

When Universalism Becomes a Bully: Revisiting the Interplay Between Cultural Rights and Women's Rights

Prof Alexandra Xanthaki
Brunel University London

Abstract: Although the scope of the right to culture has never been more recognized nor clarified, yet culture itself is currently portrayed in some human rights narratives either as a tool of nationalism or oppression; in any case an obstacle to human rights. Certainly, cultural rationalizations that justify human rights violations and the misappropriation of culture by dominant (male) elites put a dent in the recognition of collective cultural rights. However, the article argues that the binary understanding of universality v collective cultural rights ultimately harms women's rights, as such understanding does not reflect all women's experiences, priorities and strategies. The article uses the example of indigenous women to highlight the importance of culture for some women. The article suggests a paradigm shift from portraying minority and indigenous women as victims of their cultures to pushing for their empowerment through and beyond their cultures. In essence, the piece advocates for a multilayered nuanced approach on women's rights that addresses universalism but also postcolonial feminist and anthropological critiques of human rights.

INTRODUCTION

To mark the seventieth anniversary of the Universal Declaration of Human Rights, the UN Special Rapporteur in the Field of Cultural Rights has published a report where she puts forward 'the cultural rights approach to the universality of human rights, and the close interrelationship between universality and cultural diversity. She enumerates current threats to universality, calling for foundational renewal and vigorous defence of this principle.'¹ Bennoune's report stresses the centrality of universalism in human rights, puts forward universalism as a prerequisite for cultural rights, and urges states, academics and civil society to reinforce this message.

At several points in the past decades, the universality debate of human rights appeared to settle. Starting with the dominance of the liberal view of human rights, critical approaches to universality

were fiercely injected to the debate in the '90s, whereas the '00s saw the attention turning more on the application of human rights in particular situations.² But trying to find the balance between universality and cultural diversity is no easy task, as it relates to our understanding of the human rights system; its foundations, its mandate and its priorities. On the back of the populist 'concerns' about migration on the one hand, and the recent emphasis on cultural diversity in international law on the other, claims to reaffirm universality as the undisputed queen of the human rights system have intensified once again.

Both universality and cultural diversity are at the core of human rights and making justice to both requires a nuanced, multi-layered and multidisciplinary response. This article acknowledges the catastrophic effects of using 'cultural rationalizations'³ to justify human rights abuses. Yet, it urges to push back on current attempts to demonize cultures in human rights debates. It argues that the binary vision of culture v women's rights is overly simplistic and ultimately harms women's rights, particularly -but not only- the rights of migrant, minority and indigenous women. The misuse of culture should not deter the wave of recognition of cultural rights. The article uses the example of indigenous women to demonstrate the importance that cultural rights have for some women around the world. By bringing together scholarship from multiple disciplines and theoretical frameworks, the article employs postcolonial analysis and intersectionality to maintain that, like 'cultures', 'universalism' has also restricted rights. Policies based on perceptions of 'cultures' as essentially detrimental to women 'eat away' the rights of migrant women, minority women and indigenous women, because they promote stereotypes that undermine them. But such policies also undermine the rights of majority women because they shun away from patriarchal attitudes in all environments and emphasise such pockets of patriarchy among non-European women.

My approach is influenced by McCrudden's appeal to pay more attention to 'dialogic and dialectic processes that embrace sustained and reflexive contestation, pluralism, judicial institutions, and social activism.'⁴ In analysing the principle of human dignity, McCrudden proposes 'a partial détente between philosophical theories' on human rights.⁵ 'An analysis of international human rights law', he maintains, 'must take this complexity into account if a coherent and convincing explanation of the normativity of international human rights law is to stand any chance of being identified.' McCrudden has mainly used his approach on the debate of human dignity. In this piece,

I transpose this approach to the current debate on women's rights and cultural rights and I maintain that continuing on the path of so called 'qualified',⁶ 'inclusive',⁷ 'soft',⁸ or 'relative'⁹ universalism may reflect better the current viewpoints of international human rights law. In essence, I argue that only by using both the universalist and postcolonial messages, by acquiring an understanding of all streams of feminisms, and using both legal and anthropological considerations, can we begin to get closer to realizing the rights of the wonderfully diverse women all around the world. Otherwise, the universalism we attempt to implement smells of parochialism. I also use the principle of subsidiarity as put forward by Carozza to help mediate the multiple approaches in human rights.¹⁰ The explosion of subsidiarity in EU law in the 90s and its use by some federal states has not transposed to international law debates until very recently. Defined as 'a rebuttable presumption for the local',¹¹ subsidiarity requires decision-making to take place at a smaller, 'lower' level unless good reasons exist to refer it to bigger higher authorities.¹² I use subsidiarity to argue that decisions about the inconsistency of certain cultural practices must in the first instance be taken by the women themselves, rather than by technocrats and 'experts'. This has of course limitations that I also discuss.

THE DEMONIZATION OF CULTURE(S)

For some time, liberalists have been reluctant to accept the collective element of the right to culture, as they emphasise the importance of human agency and autonomy.¹³ Religious and cultural attachments, they argued, have no place in the public sphere and should not be acknowledged nor recognised by the state.¹⁴ In 1993, Howard declared 'cultural absolutism' as she put it, ie 'the position that declares culture to be of supreme ethical value'¹⁵ deeply problematic. To a large degree because of liberal concerns, the right to culture was ignored for many decades.¹⁶

In the 2000s, minority and indigenous peoples all around the world rejoiced: the right to culture started reflecting their own experiences and needs and its collective element was recognised. The most glaring recognition of collective cultural rights came in the form of the *UN Declaration on the Rights of Indigenous Peoples* which explicitly recognised the right of indigenous peoples to their own culture and cultural heritage. In a document that goes beyond the force of a mere

declaration, because of its creation and approval by indigenous peoples themselves, collective rights to tangible, intangible and natural culture are clearly recognised. Other instruments also expressed the need to protect the right to culture: The (2005) Convention on the Value of Cultural Heritage for Society of the Council of Europe, opened for signature in December 2009, also goes beyond the more traditional – individualistic- legal culture of the Council of Europe and emphasizes ‘the value and potential of cultural heritage wisely used as a resource for sustainable development and quality of life in a constantly evolving society’. In 2009, the UN Committee on Economic, Social and Cultural Rights redefined ‘the right to participate in cultural life’ as included in Art. 15 ICESCR and clarified in its General Comment 21 (2009) that this right includes a collective element. The Committee noted this is ‘the right of everyone –alone or in association with others or as a community- to act freely, to choose his or her own identity, to identify or not with one or several communities or to change that choice, to take part in the political life of society, to engage in one’s own cultural practices and to express oneself in the language of one’s choice’. Recognition of collective aspects of cultural rights have also come from the most unexpected sources: The World Bank, famous for its reluctance to refer to any human rights, now recognizes in Standard 8 of the new Environmental and Social Framework that cultural heritage provides continuity in tangible and intangible forms between the past, present and future.¹⁷ The World Bank talks about the importance of cultural heritage ‘as a reflection and expression of (...) constantly evolving values, beliefs, knowledge and traditions’.¹⁸ And the World Intellectual Property Organisation, a bastion of individualistic understandings of cultural products, is currently preparing treaties for the Protection of Traditional Knowledge and Traditional Cultural Expressions against misappropriation and misuse.¹⁹

Alas, as human rights instruments recognised the importance of the cultural frameworks for the individual, at the same time culture is being demonized.²⁰ The balance between universality and cultural diversity is most fragile when it comes to women’s rights,²¹ and the migration debate saw the re-surfacing of concerns that the emphasis on culture restricts women’s rights. Media,²² politicians²³ and parts of civil society continuously bombard us with the perils of ‘traditional’, ‘other’ -meaning migrant- ‘cultures’. Bracke has discussed how migrant women in the Netherlands are often portrayed as victims of ‘their culture’ and are told that it is in their interest that they ‘adopt western values’ and thus, integrate into Dutch society to end their victimisation.²⁴ Also, in

their work, De Leeuw and Van Wichelen have demonstrated that the Dutch state is currently employing sexual freedom, gender equality, freedom of speech and individuality as ‘emblems of Dutchness’ leaving little room for cultural and religious identities.²⁵ The concept of culture is seen in certain circles as opposing equality. In 2012, the two-day Trust Women conference held in London in 2012 was clear: Culture, the conference apparently concluded, is the main problem. ‘Delegates heard speakers’ testimony, often harrowing, about the effects of ‘culture’ on women. The male guardianship system in Muslim countries, forced marriage and bride slaves, female genital mutilation, acid attacks on wives by husbands and their relatives: culture was to [be] blamed for all such practices’.²⁶ And some international law pockets also show a renewed reluctance to acknowledge rights to culture. Peroni discusses how the recent Convention on violence against women (VAW) ‘largely circumvents the stigmatizing risks that arise from framing certain VAW forms primarily as a problem of some ‘cultures’” and places migrant and refugee women in a victimhood frame.²⁷ Judgements of the ECtHR on minority women’s clothing are also not fully in tune with discussions in the UN Human Rights Committee.²⁸ Particularly, *SAS v. France*²⁹ has clarified that on religious clothing, the choice of the minority woman will not be respected, no matter how educated, articulate and free she is, if not in accordance with – Western- values of secularism. In contrast to what was envisaged a decade ago, Stamatopoulou’s statement that cultural rights continue to evoke ‘the scary spectrum of group identities and group rights’³⁰ still rings true.

THE NON-WESTERN WOMAN AS ‘THE OTHER’

At the same time that the liberals shout for the universality of human rights, they also proclaim that human rights values are ‘European values’.³¹ The ‘Europeanisation’ discourse of human rights maintains and increases the artificial gap between ‘us, the Europeans’ who represent the noble values of gender equality and female emancipation and ‘the others’. ‘We’, the Europeans, need cultural rights – often in the sense of access to high arts-; whereas ‘they’, the migrants, minorities and indigenous peoples claim cultural rights to preserve their traditional practices. Volpp has noted: ‘Those with power appear to have no culture; those without power are culturally endowed.

Western women are defined by their abilities to make choices, in contrast to Third World subjects, who are defined by their group-based determinism.’³²

In ‘critiquing the cultural engineering that has relentlessly promoted the covering of women’,³³ the 2018 Report of the UN Special Rapporteur in the Field of Cultural Rights has noted:

Some restrictive garments are said in certain instances to represent a freely- chosen personal conviction that such “modesty” is required by the teachings of a particular religion. If so, this is a choice of a particular interpretation of any faith, and one which is relentlessly promoted by fundamentalists. One must respect the agency of adults. However, women’s dress may be heavily impacted by discrimination against women and fundamentalist propaganda, especially in the mass media and sermons.³⁴

Yet, abuses of Western women’s rights are rarely seen as the consequence of their cultural frameworks. In this respect, recent campaigns for the rights of women on social media #metoo and #BalanceTonPorc, #AnaKaman, #YoTambien reminded the world that women’s rights violations are not only the outcome of non-European cultural traditions; and that patriarchal structures and discrimination exist in minority cultures as much as in majority cultures. And even in this case, the link with the Western culture is not emphasized. In general, non-western women are seen as vulnerable, in need of strong supporters. Huchings maintains: ‘Postcolonial theory points to the dominance of liberal ideology and its corresponding vocabulary that articulates communicative encounters within the international sphere, and highlights its exclusiveness and its inextricability from power relations.’³⁵ In order to be heard, women are asked to adopt ‘Western thought, reasoning and language’,³⁶ use the given formal language and vocabulary to express their concerns and wishes. Paul Grady discusses how the experiences of victims in transitional justice settings are often lost as they try to adopt the specific format of communication that will make them heard.³⁷ In order to be heard, they need to rework their stories in order to neatly fit into the categories and expectations established by transitional justice regimes.’³⁸ Otherwise, they are viewed as ‘not making sense’ and western society organisations are encouraged to ‘help them’ understand the international setting of advocacy.

It has been rightly argued that negative representations of the ‘others’ are ‘the main engine of current efforts to introduce neo-assimilationist policies’.³⁹ As Spivak notes, the ‘white men saving brown women from brown men’ narrative was important for the operation of British colonialism.⁴⁰ Ahmed has discussed how the British colonial authorities in Egypt relied on the rhetoric of women’s emancipation for their colonial missions.⁴¹ Western feminism became a ‘handmaiden to colonialism’ in this process.⁴² It has contributed to the common portrayal of non-Western women as victims of ‘their cultures’. It is for their interest that they should ‘adopt western values’.⁴³ And if they do not, the liberal cast doubt as to why is the case. In her mission to Sweden, the Special Rapporteur on Violence against Women Yakin Ertürk found that ‘some circles have also tried to reframe the issue of gender inequality (...) as a problem re-imported into equal Sweden through immigration from developing countries’.⁴⁴ And although women’s rights seem to have an important place in the Swedish society, the effects of structural racial discrimination and the effects of colonial remains are not at the centre of current discussions.⁴⁵ More generally, several sociological studies support that there is today a widespread denial that race and colonialism continue to be present and relevant in Europe.⁴⁶

SPECIFICALLY ON UNIVERSALITY

The starting point of this article is that indeed, we all need equal and universal human rights to protect us. And international law is clear that cultural diversity and cultural rights cannot infringe human rights. Both the UNESCO Declaration on Cultural Diversity⁴⁷ and the UN Declaration on the Rights of Persons belonging to National or Ethnic, Religious and Linguistic Minorities (Declaration on Minorities) note that cultural diversity and cultural rights cannot infringe human rights guaranteed by international law. It is important to accept that human rights bind everyone and that there can be no exceptions. Prohibition of discrimination, the right to expression, refugee rights, the right to an adequate standard of living are recognized rights that bind governments that have signed and ratified the relevant treaties irrespective of where they are and what are their circumstances. And many non-Western scholars have demonstrated the universality of both the

concept and the foundations of human rights.⁴⁸ Donnelly notes that ‘it would seem inappropriate to adopt a theory that is inconsistent with the moral experience of almost all people- especially in the name of cultural sensitivity and diversity’.⁴⁹ ‘Normative cultural relativism’ he proclaims, ‘is a deeply problematic moral theory that offers a poor understanding of the relativity of human rights’. Eriksen notes ‘about cultural relativism, seen as an alternative not to morality but to moral universalism, it may be said that it stood for a radical humanism in the mid-20th century, a minority view towards the late 20th century, and an almost impossible position to defend in the early 21st century.’⁵⁰

However, one must be very careful of parochial universalism. Donnelly cautions:

The fact of cultural relativity and the doctrine of methodological cultural relativism are important antidotes to misplaced universalism. The fear of (neo-)imperialism and the desire to demonstrate cultural respect that lie behind many cultural relativist arguments need to be taken seriously.⁵¹

Indeed, often the concept of ‘universality of human rights’ is employed to serve the liberal vision of international human rights. One can see some truth in Mutua’s suggestion that ‘the grand narrative of human rights contains a subtext that depicts an epochal contest pitting savages, on the one hand, against victims and saviors, on the other’.⁵² He asks the human rights movement to be more self-critical and ‘come terms with the troubling rhetoric and history that shape, in part, the human rights movement’.⁵³ Questioning universalism, An-Na’im believes that ‘the vision of universality of human rights is fundamentally challenging to all societies and all human beings’, challenged by the true dimension and the true nature of the claim of universality of human rights.⁵⁴ ‘Human beings who are the subject of human rights must be the authors of what these rights are and must be the primary actors in realising these rights. Marginalising major actors of the society from this, the very pretence that we can universality is flawed.’⁵⁵ This is what he calls the double paradox of universality. How to realise a shared understanding of human rights are in the reality of fundamental difference that we share also. Andrew Sacks has also argued that what we call human rights now is a ‘variety of the civilized mission of the white man’.⁵⁶

The inclusive, unstructured approach, one with no pre-determined grand theory of human rights that McCrudden advocates for seems to address such criticisms without rejecting the importance of universality. McCrudden notes that the structure, the content, the methods and the theoretical underpinnings of human rights; are all contested. Focusing on human rights and the courts, he maintains: Human rights law 'is the result of claims involving competing and, sometimes, incompatible substantive values, each supported by credible human rights sources and interpretations. Human rights, as interpreted by the courts, function in apparently contradictory ways: they look forward, but also backward; they appeal to both communitarian and individualistic values; they juggle both the particular and the universal; they struggle between continuity and change; they empower the state, and they challenge its power.'⁵⁷

This seems to me to be the same about international human rights in general. Universalism is indeed one of the core principles of human rights. But it would be dangerous to make the recognition of cultural rights dependent on a notion of universalism, especially since the final authoritative decision maker is quite often not the affected party.⁵⁸

When the majority of powerful, European states have repeatedly shunned collective notions of cultural rights and this seriously affects the identity of millions of persons belonging to minority and indigenous groups, recommendation to States to support universalism must be followed by equally strong messages for collective cultural rights; otherwise the quest for universalism may be used as a smokescreen for the denial of cultural rights to non-state groups.

SPECIFICALLY ON WOMEN RIGHTS: FEMINIST CONSIDERATIONS

First wave feminist scholars have been quite vocal in emphasising the primacy of women's rights when faced with cultural claims. It was agreed that to move away from universal claims on equality and to focus on a particular, 'western' understanding of equality would be detrimental to feminism; these foundations must be critically accepted.⁵⁹ But these feminist approaches were confronted by subsequent feminist voices. 'Black feminism, critical race feminism, postcolonial feminism, and even religious feminism have staked out epistemological authority and ground in the last three decades, demanding inclusion in feminist debates and questioning dominant liberal feminist

representations'.⁶⁰ The appropriation of the experiences of subaltern women and their struggles by 'hegemonic white women's movements'⁶¹ has been criticized. Amos and Parmar noted: "Feminist theories which examine our cultural practices as 'feudal residues' or label us 'traditional,' also portray us as politically immature women who need to be versed and schooled in the ethos of Western Feminism. They need to be continually challenged."⁶²

Unfortunately, the recent migration challenge has meant that a secular universalist trend of feminism has become more popular. Göle and Billaud note the irony in this

given that feminism has initiated a criticism and disrupted frames of universalist ideals of gender. Through deconstructing the commonly held idea that difference between sexes has been mainly due to biology, feminists have (...) shown that the abstract individualism used as the basis for citizenship and equality, especially in France, could not grant their active participation in society as autonomous citizens. On the contrary, they have argued that universalism has excluded women from the political arena.⁶³

Insisting on this abstract individualism as the only principle when faced with balancing of cultural rights and women's rights is problematic. In this debate, intersectionality is a useful consideration.⁶⁴ First coined by Crenshaw, inter-sectionality has challenged the traditional belief that discrimination is a single categorical axis.⁶⁵ Crenshaw has explained that gender and racial discrimination are mutually reinforcing⁶⁶ and intersecting in shape structural and political oppression against women of colour.⁶⁷ Owing to their many identities, minority women suffer a unique form of discrimination, which is seldom recognised and addressed within the law. It is interesting to see how this short-sighted critique of non-liberal feminism has been criticized: Started by social justice bloggers, the phrase 'check your privilege' became a hit among especially young activists.⁶⁸ It reflects on the reality that mainstream feminism remains dominated by voices and understandings formulated by privileged, Western women. In fact, many academics, such as Johanna Bond and Aisha Davis, have advised that the protection of current international law to women predisposed to 'intersectional' discrimination is rather inadequate.⁶⁹

Human rights bodies are still reflecting on how to implement intersectionality in a system that is

based on single ground treaties. CEDAW General Recommendation 28 recognized that gender is ‘inextricably linked with other factors, such as race, ethnicity, class...sexual orientation and gender identity’⁷⁰. Bond has argued that CEDAW offers protection to a ‘monolithic category’ of women⁷¹ that face only gender discrimination. Campbell has also criticized CEDAW for failing to ‘capture the diversity of women’.⁷² The Human Rights Committee also noted in General Comment 28 on article 3 that discrimination against women is often ‘intertwined with discrimination on other grounds’.⁷³ In its General Recommendation 25, CERD also addressed the relevance of gender in racial discrimination⁷⁴ and committed to integrate gender analysis throughout their work.⁷⁵

However, beyond these initiatives, intersectionality continues to be in the periphery of international human rights work. Kuokkanen discusses how intersectionality was missing in the focused discussion on indigenous women in the 2004 Permanent Forum on Indigenous Issues. ‘Neither the report nor the summary explores the ways in which indigeneity and gender intersect in the lives of Indigenous women and exacerbate the discrimination and subordination they may face.’⁷⁶

INDIGENOUS WOMEN AND INDIGENOUS CULTURES: THE UNDRIP

In ways similar to migrant, refugee and minority women, indigenous women suffer from both gender discrimination and colonial perceptions of their cultures. They are a good case study to highlight how cultural rights and women’s rights are very interwoven in some women’s experiences and cannot be separated. As Coomaraswamy has noted, ‘fighting prejudice against underprivileged groups while struggling for women’s empowerment goes to the heart of the modern dilemma between the universalism of human rights and the particularity of cultural experience.’⁷⁷

Suzack has identified three ways in which indigenous women still have an inferior status in international human rights law: the first is by international networks that require them to choose between being women and being indigenous people. Second, by courts of law that apply equality jurisprudence to indigenous peoples without acknowledging the colonial law context ‘or that

equality legislation may not be the most effective means of understanding their gender discrimination experiences; and third, by competing political agendas that force women to address their issues indirectly or risk dividing social movements.⁷⁸ These considerations are at the core of a pseudo-choice they allegedly have between promoting their cultural rights or their women's rights. Attempts to improve their situation through women's rights are bound to include remains of colonialism. Attempts to ignore their gender and focus on the attacks, direct and indirect, to their cultural rights will continue their oppression.⁷⁹

Both indigenous cultural rights and indigenous women's rights are recognized in UNDRIP. The freedom of Indigenous peoples to have their indigenous identities and cultures respected has been the main incentive for their struggle and one of the main reasons for the adoption of the UN Declaration on the Rights of Indigenous Peoples (UNDRIP). Aspects of Indigenous cultural rights can be found throughout the text of the Declaration; however, the Articles that focus on cultural rights are Articles 11 to 13, together with Articles 15 and 34. Articles 11 to 13 distinguish between Indigenous tangible heritage (Article 11); Indigenous traditions and customs (Article 11); the spiritual and religious aspects of Indigenous cultures (Article 12); Indigenous intangible heritage (Article 13); and inter-culturality in education and public information (Article 15). Especially Article 11(1) of the Declaration recognizes the right of Indigenous peoples as a collectivity to practice and revitalize their cultural traditions and cultures. Studies have shown how the ethnocide of Indigenous peoples intensified the actual domestic violence towards indigenous women. Race and gender violations go hand by hand and protecting against the one but not the other leads to no real solution.

The Declaration includes 3 articles that focus on the rights of women. Article 21.2 calls for states to take effective measures to ensure the improvement of indigenous peoples' economic and social conditions while paying particular attention to 'the rights and special needs of Indigenous elders, women, youth, children and persons with disabilities.' Article 22.1 reiterates the need to attend to 'the rights and special needs of indigenous elders, women, youth, children and persons with disabilities' in implementing the Declaration. Article 22.2 calls for states, 'in conjunction with Indigenous peoples, to ensure that Indigenous women and children enjoy the full protection and guarantees against all forms of violence and discrimination.' Finally, Article 44 states that the

Declaration applies equally to ‘male and female indigenous individuals.’ The tendency of the Declaration to categorise women together with children and disabled persons undermines the rights of these women, as it portrays them as vulnerable individuals, victims who cannot defend themselves or cater for their needs.

Indigenous cultural rights often do need balancing with Indigenous women’s rights. International human rights law has a clear method of balancing competing rights: First, non-derogable rights cannot be subject to any balancing: the right to life, the right to be free from torture and other inhumane or degrading treatment or punishment, the right to be free from slavery or servitude and the right to be free from retroactive application of penal laws cannot be curtailed. No cultural practices and beliefs can violate these values and no real adjustment can be initiated to these rights. Subsidiarity cannot be applied here. It is not up to the group to decide on these practices. They must be eliminated, even if seen as expressions of some cultures, even when accepted by the women of the group. Hence, ‘family violence and abuse, [including] forced marriage, dowry deaths, [and] acid attacks’ are unacceptable practices and cannot be justified in the name of any culture and cultural right.⁸⁰ Also, the core of human rights cannot be completely squashed. Therefore, one can see that the Declaration does adopt universalism. It implies the existence of ‘a wider circle’, common values that are more or less common for the whole humanity. International public reason, as Erin Kelly called it,⁸¹ stems from the belief that the international community operates ‘as a society of societies, with its own public culture and conception of public reason’⁸² and is expressed in the international decisions, including treaties, customary law, general principles, and soft law.

However, at the same time, the Declaration and international human rights law in general do not adopt any other kind of hierarchy. Any conflicts between rights, principles, and norms are generally solved on an *ad hoc* basis, after taking into account various considerations. The Declaration confirms the more *ad hoc* method of solving such conflicts by insisting that indigenous rights are firmly within the wider human rights system and as such, subject to the same restrictions as other human rights. Preambular paragraph 1 UNDRIP links the Declaration with the ‘purposes and principles of the Charter of the United Nations’, while Article 1 UNDRIP links the text with the Charter, the UN Declaration on Human Rights and international human rights law. Article 46

UNDRIP notes that in exercising the rights contained within the Declaration, ‘human rights and fundamental freedoms of all shall be respected. The exercise of the rights set forth in this Declaration shall be subject only to such limitations as are determined by law, and in accordance with international human rights obligations’. The same applies for the rights of all minority women, based on article 27 ICCPR. In making these decisions, the UN bodies have insisted on specific principles. In *Lovelace*,⁸³ *Kitok*⁸⁴ and *Länsman*,⁸⁵ the Human Rights Committee asked for the existence of a reasonable and objective justification for the prevalence of one right over the other; consistency with human rights instruments; the necessity of the restriction; and proportionality. It is argued that the complete neglect of one right –be it cultural right or individual rights - for the full realisation of the competing right would in most cases violate the principle of necessity.⁸⁶

Importantly, the Declaration also urges conflicts of rights to be ‘interpreted in accordance with the principles of justice, democracy, respect for human rights, equality, non-discrimination, good governance and good faith’.⁸⁷ The Declaration highlights the importance of interpreting the text and the principles that will be chosen to apply when interpreting when applying the provisions.

APPLYING THE LAW: SOFT UNIVERSALITY AND SUBSIDIARITY

Absolute universalism was used in the elaboration of the Declaration as a means to restrict indigenous rights, by employing the false dichotomy between collective rights v individual rights. The United States, the United Kingdom and France ‘all (...) remained concerned about the possible confusion between individual and collective rights’.⁸⁸ Australia stated that ‘the concept of a collective right was not recognized in domestic or international legal systems at present’.⁸⁹ After the adoption of the Declaration, Japan and the UK also proclaimed that they did not ‘accept the concept of collective rights in international law’.⁹⁰ Other states expressed their specific concerns with respect to women’s rights.⁹¹ A ‘solution’ repeatedly suggested by the USA was the adoption of a language similar to the UN *Declaration on the Rights of Persons belonging to National or Ethnic, Religious and Linguistic Minorities*, whereby persons may enjoy human rights individually, and these may be exercised individually or in community with others,⁹² a clear restriction of the already existing indigenous rights at the time. Within this framework, the reluctance of the indigenous

movement to talk about the rights of indigenous women was fully justified.

Refusal to understand culture as one of the principal values of indigenous women would fail to redress the disrespect indigenous communities have experienced of their identities. A system of absolute universalism would put the maintenance and coherence of a liberal, individualistically perceived system of human rights above the needs of indigenous women around the world. It would mean submitting human rights to the oppression of a western jurisprudential viewpoint; and ultimately, this would not serve the quest for global justice. It would treat indigenous viewpoints and philosophies as inferior to liberal ideas. The international community refused to do so and the Declaration was adopted with a very strong collective element.

The ideals of justice also dictate that the voices of indigenous women, rather than all women, should be the loudest, when discussing the balancing of indigenous women's rights and cultural rights. Indigenous scholars have argued that the traditional feminist language is 'inauthentic, un-indigenous and in other ways deeply problematic for indigenous peoples'.⁹³ Indigenous feminists have been complaining that not only do they have to challenge 'patriarchy within native communities, but also white supremacy and colonialism within mainstream white feminism'.⁹⁴ The responsibility of the non-indigenous society and the state in the emergence of illiberal practices in indigenous communities should also not be undermined. Native scholars highlight the role that the Western colonialism has played in the current sex-based oppression in indigenous communities. They argue that many such ideas were imported⁹⁵ and that they derive from the hierarchical nature of Western society and its valuing of all structures in a binary manner.⁹⁶ At times, the differences between the women's indigenous movement and the feminist movement are obvious: the 1995 Fourth World Conference of Women in Beijing saw a 'contradictory and often conflictual relationship between feminist organisations and female indigenous representatives',⁹⁷ as indigenous women were pushing for a different agenda to that of feminists. Scholars have highlighted that the focus of the international women's movement on gender discrimination tends to over-emphasize individual equality and rights rather than the effects of structural violence on women's lives. The International Indigenous Women's Forum (FIMI) argued in 1996 that 'flawed assumptions that operate within the global women's movement' mean that its strategy for gendered violence is not appropriate for indigenous women.⁹⁸

In concluding, the UNDRIP recognizes the value of universal values and in applying such values, it gives primary position to the particularities of indigenous individuals and communities.

Who will decide in each case whether the cultural practice violates women's rights is essential in the process of balancing cultural rights and women's rights. If the practice contravenes non-derogable rights such as torture, right to life and the core of human rights, then there is no space for particularities: the practice will have to stop. But in all other cases, subsidiarity, namely the idea that the legitimate authority of smaller communities must be protected by larger communities, is helpful. Human beings flourish when they actively participate in realizing their own good, not when they are treated as mere observants of decision-making processes without their involvement.⁹⁹ James Anaya has stated that any assessment about a cultural practice must allow a certain deference for the group's 'own interpretive and decision-making processes in the application of universal human rights norms, just as states are accorded such deference.'¹⁰⁰ This would confirm the respect that the international community has to the indigenous group. The idea that in groups will themselves have the first say on whether their practices violate human rights has proven to be quite controversial.¹⁰¹ Madhavi Sunder urges the state's or international community's interference; she notes that many 'women argue that their governments—and the international human rights community—have improperly deferred to traditionalists and so-called cultural leaders' interpretations of private laws without taking proper account of modernizing views.'¹⁰²

The earlier discussion on indigenous feminism(s) leads to only one answer: the group that will decide in these cases must only be the indigenous women of the group. Subsidiarity applied, the decision will not be taken by the international community in the first instance, not state, nor the group as a whole, but by the actual women who are affected by the practice in question. And this choice must be real. Richards has noted that 'even when indigenous women are physically present at debates about human rights, their unique positions are frequently marginalised by those who set the terms of discussion'.¹⁰³ It is important that the indigenous women reach their decisions about the future of a practice without inappropriate interference. Unfortunately, as mentioned earlier, women who have the courage to criticise their communities are sometimes seen as betraying the

indigenous cause and their authenticity as indigenous is questioned.¹⁰⁴ Similarly, it is important that the decisions of these women about the validity of the practice and custom, their priorities and the way to eradicate such practice are respected, even if such decision goes against the ‘feminist ideal’. It is essential that they are not labelled as victims of culturally generated false consciousness in need of liberation.¹⁰⁵

It has been argued in the past that real choices can only be made if the women in question have the right to leave the group, the right to exit.¹⁰⁶ Friedman sets a three step test to determine whether individuals within groups have made their decision freely. First, they must ‘be able to choose among a significant and morally acceptable array of alternatives.’ Second, they must ‘be able to make their own choices relatively free of coercion, manipulation, and deception.’ And third, they must ‘have been able to develop, earlier in life, the capacities needed to reflect on their situations and make decisions about them.’¹⁰⁷

Leaving the group is very difficult in a culture where the community is so much at the core to the identity. But even if this is out aside, the socio-economic situation of most indigenous women would not allow them to know that they can exit the group, if they wished to do so. If an indigenous woman has been denied education, literacy, and the right to learn about the world outside the group, she does not really have ‘a substantial freedom to leave because she lacks the preconditions’ (knowledge and experience) to make ‘a meaningful choice’.¹⁰⁸ Equally importantly, the right to exit puts the onus on the indigenous woman. It is the woman who has to leave and abandon her membership and group.¹⁰⁹ Ultimately, such a solution seems to sidetrack the problem as it maintains ‘a systematic and structural problem’¹¹⁰ within the indigenous group. For these reasons Spinner-Halev sets some minimal standards, similar to the Friedman test, that are needed to ensure that exit is really an option. According to him, ‘these standards include freedom from physical abuse, decent health care and nutrition, the ability to socialize with others, a minimal education . . . and a mainstream liberal society.’¹¹¹ It is for this reason that freedom from violence takes priority among indigenous women to discriminatory practices, because violence hinders any further promotion of indigenous women’s rights. Also, the reality is that in several places indigenous women ‘often lack access to education, health care and ancestral lands, face disproportionately high rates of poverty and are subjected to violence, such as domestic violence and sexual abuse,

including in the contexts of trafficking and armed conflict.’¹¹²

At this point, the state does have an important role to play. By improving socio-economic rights of indigenous women in a culturally sensitive way, the state empowers the women to act on the illiberal practices. In contrast, by undermining the cultural rights of indigenous peoples, the state also undermines the identities of indigenous women which disempowers them and ultimately harms any real change. Also, in considering the restriction of cultural rights in the name of gender equality, the above considerations will have to be taken into account in order to decide whether a pressing need exists for the interference and whether the interference to cultural rights is proportionate to the legitimate aim pursued.¹¹³

A PARADIGM SHIFT: FROM VICTIMHOOD TO EMPOWERMENT

The above analysis demonstrated the importance of empowerment of migrant, minority and indigenous women, women whose cultures and tradition are important to their own sense of identity.¹¹⁴ Women’s empowerment was articulated in the 1980s and 1990s as a grassroots approach that was mainly concerned with challenging unequal gender relations. Such empowerment is a game-changer. From being seen as vulnerable individuals in need for an outside voice to protect their rights, their empowerment allows us to hear their own clear voice, and allows them to make their own paths and decide on their own strategies and priorities. At the same time, we should take Yuval-Davies caution about empowerment narratives seriously and avoid ‘simplistic notions of empowerment based on identity politics which homogenize and naturalize social categories and groupings and which deny shifting boundaries as well as internal power differences and conflicts of interest.’¹¹⁵

In the last few years the World Bank has greatly embraced (or coopted) the human rights discourse to promote initiatives related to financial and economic inclusion of women. With respect to indigenous women, several initiatives have also recently been taken that change the narrative from victims to empowered leaders. Indigenous Asian Women have noted in the Baguio Declaration of the second Asian Indigenous Women’s Conference:

We accept the challenge and responsibility to address cultural renewal and revitalization to promote gender-sensitive values and structures within our communities. (...)We will speak up against abusive treatment of indigenous women in the name of custom and tradition.¹¹⁶

The 2013 World Conference of Indigenous Women, attended by 300 indigenous women from all over the world, asserted the right to self-determination, ‘including the vital role of Indigenous women, in all matters related to our own human rights, political status and well-being’.¹¹⁷ The Conference affirmed that

Indigenous women have knowledge, wisdom, and practical experience, which has sustained human societies over generations. We, as mothers, life givers, culture bearers, and economic providers, nurture the linkages across generations and are the active sources of continuity and positive change.¹¹⁸

In the Final Document emerging from this Conference, adopted unanimously by the General Assembly,¹¹⁹ different organs of the UN system, including in particular the Commission on the Status of Women, were expressly invited to consider the issue of indigenous women’s empowerment at a future period of sessions (paragraph 19). Women have a greater role to play in cultural activities. The UN Special Rapporteur in the Field of Cultural Rights has commented on the ‘pervasive gender discrimination’ in cultural activities.¹²⁰ Women should not only be seen as the carriers of the culture but also the active participants in the development of their culture and in socially engaged cultural initiatives. Interesting is the example of the *mola* production of the indigenous Kuna women, in other words handmade appliqué panels worn on traditional blouses that are deeply tied to Kuna people’s history and identity. After years of unsuccessful attempts to stop the commercial imitation *mola*, Law 20 was passed. However, it was men who were involved in representing the Kunas in relevant disputes, whereas it was the Kuna women who were producing the *mola*. The recent establishment of a General Congress of Kuna Women has addressed the issue of women’s representation and hopefully strike a balance.¹²¹

Indeed, women also change the culture of their groups through social enterprise activities that work

as a way to restrict male domination within their communities.¹²² In Latin America, indigenous women have renewed their commitment to political empowerment.¹²³ Saami women have also used their culture for their empowerment. Valkonnen and Wallenius-Koekalo have demonstrated how ‘the relevance of the cultural practices and mental structures of Sáminess as forms of resilience enables Sámi women to overstep the traditional subject positions of Laestadian women.’¹²⁴ In other words, their indigenesness has given them the tools to stand up to values that restrict their role and assert themselves. After engaging in qualitative research, Valkonnen and Wallenius-Koekalo agree with the author of this article that ‘contextual and historical awareness calls for sensitivity, a critical realisation that one must not make any category – Sámi identity, religiousness, gender – the sole frame of reference when working with the Sámi’. Universalistic, postcolonial feminist considerations all contribute in understanding their experiences and protecting their rights.

CONCLUSIONS

The recent tide against cultural rights in the name of protecting women’s rights harms, rather than enhances refugee, migrant, minority and indigenous women’s rights. This article used cross-disciplinary scholarship to address the concerns on the hegemonic and excluding nature of universalism. I used the example of indigenous women to argue that the realisation of universal human rights can only really happen if both cultural rights and individual rights of women are recognised. Working towards the implementation of both these sets of rights to the degree that the specific women see appropriate is the only way that is culturally sensitive and protects women’s intersectional identities. Framing discussions in the binary way of cultural rights v women’s rights neglects the real, multiple identities of women. The decolonization of international human rights law is pointing towards accepting that rights are indeed universal, but also recognizing that the way such standards apply must take into account the particular priorities and strategies of the affected women. Balancing different rights and needs can only be effective if the women in question feel strong enough to make such decisions. This may happen if they are partners in their societies and are seen as such by the wider society. Accepting and strengthening their identities and improving their socio-economic rights that empower them is a solid first step.

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² G Corradi, 'Introduction, Human Rights and Legal Pluralism: Four Research Agendas' in Giselle Corradi, Eva Brems & Mark Goodale, eds, *Human Rights Encounter Legal Pluralism, Normative and Empirical Approaches*, Hart Publishing, 2017, pp. 1-20.

³ Monshipouri, Mahmood. "Reza Afshari and Cultural Relativism." *Human Rights Quarterly*, vol. 41 no. 1, 2019, pp. 204-208 at 204.

⁴ C McCrudden, 'Is the principle function of international human rights law to address the pathologies of international law? A comment on Patrick Macklem's *The Sovereignty of Human Rights*' (2017) 67 *University of Toronto Law Journal* 623-636 at 636.

⁵ *Ibid.*

⁶ J E Bond, 'International intersectionality: A Theoretical and Pragmatic Exploration of Women's International Human Rights Violations' 52 *3 Emory Law Journal* 71 at 76.

⁷ E Brems, *Human Rights: Universality and Diversity* (Martinus Nijhoff, 2001)

⁸ Sten Schaumburg-Müller, 'In Defense of Soft Universalism. A Modest, Yet Presumptuous Position' in Antonio-Luis Martínez-Pujalte and Susana Sanz Caballero (eds), *Cuadernos Constitucionales de la Cátedra Fabrique Furío Flores Juberial Vol I 62/63 Universitat de València* (2011) 113-126.

⁹ Ulf Jahansson Dahre, 'Searching for a middle ground: anthropologists and the debate on the universalism and the cultural relativism of human rights' (2017) 21 *5 The International Journal of Human Rights* 611-628.

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¹³ J Waldron, *Liberal Rights: Collected Papers 1981-1991*, at 363-66 (1993). Y. Tamir, 'Group Rights' in L.H. Meyer and S. L. Paulson (eds), *Rights, Culture, and the Law* (OUP, 2003), pp. 183-204. See Jack Donnelly: 'Human Rights and Human Dignity: An Analytical Critique of Non-Western Conceptions of Human Rights' 76 (1982) *The American Political Science Review*

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¹⁵ R E. Howard, *Cultural Absolutism and the Nostalgia for Community*, 15 HUM. RTS. Q. 315 (1993).

¹⁶ Article 27(1) of the Universal Declaration on Human Rights recognizes such a right. Also, Article 15 of the International Covenant on Economic, Social and Cultural Rights (ICESCR); Article 27 ICCPR; Article 5(e)(vi) of the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD); and Article 31 of the Convention on the Rights of the Child (CRC), all recognize the right to participate in the cultural life without discrimination. Also see Declaration of the Principles of International Cultural Co-operation, *adopted* 4 Nov. 1966, UNESCO Gen. Conf., 14th Sess., 16th plenary mtg., art. VI, UNESCO Doc. 14 C/Resolutions. Also, the Universal Declaration on Cultural Diversity, *adopted* 2 Nov. 2001, UNESCO Gen. Conf., 31st Sess., pmb1, ¶¶ 6-7, UNESCO Doc. CLT.2002/WS/9 (2002). Also, UNESCO Recommendation on the Safeguarding of Traditional Culture and Folklore, *adopted* 15 Nov. 1989, 25th Sess., *available at*, <http://unesdoc.unesco.org/images/0009/000926/092693mb.pdf>. Finally, Convention on the Protection and Promotion of the Diversity of Cultural Expressions, *adopted* 20 Oct. 2005, 33d Sess., art. 2(1), UNESCO Doc. CLT/CEI/DCE/2007/PI/32 (2005) (*entered into force* 18 March 2007).

¹⁷ The World Bank Environmental and Social Framework (2017) in <http://pubdocs.worldbank.org/en/837721522762050108/Environmental-and-Social-Framework.pdf>.

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¹¹⁶ Baguio Declaration of the 2d Indigenous Asian Women's Conference submitted in the 3d session of the PFIP.

¹¹⁷ Lima Declaration of the World Conference of Indigenous Women in <https://www.culturalsurvival.org/news/lima-declaration-world-conference-indigenous-women>.

¹¹⁸ Ibid.

¹¹⁹ UN A/RES/69/2, 25 Sept 2014

¹²⁰ United Nations, Report of the Special Rapporteur in the field of cultural rights, UN Doc A/HRC/37/55, 4th January 2018, para 78.

¹²¹ N Girard, 'Minority and indigenous women's right to culture: identity, gender and opportunities for empowerment' in MRG, *State of Minorities 2016* (MRG, London 2017), pp. 39- 47 at 42-43.

¹²² Mario Vazquez, Gloria Camacho Consuelo Garcia, 'Women empowerment through social innovation in indigenous social enterprises' 17 (2016) 6 *Revista de Administração Mackenzie* 164-190.

¹²³ S Rousseau and C Ewig, 'Latin America's Left-Turn and the Political Empowerment of Indigenous Women' 24 (2017) 4 *Social Politics: International Studies in Gender, State & Society* 425-451.

¹²⁴ S Valkonen and S Wallenius-Korkalo, 'Practicing postcolonial intersectionality: Gender, religion and indigeneity in Sámi social work' 59 (2016) 5 *International Social Work* 614-626 at 624.