I Introduction

The principal question addressed in this paper is whether the debate between universalism and cultural relativism, as expressed in international human rights fora, assists the resolution of conflict between indigenous women’s rights to freedom from discrimination and discriminatory indigenous custom.

After setting out a couple of examples of (allegedly) discriminatory indigenous customs, and the institutions before which their legality can be tested, I argue that the universalist versus cultural relativist debate does not aid those institutions in their decision-making. There are four interrelated reasons. First, the debate has become too politicised. It has been subverted by state self-interest. Secondly, the debate has become too polemic. There is little scope to fashion any middle ground between these two positions, which would be necessary before it could provide any meaningful answers to issues arising out of discriminatory indigenous custom. Third, the debate distracts attention away from the real issue: how best to simultaneously recognise indigenous women’s rights and reaffirm indigenous cultures while being sensitive to the difficulties that discriminatory indigenous custom throws up. Finally, a universalist or cultural relativist approach to discriminatory indigenous custom constitutes an approach determined by human rights theorists and states rather than indigenous peoples themselves. Such a ‘top down’ approach is inappropriate and counterproductive.

II Discriminatory Indigenous Custom

Indigenous customs the world over have been criticised for discriminating against women. The degree to which some indigenous customs discriminate, the type of discrimination, and factors influencing discriminatory indigenous customs, such as colonisation, differ dramatically. The extent to which
indigenous custom is protected or supported by national legal systems is equally divergent. Some examples make the point.

A village court in Papua New Guinea, applying customary law, ordered Wagi Non to pay compensation for adultery in accordance with custom. As women have no independent means of income in Papua New Guinea, she was unable to pay and, as a result, was imprisoned for thirty-two weeks. On appeal, however, the National Court of Justice read the customary laws subject to equality provisions found in the Papua New Guinean Constitution and overturned the Village Court’s order.¹

Discrimination against Kalinha and Lokono women of Surinam has partly resulted from colonisation and modernisation. Customary land ownership laws did not traditionally discriminate between men and women, although men and women did not have the same property rights. Men were responsible for deciding when and where new plots of land would be cleared. In turn, women dictated if, how, when and what would be planted or harvested. Land, once cleared, ‘belonged to women.

As a result of governmental policy, the traditional land ownership customs were eroded. With it, the status and power of women within their indigenous societies declined considerably. In the 1940s and 1950s Kalinha and Lokono men were offered government employment as part of a large forestry initiative, leading to dramatic socio-economic changes. As men were no longer clearing plots, women’s access to ‘their’ land and the ability to harvest was seriously challenged. The land now belonged to the men. Further, the colonisers’ gender ideologies seeped into the communities, as once men were gainfully employed they considered it unnecessary for their wives to work “preferring them to stay at home and assume domestic tasks”.²

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¹ Application of Wagi Non [1991] PGNC 2; Mt Hagen N949 199 <http://www.paclii.org/pg/cases/PGNC/1991/2.html> (last accessed 9 September 2003). Woods J stated: “Customs that denigrate women should be denied a place in the underlying law in Papua New Guinea because they conflict with the National Goals of equality and participation which have been laid down clearly in the Constitution”.

Arguably the most contentious example of alleged discriminatory indigenous custom in New Zealand is that of Maori women’s speaking rights on the marae. In accordance with some iwi tikanga, women do not whaikorero on the marae atea, although they karanga. This has led some, most notably Donna Huata Awatere, to proclaim that tikanga must be changed because it discriminates against Maori women.\(^3\) The issue is complex for a number of reasons:

- The marae is one of the very few remaining domains in which Maori can practice tikanga.
- In the light of the negative impact of colonisation on Maori custom, it is not surprising that Maori are inclined to want to vigorously protect their own laws and traditions.
- It is contentious whether the practice is in fact discriminatory. Is it not a case of women and men performing different but equal roles?
- Some argue that the exclusive right of men to whaikorero does not in any way prevent women from expressing their views on matters of importance to the particular iwi or hapu in other fora.
- It is significant that colonisation may have caused, or at least aggravated, discrimination against women in Maori society. Annie Mikaere argues that colonisers had a detrimental effect on the relationship between women and men in Maori societies by, for example, introducing the concept that women were chattels and dealing with men only.\(^4\)
- Tikanga may be transferred to new fora, such as Maori governing entities, where it is relatively clear that discrimination is taking place. When Cathy Dewes was elected to the Te Arawa Maori Trust Board, the existing trustees, all men, resigned on the grounds that a woman could not act as a spokesperson for her hapu.

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Bodies Vested with the Power to Resolve the Tensions between Indigenous Women’s Rights and Indigenous Customary Laws

There are a number of fora in which the legality of indigenous custom can be challenged on the grounds that it contravenes women’s guarantees of freedom from discrimination and/or the right to equality.

A Domestic Remedies

Whether an indigenous woman can bring an action against her tribe’s customary laws in domestic fora depends mostly on the constitution of the country in which she lives.

Some countries’ constitutions explicitly state that a women’s right to freedom from discrimination or the right to equality overrides custom. For example, the Ugandan Constitution prioritises women’s rights. Article 33(6) prohibits “laws, cultures or traditions which are against the dignity, welfare or interest of women or which undermine their status.”

In contrast, other countries’ constitutions may explicitly recognise both indigenous custom and women’s rights to freedom from discrimination without prioritising either. In such cases, the decision of which to give effect to falls to the domestic courts. For example, the Tanzanian High Court held that existing customary laws are modified by the Tanzanian Bill of Rights. As a result, it overturned customary inheritance law that prohibited women from selling inherited land. In contrast, in Magaya v Magaya the Supreme Court of Zimbabwe upheld discriminatory customary law over a woman’s right to freedom from discrimination by stating that customary law was not subject to guarantees of freedom from discrimination in the Zimbabwean Constitution.

5 Ephrahim v Pastory and Kazilege [1990] LRC (Const) 757 (Tanzania High Court). Similarly, the Botswanan Court of Appeal struck down discriminatory legislation based on customary norms on the basis that it was inconsistent with the Botswanan Constitution: Unity Dow v Attorney General of Botswana [1991] LRC (Const) 574 (Botswanan High Court); [1992] LRC (Const) 623 (Botswanan Court of Appeal). In Magaya v Magaya [1999] 3 LRC 35 (Zimbabwean Supreme Court), the Supreme Court upheld discriminatory customary law over a woman’s right to freedom from discrimination by stating that customary law was not subject to guarantees of freedom from discrimination in the Zimbabwean Constitution.
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In countries where customary laws are not recognised by national or customary courts or, if so, only marginally, the tension does not come before the courts to be resolved. The issue is essentially non-justiciable.

Similarly, many constitutional guarantees of rights and freedoms do not apply to indigenous customs where the customs are practised by entities that do not fulfil a public or state function. For example, Maori customs are not required to conform to rights and freedoms guarantees contained in New Zealand’s Bill of Rights Act 1990. Only those entities that fulfil a public function, power or duty have duties under the Act.\(^6\)

The question whether women’s rights trump over custom or vice versa can be extremely divisive for indigenous and tribal peoples. During the drafting of the South African Constitution, tribal leaders (mainly males) argued that constitutional guarantees of the right to equality should not be applied to customary laws. In response, tribal women formed powerful lobby groups contesting the tribal leaders’ claims that they represented the views of the tribe as a whole. In the end, the women’s arguments were persuasive. The South African Constitution states that the right to enjoy one’s culture must not be exercised in a manner inconsistent with the Bill of Rights, which includes protections against discrimination by any person.\(^7\)

The Native Women’s Association of Canada similarly argued that any model of indigenous self-government must be subject to the Canadian Charter of Rights and Freedoms during discussion of proposals for greater state

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\(^6\) New Zealand Bill of Rights Act 1990, s 3, states that it applies to acts done by the legislative, executive or judicial branches of the government of New Zealand or by any person or body in the performance of any public function, power or duty conferred or imposed on that person or body or pursuant to law.

\(^7\) South African Constitution, art 31(2). Tom W Bennett states of the South African Constitution: “By implicitly recognising customary law, and at the same time prohibiting gender discrimination, the Constitution has brought about a head-on confrontation between two opposing cultures – admittedly a confrontation that has long been gathering force. Because African culture is pervaded by the principle of patriarchy … the gender equality clause now threatens a thoroughgoing purge of customary law”: Tom W Bennett “The Equality Clause and Customary Law” (1994) 10 South African Journal of Human Rights 122, 123.
recognition of First Nation self-government. Other First Nations’ lobby groups such as AFN, made up predominantly of men, argued the contrary.

B International Remedies

Providing certain criteria are met, indigenous women can bring a communication to the United Nations Committee to the Convention on the Elimination of All Forms of Discrimination Against Women (the Committee) on the grounds that the state in which they live has not abolished discriminatory customary laws as required by that Convention. If the Committee finds in the applicant’s favour, the state comes under a duty in international law to comply with the decision.

Articles 2(f) and 5(a) of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) explicitly requires states to modify customs that discriminate against women. Under article 2(f) states undertake “to take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women.” Under article 5(a) states are required to take all appropriate measures:

... to modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of inferiority or the superiority of either of the sexes or on stereotyped roles for men and women.

Notably, it is the state rather than the indigenous peoples that has the duty to eliminate discriminatory custom under CEDAW. This is consistent with the traditional scope of international law. Only states and, in more limited circumstances, individuals have duties under international law.

Before indigenous women can bring a communication to the Committee, the state in which they live must have ratified the Optional Protocol to CEDAW and they must satisfy the admissibility criteria in the Optional Protocol.8

8 See, in particular, Native Women’s Association of Canada v Canada (1994) 119 DLR (4d) 224 (SCC).

9 Rules of admissibility include, for example, that all domestic remedies are first exhausted. It would be difficult for a Maori woman to “exhaust all domestic remedies” in New Zealand. No New Zealand court would have jurisdiction over an action brought by a Maori woman against her iwi on the grounds that marae tikanga discriminates. At most, a Maori woman could bring the issue to the attention of the Human Rights Commission under the Human Rights Act 1993.
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Further, the state must not have entered a reservation to articles 2(f) or 5(a) of CEDAW.  

It could also be possible for indigenous women to challenge allegedly discriminatory custom in other international forums, such as the United Nations Human Rights Committee, which monitors state compliance with the International Covenant on Civil and Political Rights (1966) (ICCPR). For example, an argument could be made that indigenous custom that discriminates against women denies indigenous women access to their culture under article 27 of ICCPR. However, a communication under articles 2(f) and/or 5(a) of CEDAW, given that they are directly on point, is most likely to succeed.

An indigenous woman’s power to bring an action against her peoples to a domestic court or communication to CEDAW opens up a can of worms. For example:

- Whether a non-indigenous forum (be it national or international) is an appropriate venue to address discriminatory custom; and
- Whether domestic and international law’s scope should extend to practices that take place in the private domain.

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10 For example, the Government of the Cook Islands reserved “the right not to apply … article 5(a) to the extent that the customs governing the inheritance of certain Cook Island chief titles may be inconsistent with those provisions.” Convention for the Elimination of All Forms of Discrimination Against Women (18 December 1979) 1249 UNTS 13 (CEDAW). Mexico objected to the Cook Islands’ reservation to article 5(a).

11 It is consistently argued that women’s rights must be applied in the private domain given that “unlike victims of other human rights violations such as torture, women require particular protection from those who would normally be expected to offer that protection, namely their own families and communities”: Hon Dame Sylvia Cartwright “Rights and Remedies: The Drafting of an Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women” (1998) 9 Otago LR 239, 248. Further, Celestine I Nyamu states: “In practice, human rights is a state-oriented discipline that focuses on rights violations within the public sphere, particularly state violations of civil and political rights. Violations within the private sphere are often ignored. But feminists have challenged this public/private distinction, noting that violations against women occur mainly in the private sphere, and a refusal to intervene perpetuates structures that deny women equal enjoyment of rights”: Celestine I Nyamu “How Should Human Rights and Development Respond to Cultural
Further, under international law and where domestic constitutions prioritise indigenous customary law:

- How do articles 2(f) and 5(a) of the Women’s Convention sit with other international conventions, declarations or conflicting constitutional provisions? Does an indigenous peoples’ right to self-determination protect their right to determine their own customs? Does the right to culture guaranteed in article 15 of the International Covenant on Economic, Social and Cultural Rights (1966) safeguard cultural customs whether they are discriminatory or not?\(^1\)

### IV The Question

To assess the utility of the international debate on universalism and cultural relativism to assist the resolution of issues arising out of discriminatory indigenous custom, it is helpful to consider it in the concrete context of a communication to the Committee on the grounds that marae custom breaches CEDAW. Imagine, for example, that Donna Awatere Huata brings a communication to the Committee against the New Zealand Government arguing it has not legislatively modified the practice of some iwi not to allow women to speak on the marae as required by articles 2(f) and 5(a) of CEDAW.

To answer the question whether the cultural relativism versus universalism debate assists in balancing an iwi’s right to practice its custom with an indigenous women’s right to freedom from discrimination, a number of...

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1 Legitimisation of Gender Hierarchy in Developing Countries?" (2000) 41 Harv Int’l LJ 381, 391.

12 A further question arises under the right to culture: does the individual or the collective have the right to culture? If it is a group right then it may protect the group’s right to determine and apply customary laws. However, if it is an individual right, does it guarantee an individual woman the right to participate in her culture by, for example, requiring that she is not denied the right to speak on the marae atea? Alternatively, the right to culture may not extend that far. If the culture, as reflected in custom, does not apportion the same roles to women, a woman cannot under the right to culture maintain a claim that she is denied her right to culture because it does not, as an empirical fact, guarantee her the same role as men. Jurisprudence from the United Nations Human Rights Committee relating to the International Covenant on Civil and Political Rights (1966), art 27 is relevant in this regard. For example, Lovelace v Canada (30 July 1981) Com No 24/1977 (CCPR/C/13/D/24/1977) (UNHRC).
assumptions are necessary. First, that marae tikanga not allowing Maori women to whaikorero on the marae atea is discriminatory. Secondly, that a communication to CEDAW would be admissible. Third, that a cultural relativist stance on the issue of marae speaking rights would be open to CEDAW. As illustrated above, CEDAW reflects universalist thought in that it prioritises freedom from discrimination over culture. However, Nyamu concludes:13

CEDAW offers a starting point, but it does not dictate the process for achieving change. CEDAW leaves open the possibility of a flexible process of evaluating assertions of culture in context. A word of caution: it is difficult to make any sweeping conclusions on the overall utility of the cultural relativist versus universalist debate to address discriminatory indigenous custom on the basis of one concrete example. It may be that the debate has greater value to the resolution of issues arising out of discriminatory Papua New Guinean or Kalinha and Lokono indigenous custom, say, than Maori custom or vice versa. Alternatively, the debate may have greater relevance to one country’s domestic constitutional regime than another. However, this paper illustrates that some generic conclusions are possible. The caveat is that the extent to which these conclusions apply to one or other indigenous peoples’ customs or method of domestic constitutional adjudication may differ.

Finally, the focus of this paper is more on the debate between universalism and cultural relativism as it has played out in international fora rather than in the more theoretical domain. Academic debate is more nuanced than that of states and “hard line” human rights focused non-governmental organisations.

V Universalism and Cultural Relativism

At the most fundamental level, universalism and cultural relativism are two different theoretical conceptions of the nature of human rights. The content of human rights differs according to each theory.

A Universalism

13 Nyamu, above, 416. She also states: “The fact that articles 2(f) and 5(a) of CEDAW call upon governments to abolish or modify customs that discriminate against women does not mean that in all situations the only way to achieve the desired change is through lobbying for legislation aimed at outlawing those customs”: Nyamu, above, 415.
Universalism maintains that human rights are universal. They attach to, and are inherent in, every individual irrespective of culture, race, ethnicity, gender, age and so on. Further, rights are absolute and inalienable.\(^14\)

In the light of its basis in liberal theory, it is not surprising that universalism prioritises civil and political rights over rights such as economic, social and cultural rights or, say, the right to development. Universalism similarly prioritises individual rather than group rights. Individuals (humans) are the only possible holders of rights.

**B Cultural Relativism**

Higgins explains cultural relativism as follows:\(^15\)

>G enerally speaking […] cultural relativists are committed to one or both of the following premises: that knowledge and truth are culturally contingent, creating a barrier to cross-cultural understanding; and that all cultures are equally valued. Combined with the empirical observation of cultural diversity worldwide, these two premises lead to the conclusion that human rights norms do not transcend cultural location and cannot be readily translated across cultures.

Importantly, cultural relativism maintains that the content of rights enjoyed by a community is determined by culture.\(^16\) Consistently with this thesis,

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\(^{14}\) The universalist perspective of human rights is reflected to some extent in Eugene Kamenka’s definition of human rights: “claims presented as rights are claims that are often … presented as having a special kind of importance, urgency, universality, or endorsement that makes them more than disparate or simply subjective demands”: Eugene Kamenka “Human Rights: Peoples’ Rights” in James Crawford (ed) *The Rights of Peoples* (Oxford University Press, New York, 1988) 127, 127.

\(^{15}\) Tracey E Higgins “Anti-essentialism, Relativism and Human Rights” (1996) 19 Harv Women’s LJ 89. Henry Steiner and Philip Alston define cultural relativism as follows: “Advocates of cultural relativism claim that (most, some) rights and rules about morality are encoded in and thus depend on cultural context, the term “culture” often being used in a broad and diffuse way that reaches beyond indigenous traditions and customary practices to include political and religious ideologies and institutional structures. Hence notions of right (and wrong) and moral rules based on them necessarily differ throughout the world because the cultures in which they take root and inhere themselves differ”: Henry Steiner and Philip Alston *International Human Rights in Context* (Oxford University Press, Oxford, 2000) 366, 366.
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cultural relativists argue that the content of human rights codified in international human rights instruments reflect the values of the countries with the greatest power over the substance of international human rights law, Western states.

C The conflict between universalism and cultural relativism

The conflict between univeralist and cultural relativist theories of human rights is obvious. Universalists attack the premise on which cultural relativism is based. Likewise, cultural relativists seek to undermine the fundamental basis of universalism.

Tensions between the two theories on the international stage were clear as early as the late 1940s during the drafting stages of the Universal Declaration of Human Rights (UDHR). The Executive Board of the American Anthropological Association warned that the UDHR would be “a statement of rights conceived of only in terms of the values prevalent in the countries of Western Europe and America”, and added that “what is held to be a human right in one society may be regarded as anti-social by another people.”

Western states disagreed.

The debate is particularly strong in the context of women’s rights. For example, universalists claim that cultural relativists’ views “are generally favourable to the powerful members of the group and, consequently, tend to

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mask the role of gender in shaping the interests, ideologies and practices of the group.”

Cultural relativists respond that the liberal theory on which universalism is based does not accommodate other perspectives nor recognise that “essential aspects of human dignity are ensured through membership in the community rather than through inherent rights that attach to the individual.” Higgins says this:

Cultural relativists have targeted feminism itself as a product of Western ideology and global feminism as a form of Western imperialism. [...] Cultural relativists have accused feminist human rights activists of imposing Western standards on non-Western cultures [...].

D Universalism, cultural relativism and indigenous peoples

Indigenous peoples active in international fora have used the dialogue of both cultural relativists and universalists.

Indigenous peoples consistently adopt cultural relativist language when seeking greater recognition of collective rights in the context of the draft Declaration on the Rights of Indigenous Peoples. They argue that a universalist’s individualistic conception of human rights ignores the relevance of the collective for many indigenous and tribal peoples. Anaya makes the point:

21 Higgins, above. The cultural relativist rejection of universalism in the context of women’s rights is also the subject of Savell’s attention. She states that, from the cultural relativist perspective, “feminist analyses can be criticised for failing to adequately appreciate the importance of culture in defining women’s experiences and priorities”: Savell, above, 794.
Indigenous peoples have demanded recognition of rights that are of a collective character, rights among whose beneficiaries are historically grounded communities rather than simply individuals or (inchoate) states. The conceptualisation and articulation of such rights collides with the individual/state perpetual dichotomy that has lingered in dominant conceptions of human society and persisted in the shaping of international standards. The asserted collective rights, furthermore, challenge notions of state sovereignty, which are especially jealous of matters of social and political organisation within the presumed sphere of state authority.

However, indigenous peoples have also bought into the more universalist model of international human rights law by advancing their right to culture under conventional human rights treaties such as article 27 of the ICCPR.24

E The Committee’s possible use of universalism and cultural relativism

Were the Committee to take a universalist stance on the issue of women’s speaking rights on the marae, it is likely to prioritise the civil and political right of freedom from discrimination over any inconsistent custom. In fact, given that universalists recognise only individual rights there would be no real conflict between the rights of the iwi and the rights of the individual women. Rights, a universalist would argue, do not vest in collectives.

In contrast, were the Committee to take a more cultural relativist approach to the question of marae speaking rights, it would be more sensitive to marae tikanga. It might find that rights in a particular society are determined by tikanga and do not include a right to freedom from discrimination on the marae atea. In doing so, it would prioritise the right of the collective, the iwi in question, to determine the content of its culture.

24 Examples include Lovelace v Canada (30 July 1981) Com No 24/1977 (CCPR/C/13/D/24/1977) (UNHRC) and Mahauka v New Zealand (15 November 2000) Com No 547/1993 (CCPR/C/70/D/547/1993) (UNHRC). Note also Karen Engle’s comment: “In other words, advocates for indigenous peoples might have initially dismissed the human rights regime as having excluded the rights of indigenous peoples or might have even seen the human rights principles as antithetical to indigenous culture. At some point, however, a concerted effort was made to use the mainstream instruments and their enforcement mechanisms to argue for the protection of indigenous culture”: Karen Engle “Culture and Human Rights: The Asian Values Debate in Context” [2000] 32 NYU J Int’l L and Pol 291, 305.
VI The Application of the Universalism Versus Cultural Relativism Debate to Discriminatory Indigenous Custom

At first glance, it appears useful to base a decision on how to strike the balance between indigenous women’s rights and indigenous peoples’ rights on a normative assessment of whether universalism or cultural relativism is the correct conception of human rights. It provides a ready-made answer. However, for the reasons detailed below, the Committee would not find the debate on universalism and cultural relativism, as it has taken place in international fora, useful.

A Politicisation

The debate between universalism and cultural relativism has become extremely politicised.

During the Cold War the Soviet Bloc advanced arguments for greater international recognition of economic, social and cultural rights, criticising also the bias in international human rights law towards individual rights. Further, Communist states, in a cultural relativist fashion, rejected the idea of a set of transcendent and transcultural human rights. In response, Western states slated Communist states, calling their stance a political one influenced by their unwillingness to be subject to international scrutiny on the basis of their poor human rights records. Universalism and cultural relativist arguments were used as tools in the Cold War enemies’ armour.

In the post-Cold War environment the players in states’ political disputes using the universalist and cultural relativist debate have changed. For example, the Vatican and some Muslim countries have condemned “what they viewed as the imposition of Western norms of sexual licence and individual autonomy on the rest of the world.”

25 Henry Steiner and Philip Alston state: “During the Cold War, the primary context for argument over universalism and cultural relativism was the conflict between the West and the Communist states, particularly between the United States and the Soviet Union”: Henry Steiner and Philip Alston “East Asian Perspectives” in Henry Steiner and Philip Alston (eds) International Human Rights in Context (2nd ed, Oxford University Press, Oxford, 2000) 538.

However, the most vociferous of states advocating the cultural relativist position have been Asian. Buoyed by greater international clout brought by economic success in the 1990s, Asian countries began to challenge “the universalism of human rights and criticising the international human rights movement for being Western biased.” Consistently with this new approach, Asian states agreed on the Bangkok Declaration in preparation for the 1993 World Conference on Human Rights in Vienna, which sets out Asian states’ collective, and less than universalist, position on human rights. It declares that:

... human rights [...] must be considered in the context of a dynamic and evolving process of international norm-setting, bearing in mind the significance of national and regional particularities and various historical, cultural and religious backgrounds.

The ‘Asian Values’ reflected in the Bangkok Declaration were consistent with the stance of particularly strong Asian countries on human rights, for example, China, which, in response to greater international scrutiny of its human rights record after the Tiananmen Square massacre, issued a Human Rights Paper rejecting universalism in 1991. It included:

... the claim that although some rights are universal, their interpretation and implementation depends on local circumstances, including the level of economic development, cultural practices and fundamental values that are not the same in all countries; [...] the complaint of the Western bias of the international human rights movement and its excessive emphasis on civil and political rights and the individual at the expense of the community and collective; the criticism of hypocrisy of Western imperialists who were guilty of human rights violations in Asia and continue to have their problems at

29 As set out in Peerenboom, above, 49. Similarly, Burma argued, in response to criticisms of military forced labour, rape and torture, that “Asian countries with their own norms and standards of human rights, should not be dictated to by a group of other countries who are far distant geographically, politically, economically and socially”; Kenneth Christie and Denny Roy The Politics of Human Rights in East Asia (Pluto Press, London, 2001) 93.
Peerenboom summarises that the ‘Asian Values’ approach uses “culture both to assert an exception, or opposition, to a certain type of human rights and to argue that international law should protect their culture”.30

Asian states also argued that the hierarchy of human rights in international human rights instruments privilege civil and political rights over economic, social and cultural rights, reflecting a bias “toward both Western political traditions and the wealth of Western states relative to the rest of the world”.31

The tensions between states adopting a more cultural relativist stance and those taking a universalist position was obvious at the 1993 Vienna World Conference on Human Rights. One commentator describes the cultural relativist versus universalist debate that took place as follows:32

[It] was heavily politicised, with government leaders and spokespersons often driving the debates and setting the tone. Ad hominem arguments were common, with the participants accusing others of bad faith and attacking their motives rather than examining the substance of their arguments. Anyone who defended Asian values was accused of being an apologist for dictators. Conversely, within Asia, those who were critical of Asian values ran the risk of being dismissed as “self-demeaning ‘Westophile’, a blind follower of neoliberalism, or an idealistic citizen of the world.

In the end, the Vienna Declaration and Programme of Action on Human Rights (1993) reflected a compromise between states’ universalist and cultural relativist positions.33 Paragraph 1 states “the universal nature of these rights and freedoms is beyond question.” However, paragraph 5 notes

32 Peerenboom, above, 35.
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“The significance of national and regional particularities and various historical, cultural and religious backgrounds that must be borne in mind.”

What we can glean from the above is that states have used the universalist and cultural relativist debate in international forums to forward self-promoting political interests and/or attack states who oppose those interests. States are not immune from hurling rather base accusations at other states using universalist or cultural relativist arguments while ignoring any merits of the contrary argument. The problem with this is that states are motivated by self-interest. As Otto explains,35

the emergence of the deeply polarised debate over the “universality” of human rights, ostensibly about whether universality can be qualified by cultural differences, is directly related to the current struggle for global economic dominance.

Otto’s view is supported by Kausikan, who comments that Western states views on cultural relativism are “the outcome of fears and insecurities stirred by the economic success of Asian states in the post-Cold War environment.”36 He also points out that:

[I]t is difficult to believe that economic considerations do not to some degree influence Western attitudes towards such issues as, say, the prison labour component of Chinese exports, child labour in Thailand, or some of the [...] complaints against Malaysian labour practices.

Somewhat cynically, it may be that universalism gets greater ‘air time’ in international human rights instruments, not because it is the superior theory of human rights but because of the power of the states that support it.

34 Randall Peerenboom states that “the first round of debates was heavily politicised and suffered from excessive abstraction and the lack of solid empirical foundation for many of the sweeping claims made by both sides”: Peerenboom, above, 35.
Western states, on the back of their relative economic power, dominate international forums.\(^{38}\)

Subject to the political game-playing of states, the universalist and cultural relativist debate has become less informative and, ultimately, of less service to entities vested with the power to resolve the tension between indigenous women’s rights and indigenous custom where the custom discriminates. Arguments inspired and influenced by states’ disingenuous motives are inappropriate tools when considering, for example, the issue of women’s speaking rights on the marae. To the extent that judicial and quasi-judicial bodies are influenced by the universalist and cultural relativist debate, a committed, even-handed and nuanced resolution to the conflict between the two theories is unlikely.

\(B\) Polarisation

A problem related to the politicisation of the universalist and cultural relativist debate is that it has become unhelpfully polemic and each theory too inflexible.

Western states take the ‘absolute’ view that any modification of the universalist position will open the door for states to renge on their human rights obligations.\(^{39}\) For their part, cultural relativists make the ‘absolute’

\(^{38}\) “In summary, while it may be true to say that international law has been forced to become more receptive to Third World concerns, the reality still is that when it comes to matters of importance, such as the Gulf War, western views predominate. The end of the cold war and the demise of the Soviet Union in recent years have probably accentuated this. While the numerical supremacy of the Third World certainly has meant that the West can no longer force a consensus on international law, the same can be said the other way around. In other words, without the support of the West, new rules desired by the Third World cannot come into effect. In the absence of the ability of the Third World to change the law effectively, the status quo is maintained, whereby the Western powers still hold the trump cards. On this basis, it is difficult to accept the argument that international law has changed so significantly that it no longer reflects Western conceptions of human rights”: Sam Garkawe “The Impact of the Doctrine of Cultural Relativism on the Australian Legal System” (April 1995) 2 Murdoch University Electronic Journal of Law <http://www.murdoch.edu.au/elaw/issues/v2n1/garkawe21.html> (last accessed 21 October 2002).

\(^{39}\) Dianne Otto says this: “In contemporary debates, the “universalists”, who are primarily Northern states, predict that even the slightest “dilution” of universalism will give the green light to tyrannical governments, torturers, and mutilators of women. The universalist position completely denies that the existing universal
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claim that human rights reflect Western cultural ideals only and, as such, are not only inappropriate to apply to non-Western cultures but are oppressive. Criticisms by universalists of cultural relativists and cultural relativists of universalists have become equally polemic. Nagengast illustrates the point when she states that:

... the concept of cultural relativity, developed by anthropologists to induce respect for difference, is appropriated, simplified, bastardised, and deployed by despotic states, politicians, patriarchs [...] to rationalise and excuse human rights abuses.

In more concrete terms, and as illustrated earlier, a universalist or cultural relativist approach is likely to result in the Committee taking an approach which prioritises either an indigenous woman’s right to equality or freedom standards may themselves be culturally specific and allied to dominant regimes of power": Dianne Otto “Rethinking the ‘Universality’ of Human Rights Law” (1997) 29 Colum Hum Rts L Rev 1, 8. Peerenboom makes a similar comment: “While Asian-values opponents were quick to criticise defenders of Asian values as constructing a fictive Asia, they were no less guilty of constructing an overly unified and idealised “West”. Opponents of Asian values sometimes seemed unaware of the variation even within Western states. They took at face value the long list of rights in international law documents and emphasised idealised accounts of rights or the lofty aspirational normative visions of philosophers, ignoring or downplaying the failure to implement such rights in practice or the many critiques of, and doubts about, rights in the West”: Randall Peerenboom “Beyond Universalism and Relativism: The Evolving Debates About ‘Values in Asia’” (Research Paper Series, Los Angeles School of Law, University of California, 2002) 10.

40 On the extreme cultural relativist stance, Dianne Otto states: “At the same time, “cultural relativist” counterarguments from Southern states entrench the intense polarisation of views. The relativist position advances alternative claims to universal truth that have their foundations in non-European cultural traditions and rejects the current human rights paradigm as oppressive for developing states with different cultures”; Otto, above, 8.

from discrimination or the right of the iwi to practice its customs on the marae. However, if reliant on states’ articulations of each theory in international fora, the Committee is likely not simply to prioritise one outcome over another but instead to take an absolute and uncompromising approach. Instead of balancing the two theories with a good dose of pragmatism, the Committee would be led to make an uncompromising and unconditional decision. Instead of balancing the two theories with a good dose of pragmatism, the Committee would be led to make an uncompromising and unconditional decision. Instead of balancing the two theories with a good dose of pragmatism, the Committee would be led to make an uncompromising and unconditional decision. Instead of balancing the two theories with a good dose of pragmatism, the Committee would be led to make an uncompromising and unconditional decision.

42 Certain options would be unavailable to the Committee. For example, it would be less inclined to decide that the right to equality trumps over the iwi’s right to enforce its customs, but that the state should provide Maori with the space to make the appropriate modifications to marae tikanga in a culturally appropriate manner. As Peerenboom says:

43 The debate, often engaged in at an exceedingly abstract level, is no longer fruitful, in Asia or elsewhere. Most of the contested issues concerning human rights are too specific to be resolved by falling back on claims of universalism or relativism.

44 C Universalism versus cultural relativism as a distraction

On another note, the universalism versus cultural relativism debate aggravates the already extremely complex issues arising out of discriminatory indigenous customs. An approach based on either one of the theories would distract the Committee rather than assist it in its decision. The Committee should be focused exclusively on how best to simultaneously recognise indigenous women’s rights and reaffirm indigenous cultures rather than on a theoretical debate on the nature and content of human rights.

Examples that illustrate the ways in which the debate could distract the Committee are detailed below. First, the cultural relativist and universalist debate would lead the Committee to emphasise the conflict between customs and women’s rights rather than look to how an indigenous peoples’ culture

42 “One consequence of the polarisation of the mainstream universality debate is that “transformative” critiques of human rights orthodoxy, which seek to alter dominating global economies, and the practices of power, are silenced by the imperative to express absolute, uncompromising positions on both sides”: Otto, above, 3.


44 Peerenboom, above.
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supports, or could evolve to support, indigenous women. For example, if adopting a universalist approach to rights, the Committee may not factor in the significance of the karanga in marae tikanga and the possibility that men and women have equal but different roles on the marae atea. Nyamu makes a similar point:

Some critics [of human rights groups] have pointed out that these abolitionist responses create the impression that women’s rights do not exist in custom or local practice, and the solution therefore lies in substituting custom and local practice with alternatives, offered by national legislation or the international human rights regime. Furthermore, the abolitionist approach does not encourage a holistic understanding of the context in which these practices are embedded, and as a result, prevents comprehensive solutions.

Conversely, if adopting a cultural relativist approach, the Committee is less likely to consider the possibility that marae tikanga will be transposed into new fora where it will discriminate; think of Cathy Dewes and Te Arawa Maori Trust Board example.

Secondly, the resolution of potential conflicts between articles 2(f) and 5(a) of CEDAW and, say, an indigenous peoples’ right to self-determination, would only be superficially assisted by an approach informed by the cultural relativism versus universalism debate.

If the Committee sided with universalists, it would be more inclined to prioritise civil and political rights over economic, social and cultural rights and individuals’ rights over groups’ right. Alternatively, an approach more consistent with the cultural relativist position may lead the Committee, within the confines of its mandate to apply the civil rights in CEDAW, to give greater weight to an indigenous peoples’ right to culture. The better approach for the Committee may be to focus less on which rights trump other rights according to either the cultural relativist or universalist position, but instead to decide on an outcome that minimises the extent to which each conflicting right must be compromised.

Third, adopting a cultural relativist or universalist stance could distract the Committee’s attention away from considering the impact of indigenous

peoples’ experience of colonisation on the relationship between men and women in indigenous societies. The extent to which colonisation impacts on indigenous customs is highly relevant. If discrimination can be largely attributed to colonisation, it may be more appropriate for the Committee to require a state to abolish that custom as it would involve a lesser cost to the indigenous custom. A cultural relativist or universalist stance does not allow for such a nuanced approach.

Fourth, the universalist and cultural relativist debate would not assist the Committee to find an outcome that, when implemented, would not aggravate tensions between indigenous women and their iwi. The Committee should be focused on making a decision that, perhaps, best provides Maori with the space and impetus, perhaps by requiring the state to fund consultation, to address the issues themselves.

Finally, if the Committee adopts either a universalist or cultural relativist approach, it may take one precedential line on communications involving discriminatory indigenous custom. However, a ‘one size fits all’ approach would be inappropriate. The best resolution of issues arising out of discriminatory custom is likely to differ if the context in which that custom is practised differs. Put simply, it is unlikely that the best resolution for Ugandan women is the same as that for Maori women.

D Universalist and cultural relativist solutions constitute an imperialist approach

Both the universalist and cultural relativist positions would require a ‘top-down’ approach to tensions created by discriminatory indigenous custom. They implicitly involve the resolution of indigenous issues by non-indigenous means. If the Committee based a decision on discriminatory custom on one or other theory, and the state concerned implemented the Committee’s decision, either the universalist or cultural relativist theory would, in essence, be imposed on the indigenous peoples in question.

Some may argue that a decision based on cultural relativism would not be imposed as the premise of cultural relativism is based on respect for the equality of all cultures and sensitivity for different cultural practices. However, it is important to recognise that cultural relativism is as universal a theory as universalism. It dictates one ideology of human rights as correct. The difference is simply that cultural relativism differs from universalism in content.
In addition, while cultural relativist and universalist arguments have been made by indigenous peoples at certain times in international fora, neither is a peculiarly indigenous argument. As we have seen, the theories have been a greater part of states’ parlance than that of indigenous peoples’. They are simply borrowed by indigenous peoples when it is politically expedient. In that sense, both cultural relativism and universalism are foreign to indigenous peoples.

To impose a decision on discriminatory indigenous custom adopting either a universalist or cultural relativist stance is inappropriate given, in particular, indigenous peoples’ experience with colonisation. Indigenous peoples are understandably sensitive to the imposition of foreign norms in the light of their often negative experience with them under colonial regimes. The South African Law Commission’s proposal to amend discriminatory customary succession laws inspired the following comment by the President of the Congress of Traditional Leaders in South Africa: “We reject the idea that our laws should be subject to so-called common law – an imported white man’s law that has been systematically used to denigrate our traditional systems of law.”

A decision by the Committee, especially if premised on a universalist approach and not on the evidence of indigenous women and men, may also be counterproductive if it requires the state to abolish discriminatory custom. Where custom is threatened, its adherents may become increasingly persistent in their defence of it. Nyamu makes the point:

> In the impact of colonialism, particularly efforts directed at eradicating the practice, may have identified the desire to preserve traditional rituals in order to maintain tribal identities in the face of the emergence of national states created by colonial powers.

Ironically, the greater the outside attempt to abolish custom, the more likely the custom will still be practised. Where governments in Africa have undertaken to ban female genital mutilation altogether, it has only been

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practised in greater secrecy, which has horrific consequences for women’s health.\textsuperscript{48} One academic points out:

\begin{quote}
The basic lesson is that rights advocates cannot get too far ahead of the values of the majority of the people. In general, laws that are not in accord with the values of a particular society will be difficult to enforce.\textsuperscript{49}
\end{quote}

Indigenous peoples may also become more scathing of the motives of others attempting to change their customs. Gunning comments on efforts by Western feminists to eradicate female genital mutilation:\textsuperscript{50}

\begin{quote}
Whatever the good intentions of Western feminists in expressing solidarity or “helping their sisters of colour”, Western articulations of concern over the contemporary practice of genital surgery in the Third World nations are often perceived as only thinly disguised expressions of racial and cultural superiority and imperialism.
\end{quote}

The resolution of issues arising out of discriminatory indigenous custom is best resolved by indigenous peoples themselves. A ‘ground-up’ approach is preferable. Indigenous peoples are the groups and indigenous women the individuals who are closest to the custom, are most versed in the nuances of the issue, and have the greatest investment in the outcome. Accordingly, indigenous women and peoples are in the best position to balance the interests of the indigenous peoples’ culture and the interests of indigenous women. Nyamu draws a similar conclusion, writing “A strategy that supports local efforts toward constitutional change promises more durable and far-reaching social reform than a campaign that calls for the abolition of specific cultural practices.”\textsuperscript{51}

\begin{itemize}
\item \textsuperscript{48} World Health Organisation “A Traditional Practice that Threatens Health – Female Circumcision” (1986) 40 World Health Organisation Chronicle 31.
\item \textsuperscript{49} Randall Peerenboom “Beyond Universalism and Relativism: The Evolving Debates About ‘Values in Asia’” (Research Paper Series, Los Angeles School of Law, University of California, 2002) 29.
\item \textsuperscript{50} Isabelle Gunning “Arrogant Perception, World Travelling and Multicultural Feminism: The Case of Female Genital Surgeries” (1992) 23 Colum Hum Rts L Rev 189, 212.
\item \textsuperscript{51} Celestine I Nyamu “How Should Human Rights and Development Respond to Cultural Legitimisation of Gender Hierarchy in Developing Countries?” (2000) 41 Harv Int’l LJ 381, 403.
\end{itemize}
The Committee would be better to engage indigenous communities in finding ways to address discrimination against women. As Peerenboom states:  

"Rights advocates have learned that implementation is easier and more effective when supported by local traditions, as confirmed by the experience of women’s rights groups in Malaysia and Indonesia that have made considerable progress in their daily battles by working with their religious and cultural traditions."

Indigenous peoples must also have the opportunity to develop their own language to deal with discriminatory custom, and one that is based on the realities they face. As Chidi Anselm Odinkalu states: “In Africa, the real life struggles for social justice are waged by people who feel their realities and aspirations are not adequately captured by human rights organisations or their language.”

It is imperative that indigenous women’s voices are given the greatest opportunity to be heard. They are the most affected by the issue of discriminatory indigenous custom. No other group finds this issue as difficult to deal with as indigenous women, who simply cannot choose between their womanhood and their culture. This is reflected in the Beijing Declaration of Indigenous Women. While it demands the eradication of discriminatory customary laws, it also calls for an indigenous peoples’ right to self-determination.

52 Peerenboom, above, 42.


54 In paragraph 18 of the Beijing Declaration, indigenous women require that “all governments and international non-governmental and governmental organizations recognize the right of indigenous peoples to self-determination, and enshrine the historical, political, social, cultural, economic, and religious rights of the indigenous peoples in their constitutions and legal systems.” In paragraph 36 they call for indigenous laws, customs, and traditions which are discriminatory to women to be eradicated: NGO Forum Beijing Declaration of Indigenous Women (UN Fourth World Conference on Women, Beijing, Peoples Republic of China, 1995) <http://www.ipcb.org/resolutions/htmls/dec_beijing.html> (last accessed 28 August 2003).
VII Conclusion

In this paper I argue that the debate between universalists and cultural relativists, as it has taken place in international forums, does not assist domestic or international institutions vested with the power to resolve issues arising out of indigenous customs that discriminate. The debate is simultaneously too political, polemic, distracting and each theory too imperialistic to be of utility.

On a more positive note, what is the more appropriate solution? The answer to that question is probably best explored at another VUW international human rights symposium. However, I offer this as a suggestion: institutions that decide on the legality of discriminatory indigenous custom should adopt an approach that encourages the state to allow indigenous peoples to deal with these issues themselves. I am convinced by Nyamu’s calls for “critical pragmatism”. She defines it as follows:55

Critical pragmatism involves understanding the flexibility and variation of custom in order to challenge the arguments that deploy culture as a justification for gender inequalities.

An approach based on “critical pragmatism” will prevent decision-making institutions from taking an inflexible position on cases involving discriminatory indigenous custom. It can, instead, respond appropriately to the particular facts presented to it. The focus would also be on stimulating change in custom in recognition that it is always “dynamic, responds to change and undergoes transformation over time.”56 In essence, the answer is always indigenous solutions to indigenous issues.

56 Nyamu, above, 393.