultural rights’.⁹ Of the three solutions she identifies to this dilemma, she favours the ‘equality approach’ which treats ‘women’s equality rights and cultural self-determination as of equal importance’.¹⁰ I agree with Deveaux that cultural self-determination and equality are equally important to the women involved in this struggle and that a means of reconciling these values is necessary. But, as described in her analysis, the ‘equality approach’ does not pose a solution to the problem. Rather, it restates the problem. A solution to this ‘dilemma’ would show *how* sexual equality and cultural self-determination can be reconciled when they conflict. This solution, I argue, is more difficult to reach if one understands the problem in terms of irreconcilable values that give rise to ‘dilemmas’, as Deveaux’s analysis does. Unless a solution to this dilemma dispenses with rights discourse, for example, by invoking a value more fundamental than those protected by rights, or by translating rights into claims that can be compared to each other, it risks being viewed as arbitrary or as reflecting the biases of the person or institution that devised it.

A third consequence of using the rights-based approach is that it gives rise to the risk that, in order to resolve conflicts between irreconcilable values, one value will be dismissed as merely an interest so that the other value can continue to enjoy its status as a right. In other words, when rights are understood to be fundamental values, an attractive strategy to resolve conflicts between rights is to find that one set of claims is not a right at all. This strategy is used consistently in debates about sexual equality and multiculturalism. Susan Okin, for example, acknowledges that, while both sexual equality and cultural viability play important roles in enhancing individual well-being, sexual equality is more fundamental because it plays a more constant and reliable role in enhancing individual well-being. In contrast, ‘bending over backward out of respect of cultural diversity does great disservice to many women and girls around the world’.¹¹ As if to underline what is likely to be viewed by most women as a stark and strikingly false dichotomy between one’s gender and culture, Okin suggests that some women may be ‘much better off... if the culture into which they were born were...gradually to become extinct...’¹² This dichotomy may accurately capture the choice posed by one understanding of liberal rights. But it does not accurately reflect the choice with which women who suffer inequality view themselves as confronted. Individuals do not discard their culture like unfashionable coats and hats. Rather, they seek to reclaim their culture and advocate reform by advancing rival interpretations of what their cultural traditions require.

⁸ See Eisenberg 1994, pp. 5-8.

⁹ Deveaux 2000, p. 534; emphasis added.

¹⁰ Deveaux 2000, p. 534.

¹¹ Okin 1998, p. 666.

¹² Okin 1998, p. 680.

Martha Nussbaum also writes about ‘the liberal dilemma’. She defends individual rights and dismisses outright potential rival claims that are group-based or inspired by ‘difference’.¹³ Individual rights such as freedom of speech, belief, association, legal rights and equality ought to be protected, according to Nussbaum, in all cases, within all religions and cultures throughout the world regardless of what the beliefs, circumstances, or history of a particular group is: ‘The liberal should emphasize this individualistic concept of basic rights and religious liberty’... ‘[w]e should not accept the idea that denying any fundamental right of any individual is a legitimate prerogative of a religious group’.¹⁴ With respect to cultural groups, and with specific reference to Aboriginal people in Canada, Nussbaum notes, ‘it is hard to understand how the sad history of a group can provide a philosophical justification for the gross denial of individual rights and liberties to members of the group’.¹⁵ I do not mean to argue that religious or cultural groups ought to be able to violate individual rights. Rather, my point is that using rights to express the fundamental importance of particular interests and values may end up distorting our understanding of how interests and values conflict and how to resolve conflicts when they arise. Nussbaum chooses a poor way of expressing the problem and developing a resolution to it because, like Okin and Deveaux, her argument structures choice in terms of fundamental and putatively irreconcilable values. Either one embrace individual rights or one embraces religious traditions; either individual rights or collective rights; either sexual equality or cultural autonomy.

The problem with framing the issue in this way is that these choices obscure the fact that devising rights-based solutions *in any context* requires that we pay very close attention to the traditions, beliefs, and histories of the groups and individuals involved. The concern upon which much cultural criticism of liberal rights turns is not that liberals interpret rights without implicit reference to context, but rather that they implicitly locate rights within the **wrong** context, usually the context of Anglo-American culture and history. While this culture is not without its variety, debates and disagreements about the priority of values and other matters, it is nonetheless a culture dominated by the experiences of a handful of countries. This is not to say that all the values extolled by liberalism are unique or culturally specific. But the way in which different communities give practical expression to abstract values can appropriately vary in response to different historical, social and cultural factors and controversies. By phrasing claims in terms of rights, advocates of the rights perspective risk placing claims within the context dominated by the cultural values of liberal states. Here lies the relevance of the much-repeated criticism that rights are inappropriate tools to adjudicate conflicts in indigenous communities and formerly colonized states. One need not be a cultural relativist or even a critic of rights to appreciate that rights are not culturally neutral. Indeed, even those who most champion the internationalization of human rights recognize and seek to overcome the culturally limited mindset that gave birth to rights. Without special efforts to broaden the rights perspective, rights invoke arguments and principles that, while perhaps ubiquitous to many cultures in some form, are, in the first instance, based on controversies that have shaped liberal societies.

¹³ Nussbaum 1999, pp. 38-9.

¹⁴ Nussbaum 1999, p. 107.

¹⁵ Nussbaum 1999, p. 109.

For example, while Nussbaum suggests that the history of Aboriginal communities ought not to count in philosophical arguments about rights violations within these communities, she emphasizes the relevance of history, tradition, and function – what collectively might be referred to as identity – to understanding the scope of autonomy that the Catholic Church ought to enjoy. Nussbaum believes that individuals ought to be protected against discrimination on the basis of sexual orientation. Therefore, the Church ought not to be allowed by the state to terminate the employment of a groundskeeper or an accountant because of his or her sexual orientation. However, she argues, ‘it would be wrong to require a religious body to ordain open and practicing homosexuals’.¹⁶ This conclusion requires that Nussbaum put aside the rhetoric and discourse of rights and determine what is core or peripheral to the Catholic Church’s identity. I am not suggesting that Nussbaum’s judgment on this matter is incorrect. To the contrary, this is precisely the sort of judgment that is required of those who want to apply liberal rights fairly to the Catholic Church or to other cultural and religious communities. But this judgment relies on knowledge that goes well beyond an understanding of liberal universalism and individual rights to which Nussbaum’s analysis is wedded. The rhetoric of rights is not enough because, as Nussbaum’s example correctly points out, adjudicating conflicting rights asks that we assess the identity of a group and, specifically, the way in which disputed practices, beliefs, traditions and values sustain or undermine that identity. The religious liberty of the Catholic Church ought to be shaped, in part, as Nussbaum argues, by the needs and interests – the capabilities – of individuals. But, in large part, it is also shaped by judgments about which traditions and beliefs are at the core of the Church’s identity and which are not. This is not a matter that rights can settle. Nor is it a determination that can be made without considering and weighing the history, traditions, and practices of the Church.

Methods of adjudicating conflicts that ignore the histories, traditions and practices of groups, unsurprisingly, exacerbate cultural divides and unnecessarily exaggerate cultural difference. In other words, to speculate, even hypothetically about the extinction of a culture or to apply liberal principles without careful attention to history, traditions and practices, is to take the well-trodden path of a profoundly colonial interpretation of liberalism. Today, the effects of such liberal approaches are predictable. One response of those who feel they are faced with the sort of dilemmas posed by the rights-based approach is to reject central liberal values in similarly strident terms. In Canada, for example, a leading female advocate for Aboriginal national autonomy, argues that ‘[e]quality is simply not the central organizing political principle of our communities’.¹⁷ Women who are identified as ‘traditionalists’ within indigenous communities argue that the only type of sexual equality worth pursuing is that which is consistent with community traditions that value women primarily as mothers and nurturers.¹⁸ One cannot help but wonder whether these conceptions are not partly reactions against the imposition of a myopic conception of liberal values. In some cases, it is clear that

¹⁶ Nussbaum 1999, p. 197.

¹⁷ Turpel-Lafond 1997, p. 68. Turpel-Lafond cites as evidence for her claim the testimony of two Mohawk women to the Royal Commission on Aboriginal Peoples, the observation that community Elders frequently view equality with suspicion, as a selfish and individualistic notion that alienates the individual from others in the community.

¹⁸ Deveaux 2000, p. 533.

they are. For example, the Shah Bano case,¹⁹ which involved the divorce of a Muslim couple in India, is often invoked to highlight the liberal ‘dilemma’²⁰ between fundamental rights: namely, religious freedom (i.e. allowing Muslims religious autonomy over marriage and divorce) and sexual equality (of Muslim and non-Muslim women in India). But what those analyses that focus on the liberal dilemma fail to note is that a crucial dimension of this case – the one that left Shah Bano divorced and destitute and that led to the enactment of ‘The Muslim Women (Protection of Rights on Divorce) Bill’ – was the intense and sometimes bloody rivalry between India’s Muslim and Hindu communities; not solely rival interpretations of what sexual equality or religious liberty requires. The ruling of India’s Supreme Court, which required that Shah Bano’s husband pay her maintenance, led to riots and campaigns of intimidation that strengthened the most conservative elements in the Muslim community. The resulting bill, which effectively deprives Muslim women in India of most of the rights they have in Islamic countries, was a means by which Rajiv Gandhi sought to enhance his support amongst conservative Muslim leaders.²¹ In other words, this is less a case about cultural accommodation or religious autonomy, or even the absence sexual equality rights, than it is one about the tragic consequences of religious politics where the status of women becomes a means by which a minority seeks to distance and differentiate itself from the majority.

In sum, by framing the problem of achieving sexual equality or cultural autonomy in terms of fundamental and irreconcilable values - in terms of dilemmas – the rights-based approach sets itself and the values it advances up to be swiftly rejected by those who it means to help. Rather than lending moral and political strength to the cause of enhancing sexual equality within fragile communities, the rights-based approach asks women to make an impossible choice between sexual equality and cultural autonomy. That some women should choose their cultural community and define their community in terms that build upon a rejection of the liberal principles foisted on them is not surprising at all. The fact that resolutions to such conflicts should appear to be arbitrary or based on biases rather than systematic and fairly applied is also a predictable consequence of framing the problem using the rights-based approach.

The Process-Based Approach

The process-based approach focuses, not on the substantive resolutions to such conflicts, but rather, on ensuring that the processes by which resolutions are adopted are fair ones. One of the key strengths of a process-based approach is that it highlights that fair process will reflect the historical context in which conflicts occur.²² In many cases, the legal and political institutions of the majority historically participated in dominating the minority community. Therefore, these are the wrong institutions to decide whose rights and which values ought to govern minority communities. In many cases, the majority’s institutions are

¹⁹ *Mohd. Ahmed Khan v Shah Bano Begum* AIR 1985 SC 945.

²⁰ See, for example, Nussbaum 1999, pp. 104-7 and Shachar 1998, p. 286.

²¹ Everett 1995, p. 72.

²² Spinner-Halev 2000.

viewed as responsible for the conflicts between sexual equality and cultural autonomy within the minority community. This is particularly true in the case of restrictive rules of membership. In most societies, rules regarding membership, particularly those that restrict women through marriage and divorce, are the key means by which groups distinguish themselves from others and thus retain their identity in light of the pervasive threat posed by the majority of assimilation through intermarriage.²³

For instance, the sexist rules of membership in Aboriginal communities in Canada²⁴ were designed, not by Aboriginal peoples, but by non-Aboriginal Canadian bureaucrats. Nonetheless, many Aboriginal organizations defended these rules, which were altered by the Federal government in 1981, on the basis that Aboriginal people need to have control over demarcating membership in their communities. Aboriginal organizations argued that changes to these rules should follow from Aboriginal-initiated processes and not because Canadian courts or governments say so. Ironically, critics of the sexist rules made a similar argument: they argued that these sexist rules of membership act as evidence and reminders that Aboriginal people lack control over community membership because these rules were instituted by the Canadian government and are characteristic of the patriarchal traditions of European settler societies, not Aboriginal ways of life.²⁵

The histories of colonized peoples hold many examples of assimilative policies that lead to internal community conflict. In light of this history, the process-based approach sensibly suggests that conflicts between claims to sexual equality and cultural autonomy ought to be resolved by institutions within minority communities or by reliable and trusted third party arbiters such as international tribunals.

There are two importantly different understandings of how the process-based approach works: 1) the strategic understanding; and, 2) the substantive understanding. The strategic understanding holds that resolutions that are coercively imposed on a minority community by an external majority - especially a majority that historically has oppressed the minority - will never be accepted or successfully implemented within the community. The adjudication of conflicting claims needs to be resolved by processes that minority communities view as fair and legitimate in order for resolutions to stick.²⁶

Little if anything sensible can be said against the strategic understanding of the process-based approach. To the contrary, common sense suggests a number of reasons why the court of the former colonizer is not likely to be the best adjudicator of disputes internal to the communities of formerly colonized peoples. There are two significant considerations here. First, the imperialist state is often not an unbiased arbiter of such disputes and, even if it does not view itself as a colonial oppressor, it often has an interest in one outcome of such disputes over another. In Canada, for example, the efforts of the Native Women's Association of Canada (NWAC) to enhance guarantees within Aboriginal communities for sexual equality,

²³ This point is made very well by both Shachar 1998 and Spinner-Halev 1994.

²⁴ Under these rules, Aboriginal women lost their Indian status upon marrying outside their community whereas Aboriginal men kept their status and passed it on to their non-Aboriginal wives.

²⁵ See Turpel-Lafond 1997 and Nahanee 1997.

²⁶ Spinner-Halev 2000, p. 11.

though often directed against male-dominated Aboriginal organizations, are clearly of interest to political parties and interest groups that seek reasons to oppose enhancing the autonomy of Aboriginal communities. NWAC's efforts on behalf of Native women consistently place it at risk of being used as a pawn in the struggle amongst different groups within the Canadian state to recognize or refuse to recognize Aboriginal rights to self-government. Although NWAC has sought to maintain the position that self-government and guarantees for sexual equality are entirely consistent goals, in the hands of the non-Aboriginal Canadian media, the Aboriginal community is made to appear divided over the desirability of self-government in light of NWAC's concerns about sexual equality.²⁷ The politics between Aboriginal and non-Aboriginal communities in Canada is too thick for the Canadian state to be able to, or be seen to, adjudicate impartially conflicts between these communities, let alone within Aboriginal communities.

The second consideration in favour of this strategic understanding is that minority communities often reject as inauthentic solutions that are delivered by the state's court even if these solutions are ones that the community would have arrived at on its own, or that international organizations would affirm. The strategic argument for the process-based approach addresses the problem that solutions may backfire unless processes considered to be legitimate are employed. As Uma Narayan points out, feminists from Third World contexts often confront members of their communities who dismiss feminist ideas as 'one more incarnation of the colonized consciousness' or as displaying a lack of respect for their culture.²⁸ The process of rebuilding a healthy identity from one that is damaged by colonization may well involve rejecting and dismissing the ideas of the colonizer as tainted or suspect.²⁹

Notwithstanding these considerations, the strategic understanding of the process-based approach does not do what it seems to promise; it does not replace the need to determine from the moral point of view what constitutes the best resolution to conflicts internal to minority communities. As Jeff Spinner-Halev puts it, 'understanding that procedural justice matters does not provide a philosophical justification for denying individual rights'.³⁰ The strategic understanding merely suggests that conflicts ought to be left to communities in which they occur only when this is the best way to arrive at the substantively appropriate resolution to a conflict. If institutions internal to the community provide the best strategy, then common sense suggests that they be used. If the resolution offered by institutions of the former colonizer will be viewed as illegitimate, or if the majority's attempt to intervene will provoke a backlash against women or other minorities within the community, then common sense suggests that these means not be used. But if internal institutions are not likely to yield substantively appropriate results, the strategic argument suggests that other strategies be considered. In either case, the question of strategy presupposes – it does not replace – the need to determine independently of these processes, the right solution to such conflicts.

²⁷ Bakan and Smith 1997.

²⁸ Narayan 1997, p. 396.

²⁹ Franz Fanon's *The Wretched of the Earth* is a brilliant discussion of this phenomenon.

³⁰ Spinner-Halev 2000 p. 11.

The second understanding of the process-based approach, the substantive understanding, requires that the majority's institutions not interfere with the deliberations of the minority because doing so violates principles of procedural justice.³¹ Procedural justice holds that just resolutions are the product of fair processes. The right answer in some conflicts is the answer that is produced if fair procedures are followed³² and if boundaries and jurisdictions are respected.³³ Unlike the strategic understanding, the substantive understanding of the process-based approach requires that majorities not interfere in the internal politics of minorities community when doing so violates the principles and practices of self-government to which the minority has a right. This substantive understanding holds that minority communities, especially those striving for self-determination, ought to make their own decisions according to their own processes.

Despite its purported focus merely on process, the substantive understanding of the process-based approach does not allay responsibility for making judgments about what solutions to conflicts between sexual equality and cultural autonomy are the best ones. For instance, when the American Supreme Court decided, in the *Martinez* case,³⁴ that the fairest way to resolve disputes within American Indian communities is to leave to these communities the task of working out solutions according to community traditions, the court was, at the same time, adopting a process-based approach and endorsing the value of cultural autonomy over other values in the dispute. By respecting the right to self-government in this way, the American courts give authoritative status to particular rules or traditions within the minority community, including those that dictate how subgroups, women, and dissenters ought to be treated within that community.³⁵ Sometimes, there is little difference in practice between respecting the processes internal to minority groups and making a substantive decision in favour of cultural autonomy over sexual equality. This is not to argue that self-government is less important than other values or rights. Rather, my point is that those who favour process-based solutions because such solutions respect the right to self-government are, in effect, arguing that self-government *is* more important than other potentially conflicting values, such as sexual equality. The argument is no less substantive than arguments used in the rights-based approach to secure the primacy of sexual equality over cultural autonomy.

One way to avoid endorsing processes simply because they are internal to a community is to require that they live up to democratic standards or that they be just. Spinner-Halev, for example, endorses the process-based approach but with the qualification that the laws legislated by minority communities 'be established by democratically accountable representatives, not just traditionally chosen male religious leaders'.³⁶ Democracy requires, for instance, that all sides in a dispute be given equal consideration by institutions internal to the community. However, many cases that involve conflicts between sexual equality and cultural autonomy also involve complaints that women are not treated as equals in processes of decision-making or with respect to their standing or membership in the community. In

³¹ Spinner-Halev 2000.

³² This is what Rawls calls pure procedural justice (Rawls 1971).

³³ This point is made by Kymlicka 1999.

³⁴ *Santa Clara Pueblo v Martinez*, 436 US 49 (1978); hereinafter *Martinez* 1978.

³⁵ Shachar 1998, p. 290.

³⁶ Spinner-Halev 2000, p. 26.

other words, in cases involving sexual inequality, the problem is precisely that women are not treated as equals within their communities and therefore cannot participate as equals in decision-making procedures.³⁷ All cases of sexual discrimination involve, in some way, the claim that women are denied equal membership or that their interests are not given equal consideration. Therefore, to require that community processes be democratic ones is to require that women be treated as equals in those processes. In light of this fact, the difference between ensuring that the principles of procedural justice are adhered to and ensuring that sexual equality is respected may be slight. In order to be just, laws must be passed by just procedures. But in order for procedures to be considered just, they must be democratic, allow for all members to participate on an equal basis, and treat all members with equal consideration and respect. These requirements are the substantive ones that inform charters of rights. There is little difference between requiring that processes respect these rights and requiring that sexual equality be guaranteed within all communities. Moreover, the key promise of the substantive understanding of the process-based approach, that it requires less interference in the affairs of minority communities than do non-process-based approaches, is unsustainable. Process-based approaches that insist on the requirements of procedural justice will interfere significantly in the affairs of communities that fail to have just procedures. Particularly in cases that involve the claim that some groups or individuals are not treated as equals within their communities, the process-based approach may sanction as much, if not more, interference in the affairs of a minority community than do approaches that sanction imposing substantive values, such as equality rights, on communities that fail to respect them.

In sum, the strategic understanding of the process-based approach correctly points out that often the only effective way to resolve conflicts within a community is to rely on institutions internal to the community. The substantive understanding holds that processes internal to communities ought to be favoured for reasons of fairness and justice. This second interpretation begs the question of what is required for processes to be considered fair and just and what sort of changes these requirements will impose on processes internal to the community. Concerns about procedural fairness may compel communities to abandon or alter their own processes in order to protect values, such as sexual equality, whose protection motivate the disputes that internal procedures are supposed to resolve.

The Difference Approach

If the foregoing analysis is sound, then neither the rights-based or process-based approach provides a satisfactory means of resolving conflicts between measures to protect sexual equality and attempts to protect or advance cultural autonomy. Three factors ought to be considered in developing a better approach to resolving these conflicts. First, the adjudication of these and other similar conflicts must bring communities together. In order to do so, they must not be designed in ways that impose the values of one group on another. This means that the strategic considerations of the sort discussed above are important and help to justify, in many cases, community courts, community sentencing procedures, and respect for jurisdiction. But they ought to be viewed as merely strategic considerations. The goal is to

³⁷ See, for example, Deveaux 2000, pp. 527-8.

design a method of adjudication that can resolve conflicts within cultures and between them. This does not mean that the best method is one that leads to inter and intra-community agreement about what solution is the right solution in all cases. Many of the cases about cultural autonomy and sexual equality are difficult ones where communities and their courts disagree – even courts within the same community. Rather, the goal is to delineate a credible and fair basis upon which conflicts can be adjudicated amongst peoples who must coexist and wish to do so as equals.

Second, a better approach is one that avoids analyzing disputes in terms of values that are fundamental and irreconcilable. To adjudicate conflicting claims successfully requires that they be presented in terms that can be compared and balanced with each other. Third, any credible adjudicative strategy must pay attention to context, including the history, traditions, and practices of individuals and groups and the self-understanding that individuals and groups bring to such conflicts. In light of these goals, the approach sketched below, which I call the difference-based approach, is promising even if it is incomplete and preliminary.

The difference approach requires that conflicts that are otherwise analyzed in terms of rights be assessed in terms of the interests and values at stake that play a constitutive role in the distinctive identities of the parties involved. In other words, the difference approach asks that conflicts be reassessed in terms of the significance of a disputed practice or rule to the identities of the individual and the group involved in the conflict. Culture, gender, religion, and language are central identity-related differences that distinguish and help to determine individual and group identities. Obviously, people differ from each other in a myriad of ways, and therefore, many other characteristics might be added to the list. Precisely which identity-related interests or values are most significant will partly depend on which characteristics are held to have political significance within a community. For example, gender is significant in most societies. The centrality of gender is dependent upon the extent to, and manner in which, being male or female alters the way in which one is treated by societal institutions, practices, and traditions. Whether similar or different treatment is required, depends largely on the impact that each type of treatment has on the shape and health of the individual's or group's identity.

The difference approach is tied to what is sometimes called a politics of difference³⁸ which principally rejects the claim that individuals and groups have to be treated precisely the same way despite the characteristics that are crucial to a healthy identity by which they differ. As a method of political analysis, the difference approach highlights the ways in which differences are treated by societal institutions. Societies construct their political institutions, establish their practices and develop their traditions partly for the purposes of creating some differences, exaggerating others, protecting and nurturing some differences, and ignoring or hoping to erase others. In each case, the difference perspective, as a method of analysis, asks that institutions, practices and traditions be scrutinized in terms of the impact they have on identity-related differences and, specifically, whether institutions have nurtured and protected

³⁸ Examples of a politics of difference broadly conceived include Carens 2000, Minow 1991, Tully 1995, Young 1990 and 1997.

or ignored and perverted the identities upon which they have had an impact.³⁹ The difference perspective does not maintain that each and every practice, tradition, and institution shapes identity. Rather, it claims, first, that many practices either intentionally or unintentionally shape identity; second, that the identity-related aspect of such practices may be ignored by methods, categories, and concepts that presuppose only the need to protect undifferentiated individuals through rights or democratic processes; and third, that many conflicts in contemporary societies implicate identity-related differences in deep and complex ways. Certainly, conflicts that involve sexual equality and cultural autonomy involve questions about identity and difference.

To adopt an approach that is predicated on assessing the identity-related differences at stake does not require abandoning the use of rights or community decision-making processes. As previously stated, these three approaches are not mutually exclusive. The difference-based approach asks that rights, processes and other political structures be assessed in terms of the effect they have on the identity-constituting differences of individuals and groups. The difference approach is not hostile to rights, but views rights as a distinctive sort of tool that is used to offer a distinctive type of protection to some kinds of differences. Rights are probably one of the most powerful and effective ways in which individual differences are protected in liberal societies. Freedom of speech, belief, opinion, religion, and association are protected as rights partly because they are viewed as crucial to the development of a healthy and distinct individual identity. Rights are also used to protect group differences. For instance, minority language rights, which allow minority groups to communicate and be educated in their language, protect what is often considered to be one of the most crucial identity-constituting characteristics of a national group and, moreover, a characteristic that is easily threatened unless protected by the forceful power of constitutionally-recognized rights. Cultural rights, including the right to be recognized as a distinct people, the right to have vulnerable cultural traditions protected, the right to practice a particular way of gaining a livelihood that is at risk due to economic development or regulation, and the right to self-determination, are all examples of using rights to protect identity-related interests and values held by groups and viewed as crucial by them. But other political devices are used to protect these sorts of group differences as well. National and international treaties, federalism, consociational arrangements, and educational campaigns are all employed to protect individual and group difference. Some are clearly more effective than others are; some are more coercive than others are; and some are more culturally familiar to some societies than others are. But they can all be viewed as protecting differences.

Processes of decision-making are also the means by which the values and interests crucial to the healthy identities of individuals and groups are shaped. Decision-making processes are structured in different ways partly in order to enhance or diminish the recognition of the interests and values of certain participants – e.g. regions, ethnic and language groups - in those processes. Special rights to representation, for example, bolster the presence of particular groups in order to highlight the importance of their contribution to decision-making. The reason why a minority community may not accept decisions as legitimate unless they are produced by processes internal to the minority's culture is related to

³⁹ Eisenberg 1994, p. 10.

the identity-related dimension of decision-making processes. Like rights, decision-making processes offer ways to recognize, ignore, and shape the identity-related interests and values of different groups within a community. The difference approach highlights this aspect of decision-making and requires that different processes be assessed in terms of their impact on the distinctive identity-related interests of the participants involved.

Finally, the difference approach allows identity to be conceptualized in terms that are dynamic and subject to dispute and revision. The approach relies on the arguments that are made regarding what is constitutive of the identities of those engaged in a dispute. These arguments will be based on reasons that are grounded in historical or current circumstances. For example, arguments about whether a particular practice is central to a community's identity could rely on evidence that includes the historical role of a practice, previous agreements to protect the practice (e.g. treaties), current debates within the community about the practice, and the consistency with which a practice has been employed. Arguments about the impact of a practice on the identities of those in the community may rely on the testimony of individuals or evidence about the actual or probable impact of the practice on individuals. These arguments may not produce consensus about the importance of a particular practice to the identities of the groups and individuals involved. But consensus is not the goal. These cases involve potentially divisive conflicts about difference and sometimes dissent. The goal is to construct persuasive arguments that will form the basis upon which judgments can be made about what is central or peripheral to the identities of individuals and communities involved in such disputes.

In sum, the difference perspective is not hostile to democratic decision-making, to rights, or to any other device used to protect difference. Rather, the perspective asks that we view all of these methods as tools that shape identity-related interests and values. In this way the difference perspective focuses on the values and interests that rights are often meant to protect rather than on the rights themselves. Clearly, not all rights or decision-making structures have as their chief objective the protection of difference. The right to legal counsel or the right to be protected from cruel and unusual punishment is not, in the first instance, rights that protect identity-related differences.⁴⁰ Nor are identity-related concerns the only sort of concerns that structure decision-making processes. For instance, the process through which legal cases make their way from lower to higher courts is guided by concerns of efficiency, expense, and jurisdiction that are only distantly related to identity and difference. The difference-based approach does not aspire to reinterpret all political institutions and processes. Rather, it highlights a crucial feature of most institutions and processes, namely that, either intentionally or not, they shape, protect, erase, or otherwise affect the identity-related interests and values of individuals and groups. The approach requires that, in the adjudication of conflicts which arise between groups or between individuals and groups, these identity-related aspects be considered relevant.

Two Examples

⁴⁰ Although, in practice, the protection afforded by these rights is often particularly useful to individuals from groups that suffer from discrimination with the legal system.

Two examples can help to illustrate how the difference approach provides a better interpretation than do the other two approaches to reconciling conflicts that involve sexual equality and cultural autonomy. The first example is the Lavell case⁴¹ in which Jeanette Lavell and Yvonne Bédard challenged a section in the Canadian Indian Act that revoked the status of Aboriginal women who married non-Aboriginal men (and the children from such marriages), but allowed Aboriginal men to pass on status to their non-Aboriginal wives (and children). The rule, which is found in section 12(1)(b) of the Indian Act, was part of a set of rules that defined who is a status Indian and therefore who qualifies to live on reserve and to receive other benefits associated with status. The case was decided in 1974 when the ‘right to equality before the law and the protection of the law’ was protected by a federal statute called the Canadian Bill of Rights. The Bill of Rights (which has since been replaced by the constitutionally entrenched, Charter of Rights and Freedoms) protects equality rights ‘without discrimination by reason of race, national origin, colour, religion or sex’. Lavell and Bédard were Aboriginal women who, upon marrying non-Aboriginal men, were not allowed to live in their communities and were not allowed to return to their communities even upon separating from their non-Aboriginal husbands.

The case is well known in Canadian jurisprudence mainly because the decision reflected, even according to the standards of that time, the failure of the Canadian justice system to comprehend how to protect equality rights.⁴² The majority in the court found against Lavell and Bédard on the grounds that equality before the law meant only the ‘equal subjection of all classes to the ordinary law of the land as administered by the ordinary courts’.⁴³ In other words, the equality provisions were not violated as long as a law, meant only to apply to Aboriginal women, was applied equally to all Aboriginal women.

Notwithstanding the fact that this bizarre understanding of equality (which has also been replaced by the strongly worded protections of section 15 of the Canadian Charter of Rights and Freedoms), dominated the majority’s position, the case can be reassessed to illustrate the contrast between employing the rights-based and the difference-based approaches. Using rights, the case appears, as it did to many of those involved at the time, to be a dilemma between sexual equality rights and cultural autonomy. The right to equality, as guaranteed by a more purposive interpretation of the equality right found in the Canadian Bill of Rights, runs in direct conflict with the right of Aboriginal communities to define their own membership – or at least, the right of Aboriginal communities to control changes to how their membership is defined by the Indian Act. In an effort to underline and emphasize the dilemma posed by these rights, the head of the National Indian Brotherhood refused, in 1980, to endorse the federal government’s plan to amend this disputed section until provisions were in place to guarantee constitutionally the right to self-government.⁴⁴ His strategy was clearly one intended to emphasize the pre-eminence of cultural autonomy over all other rights, and perhaps to force on Aboriginal women a choice between these conflicting rights.

⁴¹ *AG Canada v Lavell – Isaac v Bédard* [1974] SCR 1349; [hereinafter *Lavell*].

⁴² Whyte 1974.

⁴³ *Lavell* at 1366

⁴⁴ Nahanee 1997, pp.97-8 and 333 fn 55.

The difference-based approach would ask, first, that the conflict be represented in terms of rival claims to values and interests which are associated with constitutive elements of the healthy identities of each party involved. Second, the approach requires evidence or argument that these claims are recognized as central to and constitutive of the identities of each party. Third, it requires that conflicting claims be compared with each other in order to determine which side has a more compelling case.

In the *Lavell* case, a discussion of identity and a more purposive interpretation of equality are both found in the dissenting opinion of Justice Laskin. After wading through the relevance of precedent, the application of the Bill of Rights, and the majority's convoluted interpretation of equality, Laskin compares the concerns of each side in terms of the impact they have on the identities of those involved. The impact of section 12(1)(b) on the identities of Aboriginal women is clear and profound, according to Laskin. On one hand, the women who lose status are effectively 'excommunicated' from their society. Further, the effect of section 12(1)(b), 'is to excommunicate the children of a union of an Indian woman and a non-Indian' and to create 'an invidious distinction'... 'between brothers and sisters who are Indians and who respectively marry non-Indians'.... 'It is, if anything, an additional legal instrument of separation of an Indian woman from her native society and from her kin...'⁴⁵

The arguments in favour of retaining section 12(1)(b), presented by the Attorney General of Canada, the Indian bands involved, and eleven Aboriginal organizations from across the country, also emphasized identity-related concerns. The appellants urged the Court to uphold the 'paramount purpose of the Act to preserve and protect the members of the race.' This purpose, they argued, is promoted 'by the statutory preference for Indian men'.⁴⁶ Laskin responds by first putting rights aside: 'even without the explicit direction against sexual discrimination found in the Canadian Bill of Rights,' the discrimination in section 12(1)(b) cannot be sustained as reasonable because it lacks any historical basis: 'There is no clear historical basis for the position taken by the appellants' that gives preference in this regard to Aboriginal men over Aboriginal women, 'certainly not in relation to Indians in Canada as a whole, and this was in effect conceded during the hearing in this court'.⁴⁷ In other words, according to Laskin, section 12(1)(b) does not play a constitutive role in the identities of Aboriginal communities.

In terms of his approach to adjudicating this conflict, Laskin's opinion reflects precisely what I have argued the difference approach requires in cases where fundamental values conflict. It requires that the language of rights is set aside and claims are reassessed in terms of their identity-related impact. Whereas rights-based claims appear to be irreconcilable because they embody values that seem, at least in principle, fundamental, claims that are recast in terms of the identity-related values that they advance are more easily compared to each other. In the *Lavell* case, Laskin correctly notes that the effect of section 12(1)(b) is likely to be profound not only on the women whose status is revoked but also on their children and their families. In contrast, the patriarchal preference reflected by section 12(1)(b)

⁴⁵ *Lavell* at 1366.

⁴⁶ *Lavell* at 1386.

⁴⁷ *Lavell* at 1388.

is not a constitutive part of Aboriginal identity. To extrapolate from Laskin's decision, while there may be good reasons, born out of the need to protect community identity, to restrict intermarriage, this protection can be instituted in a variety of ways. The provisions of section 12(1)(b) provide protection in a way that, on one hand, has damaging effects on the identities of Aboriginal women and invidious effects on their families, and, on the other hand, fails to reflect any constitutive feature of Aboriginal identity. There is no dilemma here. The difference approach suggests that the case ought to have been decided in favour of Lavell and Bédard based on comparing the effects of the disputed rule on the identities of those involved.

I do not mean to suggest that Laskin applied the difference-based approach correctly in all respects or that he correctly considered all the identity-related evidence relevant to the case. Rather, the point here is that whether it is explicitly recognized or not, something like the difference approach is already used in jurisprudence, by lawyers who present identity-related evidence to the court, and by the interveners who also ask that the courts consider such evidence.

The contrast between the process-based and difference-based approaches can be illustrated by examining the case of *Martinez v. Santa Clara Pueblo* (1978). In this US Supreme Court case, Martinez and her children brought suit against the Santa Clara Indians because of a tribal ordinance that denied membership to the children of woman, not men, who married outside the tribe. Before the case made it to the Supreme Court, the District Court noted in its decision all the ways in which the children affected by this ordinance identified as Santa Clarans; they 'have been brought up on the Pueblo, speak the Tewa language, participate in its life, and are, culturally, for all practical purposes, Santa Clara Indians'.⁴⁸ It then contrasted the effect on their identities of being denied membership with weighty observations about the tribe's identity, including that the rules of membership 'reflect traditional values of patriarchy still significant in tribal life... [M]embership rules were no more or less than a mechanism of social. self-definition,' and as such were basic to the tribe's survival as 'a cultural and economic entity'.⁴⁹ In the end, the District Court held that 'the balance to be struck between these competing interests was better left to the judgment of the Pueblo': 'To abrogate tribal decisions, particularly in the delicate area of membership, for whatever "good" reasons, is to destroy cultural identity under the guise of saving it'.⁵⁰

The Court of Appeal reversed this decision again on grounds that were directly related to identity. The sex-based distinction in the membership rules 'was presumptively invidious and it could be sustained only if justified by a compelling tribal interest'.⁵¹ In relation to establishing such a compelling interest, the court notes that the membership ordinance is of 'recent vintage' and that it fails to 'rationally identify those persons who were emotionally and culturally Santa Clarans'.⁵² On these grounds, the appeal court found in favour of Martinez.

⁴⁸ *Martinez v Santa Clara Pueblo* 402 F.Supp, at 18 [D.N.M. 1975]; hereinafter *Martinez* 1975.

⁴⁹ *Martinez* 1975 at 15.

⁵⁰ *Martinez* 1978 at 54; *Martinez* 1975 at 18-19.

⁵¹ *Martinez v Santa Clara Pueblo* 540 F2d 1039 (CA 1976) as quoted in *Martinez* 1978 at 56.

⁵² *Martinez* 1978 at 56.

For the Supreme Court, the case turned on, first, whether federal courts had jurisdiction to interfere ‘with tribal autonomy and self-government’ and, second, whether the Indian Civil Rights Act (ICRA) could be used by Aboriginal individuals against their own communities. The Supreme Court noted the importance of identity-related issues in the lower courts decisions but tried to downplay their importance in its own decision in order to highlight matters related to procedural justice. But, as reflected in its decision, matters of procedural justice and matters of identity are deeply connected.

The majority of the court found that federal courts lacked jurisdiction and that suits against the tribe under the ICRA are barred by the tribe’s sovereign immunity from suit. To resolve conflicts that involve tribal statutes ‘will frequently depend on questions of tribal tradition and custom that tribal forums may be in a better position to evaluate than federal courts’. Federal interference will ‘undermine the authority of the tribal court... and hence... infringe on the right of the Indians to govern themselves’.⁵³ In describing the basis for their decision in favour of the Santa Clara Pueblo tribe, the Court maintains that Indian tribes are different and ought to be allowed to remain different. The tribes are akin to ‘foreign states’ and have government structures, culture and sources of sovereignty that are ‘in many ways foreign to the constitutional institutions of Federal and State Governments’.⁵⁴ In exercising authority over this and other conflicts of this sort, the federal judiciary ‘may substantially interfere with the tribe’s ability to maintain itself as a culturally and politically distinct entity’.⁵⁵

The importance of these considerations, especially the need to abide by treaties that recognize tribal authority, and the need to avoid undermining the legitimacy of tribal forums to resolve such conflicts, is not disputed here. The argument here is that each of these considerations is, as the Supreme Court’s arguments suggest, related to sustaining the health and distinctiveness of the community’s identity. While the Supreme Court’s decision correctly discusses the importance of these identity-related interests, it fails to grapple with several other considerations that are also relevant to the identity-related issues raised by this case. As Catharine Mackinnon notes, the court fails to discuss the historical origins of the membership ordinance or whether cultural survival can be secured without recourse to sexist classifications.⁵⁶ It also fails to discuss the impact of the rule on Martinez’s children and others similarly situated. These considerations may not, in the end, have changed the Supreme Court’s decision. The importance to tribal identity of respecting tribal methods of adjudication and remedy may outweigh all other considerations. But, as the lower courts made clear, these identity-related considerations were relevant to the case. The Supreme Court failed to even consider any other claims based on identity yet clearly empowered a particular and disputed set of identity-related claims by choosing not to interfere. I agree with Mackinnon who observes that, in the end, this is a difficult case. But the difficulties do not stem merely from

⁵³ *Martinez* 1978 at 59.

⁵⁴ *Martinez* 1978 at 71.

⁵⁵ *Martinez* 1978 at 72.

⁵⁶ As Mackinnon notes, sex inequality may threaten the cultural survival of Native communities and survival may depend on changing sexist rules such as this one in order to enhance the loyalty that women feel towards their tribe. See Mackinnon 1983, p. 68.

the question of whether federal jurisdiction exists or not. The challenge here is to compare the identity-related interests of the parties involved and to substantiate a decision – whether it ends up favouring Martinez or the Santa Clara Indian tribe – by showing that one set of claims has a more significant impact on the identities of the parties involved.

I am not suggesting that identity-related arguments of this sort are easy to make. Rather one point I am making is that, implicitly or explicitly, these are the sorts of arguments that form the basis of many decisions that involve conflicting differences. The difference approach offers a systematic way of adjudicating conflicts that otherwise generate rights-based ‘dilemmas’. It allows us to compare individual and group claims and claims within and between different groups. It is a method that focuses on the actual interests and values at stake in such disputes rather than the tools, such as rights, that are meant to protect or enhance these interests. And, finally, it asks that these interests and values be assessed in the cultural, religious and historical contexts in which they exist. It is very likely that the approach will not yield easy results in all difficult cases. But is likely to narrow the cases that are considered truly difficult ones.

Conclusion

The difference, rights-based, and process-based approaches ought not to be viewed as exclusive of each other. In fact, sometimes the best solutions to conflicts between claims to sexual equality and cultural autonomy involve using rights discourse or may be facilitated best by community decision-making processes. But the difference approach recognizes that, sometimes, when rights are used to express the fundamental importance of particular interests and values, they end up distorting our understanding of how interests and values conflict and how to resolve such conflicts. The difference approach also differs from the process-based approach in holding that these conflicts are not primarily questions of process even though concerns about process and jurisdiction may be important to implementing solutions to them. According to the difference approach, competing claims are more easily compared once they are translated into non-rights terms, in particular into terms of the specific identity-based values that the conflicting rights are meant to protect. Rather than replacing rights or negating the importance of fair processes, the difference approach offers the best terms upon which a solution to such conflicts can be reached when rights conflict and processes fail. The difference approach avoids posing the problem in terms of incommensurable values and thereby forcing a choice between sexual equality and cultural autonomy. But, nonetheless, it addresses the substantive issues directly as matters of moral principle, and not merely process. It also leads to solutions that are more likely to foster a respect for, a better understanding of, and possibly a trust between the particular cultures whose differences it seeks to protect.

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