

REVIEW ESSAY

THE ELUSIVE PROMISE OF INDIGENOUS DEVELOPMENT: RIGHTS, CULTURE, STRATEGY BY KAREN ENGLE (DUKE UNIVERSITY PRESS, 2010) 424 PAGES. PRICE US\$94.95 (HARDCOVER) ISBN 9780822347507.

‘Culture is a deeply compromised idea I cannot yet do without.’

— James Clifford, *The Predicament of Culture*¹

‘Very bad descriptions may on occasion be extremely serviceable tools of thought.’

— Karl Llewellyn, ‘The Constitution as an Institution’²

For all its indeterminacy, the concept of culture has provided an extremely versatile justificatory basis for indigenous rights. In principle, the human right to culture (or more precisely, the right to enjoy one’s culture in community with others) can accommodate any claim premised on indigenous difference. However, because of its expansiveness, some commentators have begun to wonder how far the category of culture can be stretched before it collapses. More specifically, they worry that limits may be imposed on the content of indigenous ‘culture’ in order to confine states’ human rights obligations. The risk that indigenous rights might be undermined in this way is the ‘dark side’ of indigenous success in cultural claims-making, and is the focus of Karen Engle’s new book: *The Elusive Promise of Indigenous Development: Rights, Culture, Strategy*. Engle confronts the ascendancy of culture in the strategies used by indigenous advocates in international fora, drawing primarily on the claims of indigenous peoples in the Americas. She argues that the recent focus on cultural rights has curtailed the development of more transformative and sustainable bases for indigenous empowerment and development. She is primarily concerned that the expansion of culture in indigenous advocacy has obscured approaches based on the principles of indigenous self-determination, autonomy and agency.³ Engle suggests that while culture may well be the path of least resistance for indigenous advocates, in the long-term, the move away from self-determination is likely to be detrimental, to the extent that it leaves unexplored a set of ideas that could, if developed, provide a better basis for indigenous claims.

International indigenous rights scholarship has been reinvigorated by the United Nations General Assembly’s 2007 adoption of the *Declaration on the*

¹ James Clifford, *The Predicament of Culture* (Harvard University Press, 1988) 10.

² Karl Llewellyn, ‘The Constitution as an Institution’ (1934) 34 *Columbia Law Review* 1, 4.

³ Karen Engle, *The Elusive Promise of Indigenous Development: Rights, Culture, Strategy* (Duke University Press, 2010) 4.

Rights of Indigenous Peoples ('UNDRIP').⁴ Methodologically, however, the focus in the field has remained steadfastly legal, and mostly doctrinal. Recent contributions address the content and novelty of the indigenous rights repertoire now expressed in the *UNDRIP*, assessing its compatibility with other international human rights instruments and predicting the likelihood that its provisions will be deployed by existing human rights bodies and by the governments of states. Engle's is perhaps the only book-length work to approach the evolution of indigenous rights by reference to the political context and aims of indigenous peoples, rather than as an exegesis of applicable international law. By drawing on written texts produced by indigenous advocates, alongside the jurisprudence and policy of international institutions, Engle takes indigenous advocacy seriously. She positions indigenous communities as political actors who make choices, lodge claims, lobby officials, form allegiances, litigate and deploy rhetoric in pursuit of their goals. Most importantly, Engle illustrates that like all political communities, indigenous groups alter their strategies in response to changes in their legal and political environment, and are incentivised by opportunities to realise both short- and long-term benefits. While she does not directly consider the politics of inter-indigenous relations or self-governance, Engle nonetheless makes it clear that in their engagement with states, different indigenous groups pursue different strategies at different times. This emphasis on indigenous agency is the great strength of Engle's work. The book is an important contribution to a promising turn in the literature away from a conception of indigenous groups as beneficiaries of human rights, and toward an examination of indigenous politics as a subject of analysis in and of itself.

Engle's book develops both diagnostic and normative arguments. In this review, I focus on two: her comparative and explanatory study of strategies deployed by North American and Latin American indigenous advocates, and her argument that self-determination-based approaches to advocacy are more desirable, durable and less prone to limitation or cooption than claims based on the human right to culture. While the documentary and empirical evidence marshalled by Engle is impressive (and includes a substantial case study on Afro-Colombian communities), I have focused here on those aspects of her argument that implicate competing theories of indigenous rights. There is plenty of insightful analysis in Engle's book that does not bear directly on normative theory, and many readers will understand Engle's central contribution to lie in the explanatory and causal claims she advances, and in the rigorous historical, anthropological and legal analysis that supports them. In this review, however, my aim is to draw attention to some of the implications of Engle's critique of cultural rights, by asking about the shape of the normative ideal that necessarily informs her claim that cultural rights are sub-optimal and counterproductive. In particular, I am most interested in those parts of her argument that raise a question at the core of indigenous rights theory: how will we know when they're working?

In Part I of her book, Engle offers a lucid comparative and longitudinal study of the strategies used by North American and Latin American indigenous

⁴ *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN GAOR, 61st sess, 107th plen mtg, Agenda Item 68, Supp No 49, UN Doc A/RES/61/295 (2 October 2007, adopted 13 September 2007).

advocates, identifying the variables that have influenced indigenous communities in the formulation of their claims. She identifies two lines of advocacy: one emphasising claims to land and self-determination, which she associates with indigenous communities in the former British Colonies of North America, and the other emphasising claims to internal autonomy and collective cultural rights, which is associated with indigenous communities in the former Spanish colonies of Latin America.⁵ These two approaches to advocacy, she argues, respond to different histories of colonialism.⁶

Engle explains that during colonial expansion, the British and French in North America directed their efforts to the acquisition of indigenous land by treaty, or by asserting the doctrine of *terra nullius*.⁷ In contrast, there was no history of treaty-making in Latin America. Instead, Spanish colonial authorities exercised doctrines of conquest in order to control indigenous populations, and to appropriate their labour by enslaving them.⁸ Accordingly, Engle argues, the history of colonialism in Latin America produced longstanding policies of wardship and assimilation. Because indigenous strategies evolved in response to the dominant tools of colonialism in each region, in North America, 'advocates seized upon the language of decolonization and self-determination, the latter often including references to Indian treaties',⁹ while in Latin America, groups 'typically focused on the need for cultural, if not physical or territorial, distinction'.¹⁰

Engle goes on to point out that when the Working Group on Indigenous Populations ('WGIP') began work on the draft *UNDRIP* in the early 1980s, discussions were dominated by representatives of North American groups. Many of these representatives, argues Engle, explicitly presented their claim to self-determination as a 'political' entitlement, arising from treaties and pre-colonial indigenous sovereignty.¹¹ Thus, the early articulation of self-determination in the WGIP took a 'strong' form, drawing on concepts of independent statehood extant in the international law and policy of decolonisation.¹² In contrast, she suggests, when '*panindianismo*' emerged in Latin America in the 1970s and 1980s, groups 'rarely used the terms "self-determination" or "decolonization"'.¹³ The focus of Latin American advocates was instead on the recovery and protection of distinctive indigenous cultures.¹⁴ Furthermore, Engle observes, 'indigenous groups in Latin America participated very little in international indigenous advocacy during that time'.¹⁵

Engle alerts readers to the dominance of analyses based on labour rights and class in Latin American indigenous politics, including the influence of Marxist

⁵ Engle, above n 3, 19.

⁶ *Ibid.*

⁷ *Ibid.* 21.

⁸ *Ibid.*; see also *ibid.* 30.

⁹ *Ibid.* 47.

¹⁰ *Ibid.* 47.

¹¹ *Ibid.* 78–9.

¹² *Ibid.* 75.

¹³ *Ibid.* 55–6.

¹⁴ *Ibid.* 56–7.

¹⁵ *Ibid.* 71.

theory in the region.¹⁶ Indigenous advocates had an uneasy relationship with labour-based movements, especially where assertions of cultural difference were thought to be in tension with principles of class solidarity. Nonetheless indigenous claims-making in Latin America was supported by the prevailing emphasis on social and economic justice in rights advocacy. Importantly, the indigenous movement was genuinely pan-indigenous and transnational, and participants 'did not seem particularly focused on the question of statehood'.¹⁷ In the 1990s, indigenous groups from outside North America began to participate in the international arena and to articulate claims based on cultural integrity and economic equality, rather than decolonisation and statehood, thus diluting 'strong' claims to indigenous self-determination in international standard-setting.¹⁸

The contrast that Engle draws in her comparative analysis between political claims of strong self-determination and the legal 'human right' of culture, forms the structural basis of her critical argument. The rise of cultural claims, Engle observes, has been accompanied by a weakening of the form of self-determination used in indigenous advocacy, so that 'the self-determination strategy has for the most part given way to models based on human rights, particularly the human right to culture'.¹⁹ As she explains, advocates recast self-determination as 'a human right, as opposed to a right to the political power seen as accompanying statehood',²⁰ and likewise reformulated the right to culture by accepting external constraints on its content. By the time the *UNDRIP* was adopted, '[e]ven some of the strongest advocates of the right to culture [had] proposed, or at least accepted, restraints on that right. Those restraints generally find their source in the language of human rights.'²¹ The implication of Engle's analysis is that, by abandoning the political language of decolonisation in favour of human rights-based approaches, indigenous advocates have accepted that their rights are limited by the interpretative decisions of state officials and adjudicators. This argument depends for its logic on Engle's modelling of self-determination and human rights as approaches that stand (or stood) in opposition to one another. That is, on the idea that there were once clear, definable boundaries between the two strategies that have since collapsed and become opaque in a normatively undesirable way. While Engle herself recognises the difficulties of condensing very complex political movements into a manageable narrative, some readers may nonetheless have concerns about the neatness of the dichotomy she has constructed. Some (including myself) may instead perceive in this transition a more familiar trajectory from principle to practice, or, in other words, from political theory to politics itself. Clean taxonomic lines are sustainable when categories are expressed as abstract moral benchmarks, because the extent of overlap and conflict has not yet been fully explored. However, when rights are accommodated in national politics, including inter-indigenous politics, few entitlements can remain unlimited.

¹⁶ Ibid 60.

¹⁷ Ibid 63.

¹⁸ Ibid 73.

¹⁹ Ibid.

²⁰ Ibid 99.

²¹ Ibid 133.

It is important to acknowledge that Engle's project is for the most part pitched at the level of principle and theory rather than empirics. Her argument is largely descriptive and critical. It contains a causal theory but is not strongly normative, in the sense that Engle does not directly posit an alternative strategy that could mitigate the deficiencies she describes. In the book's conclusion, Engle discusses the possibility of reworking concepts of culture, by deploying constructivist reasoning, in order to avoid essentialism and stagnation, but by her own admission, this is a modest and exploratory gesture, not a prescriptive one.²² Rather than outline a solution, Engle's primary goal is to explore the 'dark sides and unintended consequences'²³ of the various indigenous strategies she describes. Her critical analysis is premised on the central idea that the 'often elusive promise of indigenous development underlies nearly every strategy that indigenous peoples have chosen to pursue their claims'.²⁴ Engle has produced a vivid critique of the under- and over-inclusivity of those strategies, but there remains an implicit normative claim in her approach that is tantalising and sometimes elusive. Engle is of the view that strategies based on culture are sub-optimal, but does not have a clear argument as to why a strategy based on self-determination would fare any better in the hands of settler states or international institutions. She does not explicitly say, in fact, that it *would* fare any better, and conceivably Engle means only to suggest that it is impossible to know, because indigenous self-determination as a strategy has prematurely stalled and remains inchoate. Schematically, Engle's book suggests that cultural claims have resulted in cultural rights, but claims to self-determination have not resulted in independent statehood, or in fact to autonomy. Rather than conclude that self-determination has already failed as a strategy, Engle proposes that it is a promising avenue for political change that could and should be revived. This logical move depends on the prior assumption that self-determination, in principle at least, can generate outcomes that are normatively desirable, but that cultural claims cannot deliver. These outcomes, however, are not explicitly identified in the book. In short, I am curious about the 'ends' that Engle has in mind, in her evaluation of the means. In the following section, I sketch some possibilities.

Engle's starting point appears to be that self-determination (in the broad sense) holds the promise of substantive autonomy for indigenous peoples, including perhaps the possibility of independent statehood. According to Engle, one reason why claims premised on the human right to culture are inadequate is that they do not admit the full range of indigenous political possibilities, whatever they may be, from time to time and from group to group. In Engle's analysis this remains true, even if the substance of a right claimed under the auspices of culture is identical to that sought as an expression of self-determination.²⁵ The underpinning normative assumption is that by turning to human rights as a basis for claims, indigenous peoples allow external actors to impose limits on their autonomy, whereas claims based on self-determination do not necessarily lead to limitations of this kind and are less susceptible to

²² Ibid 277–8.

²³ Ibid 168.

²⁴ Ibid 4.

²⁵ Ibid 102.

qualification. Alternatively, self-determination strategies are likely to yield rights that, while limited, are limited in different and less problematic ways. Neither claim is fully elaborated in the book.

The qualifications that most concern Engle derive from the obligation to respect individual rights in the exercise of collective cultural rights, and from the manipulability of the category of culture itself, especially the tendency of external actors to equate indigenous culture with traditional and non-economic uses of land and heritage. Thus, the full scope of culture is co-opted and undermined by legal frameworks, so that indigenous peoples are 'often forced to give up those parts of their culture that are seen to conflict with universal understandings of human rights'.²⁶ According to Engle, strategies premised on the right to culture do not adequately reveal the 'economic dependency and marginalization of most of the world's indigenous peoples',²⁷ and are 'defensive', because they are designed to 'protect the group, rather than to transform the underlying power structures that work to marginalize it'.²⁸ As a consequence, she suggests, cultural claims 'might be short-sighted and even counterproductive'.²⁹ This logic is evident in the following key passage:

I hope to demonstrate that right to culture claims, when successful, threaten to limit the groups that might qualify for protection, force groups to overstate their cultural cohesion, and limit indigenous economic, political, and territorial autonomy. That is, I encourage indigenous peoples and their advocates to resist essentialism in a way that would not only be willing to expose the often fragile nature of the culture claims, but might facilitate the study of the background distributional inequality that both underlies and structures them.³⁰

In Engle's discussion of the various shortcomings and limitations of cultural rights claims, however, it is not easy to discern what limits she might accept, if any, on the indigenous exercise of any human right, including rights to self-determination. In fact, she seems to argue that the appeal of 'strong self-determination' claims is precisely that they are political claims, based on indigenous sovereignty, and so superior to the 'weaker form' of self-determination that is 'articulated as a human right'.³¹

As I understand Engle's argument, limits on indigenous autonomy impede indigenous peoples' efforts to realise 'the promise of indigenous development'. Accordingly, the value of self-determination as an alternative basis for indigenous claims is that it better advances what is, in Engle's view, the primary end of indigenous advocacy: 'economic justice'.³² However, the link between self-determination (the means) and development (the end) is not clearly spelt out in Engle's account. On my reading of the book, indigenous autonomy is sometimes discussed as if it were a good in and of itself, and elsewhere is presented in instrumental terms, as the most effective of a range of strategies that might plausibly be used to advance indigenous economic development. The

²⁶ Ibid 7.

²⁷ Ibid 13.

²⁸ Ibid 14.

²⁹ Ibid.

³⁰ Ibid 13.

³¹ Ibid 3.

³² Ibid 275.

central challenge here is that increases in indigenous autonomy do not always result in improvements to their economic wellbeing (for example, where greater agency is accorded to indigenous communities as part of programs designed to privatise service delivery and reduce the social welfare commitments of the state) and economic success is not always correlated with indigenous self-determination (where governments or private actors provide resources to indigenous groups but retain control over their distribution). Strategies that achieve one of these goals need not advance the other as a matter of course, so the choice between 'economic development' or 'autonomy' as the primary good predetermines the evaluation of the strategy.

Engle's work resonates in a productive and interesting way with scholarly debates underway on political theories of indigeneity and indigenous rights. While Engle does not expressly engage with normative theories of justice as they pertain to indigenous peoples, these broader issues are implicated in her work and, I would argue, tacitly articulated within it. One of the great contributions of Engle's analysis is that her reasoning alerts the reader to the ongoing difficulty of locating a coherent normative theory of indigenous rights. This makes these rights vulnerable to challenge. Taking the provisions of the *UNDRIP* as an expression of the 'state of play', the current range of indigenous rights contains both 'universal' and 'particular' rights. Some of the rights articulated in the *UNDRIP* inhere in all individuals or all cultural minorities by virtue of extant human rights protections, while others, most properly called 'indigenous rights', attach only to indigenous communities and indigenous individuals. 'Indigenous rights', so understood, are especially vulnerable, because they appear to derive from a particular set of historic circumstances or experiences, or else from political bargains, and so fall outside of the corpus of universal human rights that vest in all human beings by virtue of their humanity. Thus while the adoption of the *UNDRIP* suggests that there is at least an 'in principle' consensus amongst states that indigenous rights are morally justified, there is nothing like a consensus on why they are needed. Because they are often understood to be 'political rights', rather than inherent human rights, questions arise as to their political purpose and function, requiring justifications of the kind that are seldom sought of individual civil and political rights. Are indigenous rights essentially reparative, designed to compensate victims of historic injustice, or are they primarily distributive, designed to raise the living standards of indigenous communities in order to secure socioeconomic parity? Alternatively, are indigenous rights justified because they further some other political goal of the state or of the society it governs, by, for instance, reducing ethnic conflict, protecting the public goods of diversity and pluralism, or improving the legitimacy of national governments and legal systems? The answers to these questions determine the priority of indigenous rights relative to the rights of third parties and the public, and determine how the rights of each might be limited to accommodate the others. Just as there is no consensus amongst states on how to identify and balance indigenous and other human rights in the public interest, there is no consensus amongst indigenous groups themselves on how this is to be done.

If, as Engle seems to suggest, we should evaluate indigenous rights primarily by reference to the scope of the autonomy they guarantee to indigenous peoples,

and perhaps secondarily by their capacity to contribute to indigenous economic development, then it appears that whatever the decisions made by an indigenous community, they will be morally justified if they are genuinely the expression of a community's political will and do not impede the development of that group. However, as Engle notes, indigenous self-governance *in practice* at times seems inconsistent with some or all of the political or economic arguments used to justify the right itself. Indigenous communities make decisions in the exercise of their collective rights that have a strongly ideological character, including whether and how to participate in the market, whether to preserve or sell scarce and valuable resources, whether to permit dangerous or morally dubious commercial activities to take place on their land, whether to cooperate or compete with neighbouring communities, or, as in Engle's example, whether or not to store nuclear waste on their territories in order to bolster their economic development.³³ In short, indigenous communities may make decisions that are not supported by the particular political theory used to justify their right to decide. A central and fascinating aspect of indigenous rights, and the debates that attend them, is that 'in principle' support for indigenous rights offers no basis on which to evaluate the exercise of those rights. This is true of all human rights, which may well be absolute and non-derogable in principle, but, when implemented, are necessarily limited by other legitimate rights. Evaluation of collective rights *as exercised* must derive from prior theories about the qualities of a 'good life' and a just society. A right of self-determination protects something of moral value, but self-governance in practice is simply governance, and is only as good or as bad as our political theories allow. The exercise of indigenous rights is ultimately nothing more or less than indigenous politics.

I stress these points in order to frame my reading of Part II of Engle's book, in which she methodically unpacks the 'dark sides' of various culture-based claims deployed to promote indigenous development. As I understand her argument, she is of the view that all culture-based rights are inadequate vehicles for indigenous development, either because they do not allow sufficient indigenous control over development strategies (for instance, by rendering land inalienable), or because they allow indigenous communities to make decisions that are not in their long-term interests (for instance, where a group pursues land-use strategies that are not environmentally sustainable). There is not enough indigenous autonomy in the first example, and too much in the second. This illuminates the challenge of reconciling indigenous choice with indigenous development. The first example presents a relatively straightforward normative problem for Engle, assuming the relevant law has been enacted against the wishes of the indigenous community and not (as is sometimes the case) in the exercise of powers devolved to the state by that group, or in fulfilment of an indigenous-state agreement. However, the second is much more normatively complex, because here the state might acquiesce in a decision made by the group in deference to its choice, and that decision might nonetheless be normatively suspect on other moral grounds, *even if* it protects and increases indigenous autonomy. Engle's evaluation is premised on a particular vision of the relationship between indigenous autonomy

³³ Ibid 205–8.

and indigenous development, but this is sometimes tacit in her argument. In the discussion that follows I attempt to further unpack her reasoning.

Even though she observes that cultural claims can have powerful distributive effects³⁴ and reflect the aspirations of at least some indigenous peoples themselves, Engle worries that the utility of culture as a justificatory basis for indigenous claims is too often limited by the provisos of tradition (and so cultural continuity) or repugnancy (respect for human rights).³⁵ There is, as she notes, nothing inherent in the concept of culture that limits protected indigenous cultural activities to ones that are demonstrably continuations of pre-contact activity, but nonetheless, the legally protected elements of indigenous culture are often those that are expressly 'traditional' or 'customary'. This again is a dilemma that attends theories of indigenous rights. To my mind, one problem with the concept of culture as a justificatory basis for indigenous rights is that it is too inclusive of non-indigenous claims, and not sufficiently inclusive of indigenous claims. Because the human right to culture can accommodate all cultural claims made by distinctive minority groups, indigenous or otherwise, further qualifications are added to provide a justificatory basis for rights that vest *only* in indigenous communities, especially rights to lands, resources and self-governance. As Engle observes, qualifiers are all under-inclusive in some normatively significant way. Insisting on a distinctive connection between indigenous culture and land does not include displaced or urban indigenous communities, and requiring the continuity of cultural practices with pre-contact activities does not accommodate aspects of indigenous cultural life that are commercial or technological. It is not clear that these limitations always reflect only the preferences of states. They could, as Engle notes, be part of indigenous strategies to confine cultural rights to groups that can demonstrate continuity with pre-colonial sovereigns. Historic tribes, for example, sometimes contest the claims of more recently-constituted indigenous communities. Would Engle's argument support limitations chosen by groups in the exercise of self-determination in an attempt to deny other groups the benefit of indigenous rights?

As I see it, the question of 'indigenous choice' and its preconditions lies as the heart of Engle's analysis. For instance, by consistently using the language of 'choice' to explain shifts in indigenous strategy over time, she seems to imply that some strategies are preferred by indigenous peoples over others because they more accurately reflect indigenous concepts of themselves and their entitlements. This probably understates the institutional constraints operating on indigenous peoples in the formulation of the claims, let alone those imposed by external actors when the claims are adjudicated. Many claims that indigenous peoples might otherwise make find no legal forum because they are deemed to be inadmissible or non-justiciable at the outset. Engle is aware of the chilling effect that jurisdictional pronouncements may have on the expression of indigenous claims. She notes for example that in its interpretation of the *International Covenant on Civil and Political Rights* ('ICCPR'),³⁶ the Human Rights

³⁴ Ibid 8.

³⁵ Ibid 7.

³⁶ *International Covenant on Civil and Political Rights*, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976) ('ICCPR').

Committee ('HRC') has refused to consider claims based on self-determination brought by indigenous individuals on behalf of their communities under the *Optional Protocol to the ICCPR*,³⁷ notwithstanding that the right is guaranteed to all peoples by art 1 of the *ICCPR*. In such a context, a decision to shift to the alternative basis of culture appears to be not so much an expression of the upper limit of indigenous aspirations, but rather a political response to what is legally possible at the relevant time and in the relevant forum.

Pursuing this line of inquiry a little further, I suggest that Engle may use a concept of choice that is too narrow to accommodate the full range of strategic decisions made by indigenous groups. Engle notes that during the discussion of the *UNDRIP*, Australia and the United States altered their position on the right of self-determination as a result of changes in the political leadership of those countries.³⁸ She expresses surprise, however, that by 2007 'the positions of advocates [had] changed so substantially' (most had by then ceased to insist that the self-determination provision should allow the right to secession).³⁹ Engle seems to see this shift as a capitulation. In their best light, however, the *UNDRIP*'s qualified textual references to self-determination could be seen as a form of accommodation, and their content as a result of a realist indigenous strategy, intended to secure the best possible outcome in the face of state opposition, and to make the most of any momentum and goodwill remaining after 22 years of difficult negotiations. Advocacy is one form of political strategy used by indigenous peoples, but it is not by any stretch the only one. Trade-offs, bargaining, negotiation, forbearance and temporal accommodations are very present in the day-to-day relationships between indigenous communities and states, and are also expressions of self-determination and indigenous political will. It is likely that most indigenous groups would have preferred an unqualified reference to self-determination in the *UNDRIP*, but clearly most also agreed to accept a less than optimal articulation in order to secure the adoption of the text as a whole. The record of negotiations shows that indigenous participants sometimes disagreed with one another on the appropriate strategy to deploy in the final stages of the *UNDRIP*'s progress to the UN General Assembly, but nonetheless managed (under extraordinary time pressures) to agree on a compromise position amongst themselves.⁴⁰ In other words, by necessity indigenous advocacy includes strategies to manage inter-indigenous politics as well as those designed to influence states.

If I am correct in my understanding that Engle views any limitation on indigenous autonomy as suspect, it is worth taking a closer look at the implications of her analysis for a theory of indigenous development. She makes the important observation that confining protection to practices that are 'traditional' has the effect of restricting indigenous autonomy in the market, by

³⁷ *Optional Protocol to the International Covenant on Civil and Political Rights*, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976) ('*Optional Protocol to the ICCPR*').

³⁸ Engle, above n 3, 88.

³⁹ *Ibid* 88–9.

⁴⁰ See generally, Luis Alfonso de Alba, 'The Human Rights Council's Adoption of the *United Nations Declaration on the Rights of Indigenous Peoples*' in Claire Charters and Rudolfo Stavenhagen (eds), *Making the Declaration Work: The United Nations Declaration on the Rights of Indigenous Peoples* (Transaction Publishers, 2009) 108, 117, 135.

rendering their land and resource interests inalienable, and by confining their activities on land to those which are considered to be ecologically sustainable or otherwise in the national interest.⁴¹ Engle's primary concern is that this restricts the 'long-term possibilities for indigenous groups' economic development'.⁴² She observes that 'the culture as land strategy has in some ways served to exclude indigenous peoples from many of the benefits of modernization',⁴³ while paradoxically, if indigenous peoples 'aim to participate in the market with regard to land, they go against their culture, potentially losing their claim to indigeneness'.⁴⁴ In the case of indigenous land, 'stewardship sometimes takes priority over the autonomy of indigenous peoples' so that '[s]tates are permitted, in the public interest, to prohibit its alienation'.⁴⁵

She is less sceptical of inalienability imposed on indigenous communities under the auspices of the trust obligation that the Federal Government of the US (and Canada) holds in relation to recognised tribes. This obligation has developed in common law as a concomitant of the government's monopoly on acquisitions of indigenous land (its right of pre-emption) and its treaty obligations, and broadly, requires the government to act in the interests of indigenous peoples. Engle suggests that while the trust responsibility is 'not only paternalistic but tenuous ... [it] at least acknowledges the real lack of power and wealth of most Indian tribes and understands why a land sale might be attractive as a short-term solution'.⁴⁶ She notes that genuine ideological conflict between autonomy and development can emerge when indigenous groups attempt to exercise their autonomy by using land for non-traditional purposes. She explains that the Skull Valley Band of Goshute Indians did exactly this in the early 1990s, by consenting to the establishment of a nuclear waste storage site on its reservation against the opposition of the government of Utah, the Federal Government and neighbouring tribes.⁴⁷ Engle acknowledges that efforts by States and the Federal Government to limit the sovereignty of tribes in situations like this are 'problematic' because 'consent assumes they have a choice' but does not problematise the efforts of other tribes to limit Goshute sovereignty by asserting their own, let alone the efforts of some Goshute members to restrain their representatives. She concludes by noting that '[a]s with consultation, [consent] can be used to legitimize state decisions'.⁴⁸ This summation is puzzling, since in the account presented by Engle, the contract was offered to the Goshutes by a private fuel storage company and was opposed by the government of Utah and by the Federal Government. It is the tribe's decision, made in the exercise of self-governance, that is problematic in this case. In situations like this one, she notes, when supporters of ethno-development and ecological development strategies have searched for 'evidence that capitalism and neoliberalism are subverted by local knowledge, they have often found that

41 Engle, above n 3, 7.

42 Ibid 168.

43 Ibid 182.

44 Ibid.

45 Ibid 168.

46 Ibid 179.

47 Ibid 206–7.

48 Ibid 208.

indigenous and minority cultures provide less of a challenge to those ideologies than might have been hoped'.⁴⁹ This again points to the central difficulty of premising justificatory arguments for indigenous rights on the priority of indigenous autonomy and agency. Where the exercise of the claimed right impacts adversely on other communities, some other principle must be found to justify prioritising the interests of an indigenous community over those of other affected persons and groups.

Finally, an important part of Engle's critique is directed to the method used by international human rights bodies to resolve tensions between the collective right to culture, and individual rights. Engle is of the view that the approach taken by international institutions offers no way of reconciling collective and individual rights in the event of a conflict.⁵⁰ She is especially troubled by the fact that there seems to be no space for collective rights to culture to 'trump' individual rights, because in human rights adjudication, individual rights are given priority.⁵¹ As part of this discussion, Engle reviews several important individual complaints, including *Lovelace v Canada*⁵² and *Kitok v Sweden*,⁵³ brought by indigenous individuals to the HRC, via the *Optional Protocol to the ICCPR*. These claims were based (in part) on art 27 of the Covenant, which protects the rights of persons belonging to minorities to enjoy their culture 'in community with the other members of their group'.⁵⁴ Engle suggests that in each case, the potential of cultural rights was significantly compromised by the HRC's method and findings, which protected only those aspects of indigenous culture that did not conflict with other human rights.⁵⁵ Significantly, both decisions involved membership disputes, the applicant in each case having been excluded by the governing board of that community. This meant that in each case, there was more than one indigenous actor with an interest in the outcome of the adjudication. Effectively, cultural rights were claimed by both the excluded individual and by members of the community, but in an international forum, an individual petition must be formulated as a claim against the state. This feature of international human rights adjudication is normatively significant. Engle notes, but does not emphasise, that in both cases the *Covenant* was alleged to have been breached by the state's decision to support or acquiesce in a determination made by an indigenous community, specifically the community's decision to deny membership to the applicant individual in accordance with applicable law. It is this decision that is evaluated by the HRC relative to that state's international human rights obligations. As is well-known, the response of the Canadian Federal Government to the HRC's decision in favour of Sandra Lovelace was to amend the Federal *Indian Act*⁵⁶ to reinstate all women who, like Lovelace, had lost their Indian status by marrying a non-Indian, along with the

⁴⁹ *Ibid* 215.

⁵⁰ *Ibid* 134.

⁵¹ *Ibid* 134.

⁵² Human Rights Committee, *Communication No 24/1977: Canada*, UN Doc CCPR/C/13/D/24/1977 (30 July 1981) ('*Lovelace v Canada*').

⁵³ Human Rights Committee, *Views: Communication No 879/1999*, UN Doc CCPR/C/33/D/197/1985 (4 August 2005) ('*Kitok v Sweden*').

⁵⁴ *ICCPR* art 27.

⁵⁵ Engle, above n 3, 106.

⁵⁶ *Indian Act*, RSC 1985, c 1-5.

children of such a marriage. The amendment, affected by Bill C-31 in 1985,⁵⁷ had the effect of increasing the registered Indian population by 19 per cent within five years.⁵⁸ All of these 'reinstated persons' had to be accommodated within existing First Nations, whether those nations consented or not (although many people made eligible by the legislative amendments did not return to the reserves to live).⁵⁹ This amendment was made against strong opposition from some First Nations, many of whom complained that the legislative amendments overburdened their under-resourced communities, placed unsustainable pressure on land and amenities on the reserves, and interfered with the community's capacity to self-govern and to apply customary membership norms.⁶⁰ This illustrates one of the central challenges posed to official decision-makers by indigenous rights: because indigenous communities are arranged in a complex multilateral relationship to one another, their claims frequently conflict. Often claims made in international fora by indigenous individuals have already been advanced domestically as claims against another indigenous person or community, mediated by state institutions. However, the detail and complexity of inter-indigenous disputation in the lead-up to an international claim is irrelevant in international adjudication. In international law, indigenous communities are rights-holders, and are not themselves subject to human rights obligations.

In these cases, as in many others, indigenous peoples from time to time look to the state to advance their interests by limiting the rights of other indigenous communities. There is often no alignment of indigenous peoples against external actors, including international institutions, but rather a complex set of shifting allegiances and preferences arising from the political goals of those groups and the strategies they choose in order to pursue them. Indigenous individuals, peoples, states and international adjudicatory bodies frequently disagree, vertically and laterally, about the content of indigenous rights and how they are to be exercised. Engle's work helps to illuminate the complexity of indigenous politics and inter-institutional dynamics. Her book contributes to discussions of indigenous rights an enlightening dynamism that I hope will inspire further work on the politics of indigeneity.

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⁵⁷ Bill C-31 was passed as *An Act to Amend the Indian Act*, RSC 1985, c 27 (Canada).

⁵⁸ Megan Furi and Jill Wherrett, 'Indian Status and Band Membership Issues' (Research Paper No BP-410E, Parliamentary Library, Parliament of Canada, February 1996, revised February 2003) 7 <<http://www.parl.gc.ca/Content/LOP/ResearchPublications/bp410-e.htm>>.

⁵⁹ *Ibid* 7–8.

⁶⁰ *Ibid* 16–19.

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