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Indigenous Peoples and the Right to Culture:
A Critical Review of Karen Engle’s *The Elusive Promise of Indigenous Development*

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Abstract

What is the potential for claims based on the right to culture to ameliorate the conditions of indigenous peoples? In what ways does a right-to-culture strategy limit the potential of indigenous economic development? Karen Engle tackles these questions in her study, *The Elusive Promise of Indigenous Development: Rights, Culture, Strategy*. Engle’s study is impressive and engaging in its questioning of the ways in which advocacy strategies impact economic development. This critical review, however, argues that Engle too readily dismisses self-determination, conceived as a human right rather than a right associated with political power, as a viable alternative to the right to culture. It also critiques Engle’s argument that universal human rights are both imposed by the West and threatening to the cultural integrity of indigenous groups, arguing that universalism is capable of accommodating more difference than she gives it credit for. Finally, this review argues that Engle’s book would benefit from a deeper probing of the parameters of indigenous difference and how the situation of indigenous peoples gives rise to rights distinct from other marginalised minorities.
Indigenous peoples are among the world’s poorest, most socially marginalised and politically powerless.¹ This remains the case, despite a surge of indigenous advocacy over the past thirty years that has begun to increasingly enlist international law in its cause, and in the process, to shape its parameters.² The crowning achievement to date was the adoption in 2007 of the United Nations Declaration on the Rights of Indigenous Peoples, the product of decades of drafting which, while not legally binding, has become the principal instrument of the UN system for measuring the human rights conditions of indigenous peoples.³ But given its lack of an enforcement mechanism, and its only recent adoption, indigenous peoples have looked to a variety of other international human rights instruments in an effort to protect their rights and culture.

It is this issue that Karen Engle addresses in her book *The Elusive Promise of Indigenous Development*.⁴ Engle argues that development, and more specifically the lack of access to profits from development, continue to be the most significant issue for indigenous peoples.⁵ The central question she poses is whether claims based on the right to culture are capable of contributing to the major economic and political restructuring that indigenous peoples are often seeking when they bring such claims.

This paper will offer a critical analysis of *The Elusive Promise of Indigenous Development*, focusing on Engle’s account of indigenous peoples’ use of the right to culture. While Engle

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⁵ Karen Engle, “The Elusive Promise of Indigenous Development” (Paper presented to the Law and Globalization Workshop) Faculty of Law, University of Toronto, 28 October 2010.
catalogues some positive effects of the right to culture strategy, she focuses on its pitfalls, especially its penchant to demand “stereotyped and unrealistically coherent stories of culture” that may have the counterproductive effect of limiting other, development-related goals. I will argue, however, that she does not go far enough in her critique of the right to culture. The dangers that Engle points to, and the direction of the UN Human Rights Committee’s jurisprudence on the right to culture, show that it has outlived its utility as a basis on which to protect indigenous communities. Engle’s argument implies that the point at which the right to culture becomes meaningful in terms of enabling indigenous communities to pursue their own development goals is the point of self-determination. The self-determination she speaks to is not external political sovereignty, but a level of autonomy and self-government sought in varying degrees by indigenous groups. If that is the case, then it is that right, rather than the right to culture, which should become the focus. And, as a brief examination of the way that the right to self-determination has evolved shows, groups may be able to rely on it in ways that in the past would have been seen as too radical or destabilising.

The second area of Engle’s argument that this paper will critique relates to what she refers to as the “invisible asterisk”. By this, Engle means the limits on deference to indigenous cultural traditions that are built in to their international legal protection, which she sees as another manifestation of Western paternalism. I will argue, however, that in asserting that it is the values of Western culture that are used as a benchmark to limit protections for indigenous cultures, Engle is misguided in two ways. First, her criticism implies a certain static view of culture in relation to practices that may run afoul of other human rights protections. This is at odds with her

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6 Supra note 4 at 12.
urging a view of culture that is nuanced and dynamic as it relates to the way it is presented in legal claims and protected by courts. Second, and more fundamentally, Engle’s account of the tension between universal human rights and cultural particularities is both too quick to dismiss the universal aspects as values imposed by the West, and too quick to see those rights as threatening to the cultural integrity of indigenous groups.

Finally, I will argue that both of these areas of Engle’s analysis that I find unsatisfying stem from the fact that her book never fully comes to terms with the parameters of indigenous difference. In her account, indigenous difference is important enough that groups have claims to cultural protection, but not so different that they are impeded from developing in ways that might result in fundamental cultural change. They must be different enough that in the name of cultural protection they are insulated from human rights norms binding on dominant societies, but not so different that they can’t draw down international legal protections that may benefit their communities. In its final section, I will briefly look at theories of indigenous difference. I will argue that only by probing the parameters of such difference can some of the tensions in Engle’s argument be resolved.

This paper will begin with a brief overview of Engle’s arguments. It will then examine in turn the questions I have posed about the right to culture, the implications of the “invisible asterisk”, and finally the issue of what indigenous difference means to the parameters of rights claimed.

**The Elusive Promise of Indigenous Development**

Engle’s book briefly traces the rise of indigenous advocacy from the 1970s to the present, along with the array of international instruments that have accompanied it. Among them are the
International Labour Organisation Convention 169,\(^8\) which, passed in 1989, for the first time rejected the theme of integration in favour of protecting cultural difference,\(^9\) and Article 27 of the UN’s International Covenant on Civil and Political Rights (ICCPR).\(^{10}\) She looks briefly at self-determination claims, but argues that that strategy has given way to models based on human rights, especially the human right to culture.\(^{11}\) Engle then examines in turn three variants of the right to culture, as heritage, as land and as development. She argues that while each has played a role in protecting indigenous peoples, each variant also has a tendency of displacing features of other variants that are important to the broader project of economic development.\(^{12}\)

Each variant of the right to culture also has what Engle terms “dark sides”. Culture as heritage, for example, has the advantage of seeing culture as a value to be preserved and protected, but at times heritage itself has been valued over, and disembodied from, the people associated with it.\(^{13}\) That allows states and international institutions to pick and choose parts of heritage they believe are worth protecting.\(^{14}\) The focus on heritage also has a tendency to idealise a pre-industrial, pre-global view of the world.\(^{15}\) Culture as land, by contrast, envisions a communal conception of property and appears to offer more than the heritage approach in that a form of collective jurisdiction over territory comes close to self-government.\(^{16}\) It too, has dark sides, however, in that the object is the protection of the land itself, and indigenous peoples are

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\(^9\) See for example, Article 2(b), which calls on governments to promote the “full realisation of the social, economic and cultural rights of these peoples with respect for their social and cultural identity…”; Article 4, which calls for “special protection” for indigenous institutions and culture; and Article 8, which speaks to the right to retain customs and institutions.


\(^{11}\) Supra note 4 at 73.

\(^{12}\) Ibid. at 7.

\(^{13}\) Ibid. at 142.

\(^{14}\) Ibid. at 143.

\(^{15}\) Ibid. at 148.

\(^{16}\) Ibid. at 167.
expected to play a certain role as its guardians. That understanding places inherent limits on its use that may doom indigenous groups to economic marginalisation. Even when collective title is granted, land is usually treated as inalienable. While protective of the group, inalienability of lands that are frequently remote or poor, or both, provides another example of how land rights based on culture might limit possible economic arrangements and entrench the economic dependency of indigenous groups.¹⁷

Finally, Engle addresses the notion of culture as development. In particular, she focuses on the promise of “ethnodevelopment”, the idea of development based on the traditional culture of indigenous groups.¹⁸ Protections here are commonly phrased as the right of indigenous groups to be consulted on or give consent to development schemes affecting them. Engle argues that this branch too is limited in terms of its ability to attend to economic inequalities,¹⁹ and, just as a focus on culture as land can miss development, a discussion of development can displace issues of land. Indigenous peoples become defined by pre-modern modes of development that keep them marginalised, while the “rich Indian” is seen as a symbol of cultural loss.²⁰

In the remaining chapters of her book, Engle looks at indigenous models in terms of cultural protection and collective title in other contexts. In the case of Afro-Colombians, she argues that their political strategies in response to threats to the existence of their communities in the 1980s were very similar to responses in the indigenous context, in terms of the assertion of cultural rights.²¹ In particular, Engle traces the development and implementation of Colombia’s Law 70, whose purpose was to recognise the right to collective property of black communities, protect

¹⁷ Supra note 4 at 182.
¹⁸ Supra note 4 at 184.
¹⁹ Supra note 4 at 204.
²¹ Supra note 4 at 228.
their culture and foster their social and economic development. I will return to Engle’s choice of Afro-Colombians as a case study in the final part of this paper, to discuss the difference, if any, between the treatment in international law of indigenous peoples and other marginalised minorities, and the parameters of indigenous difference.

The Right to Culture: Past its Prime?

Engle begins with the premise that the past 20 years have demonstrated that the human right to culture provides a relatively secure and uncontroversial means through which to protect the rights of indigenous peoples. As noted, however, her focus is on the unintended consequences of varying advocacy strategies, which, in the case of the right to culture has meant the essentialising of indigenous culture as both unrealistically uniform and as frozen in pre-modern culture. That, in turn, has had consequences for the paths of development that indigenous peoples may take. As scholars have noted, however, while a certain image of the Indian as an exotic creature embodying spiritual attachment to the land has been to an extent an effective tool in winning support internationally, protection of that embodiment of culture has largely not been the goal. “Cultural survival in the sense of preservation of precontact, low-technology indigenous cultures is neither viable nor desired by most groups”, for the reason that those cultures are not static or primordial; they evolve like any other.

Engle details both the reasons the right to culture came to be relied on – it was relatively less threatening and more likely to yield results that the more radical right to self-determination, especially for many Latin American groups who faced greater threats from state violence – as

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22 Supra note 4 at 6.
23 Engle notes that this is particularly the case where indigenous advocacy has mapped on to the goals of international environmental advocacy that gained strength through the 1980s. See supra note 4 at 191-194.
24 Alison Brysk, “Turning Weakness into Strength: The Internationalization of Indian Rights” (Spring 1996) 23:2 Latin American Perspectives 38 at 41.
Well as its shortcomings. Yet ultimately she does not reject the concept of a right to culture as grounding indigenous claims as a whole. Instead she argues for an “embodied” historic and ethnographic understanding of culture that connects culture to economic and political issues. In this section, however, I will argue that for the more extreme position that the utility of the right to culture has passed. As it has evolved, the right to culture has become ill-suited to indigenous claims, for many of the reasons the Engle lays out. This section will look at the right to culture as it evolved under Article 27 of the ICCPR, before briefly looking at how some of the same tendency to emphasize pre-contact cultures pervades domestic jurisprudence in Canada and Australia. Finally, it will come back to Engle’s alternative – self-determination – and argue that the features that made it so threatening as the basis for indigenous claims are no longer as salient as they once were, making a conception of self-determination as a human right a more promising path.

Article 27 speaks not to indigenous peoples, but to minorities. It is worded in terms of negative obligations on states not to deny the right of minorities, “in community with the other members of their group, to enjoy their own culture, to process and practice their own religion, or to use their own language”. In the practice of the Human Rights Committee – which hears claims under the ICCPR’s Optional Protocol – however, positive obligations have been derived from the provision. And, apart from its application to minorities more generally, it has come to

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25 Supra note 4 at 277.
26 Engle also looks at claims brought under regional instruments, including the Inter-American Court of Human Rights, and a right to culture is protected in varying ways in other instruments, including the International Convention on the Elimination of All Forms of Racial Discrimination and the International Covenant on Economic, Cultural and Social Rights. But I have chosen to focus here on Article 27 simply because it is universal in application and because it has an enforcement mechanism in the form of the Optional Protocol, which allows individuals to bring claims to the Human Rights Committee.
27 Supra note 10 at Article 27.
be relied on as among the doctrinal techniques that international law offers to protect aboriginal cultural difference.\textsuperscript{29} This is in part because the Committee ruled that it will not hear claims under Article 1, which protects the right to self-determination, on the basis that self-determination is a collective, as opposed to individual right.\textsuperscript{30}

This distinction has come to seem strangely formalistic in light of the Committee’s ensuing interpretation of Article 27. The case of \textit{Ominayak and the Lubicon Lake Band v. Canada}\textsuperscript{31} provides an example. The claim of the Cree band in northern Alberta, brought as a result of oil exploration and resource extraction alleged to negatively affect their territory, was rejected on the basis of Article 1. However, the Committee decided that the communication was admissible under article 27.\textsuperscript{32} The Committee agreed with Chief Ominayak that “in an indigenous community, the entire family system is predicated upon the spiritual and cultural ties to the land and the exercise of traditional activities”.\textsuperscript{33} The Band’s loss of game and fish that formed its economic base, and the breakdown of its social institutions, had led to a transition away from a life of trapping and hunting to a sedentary lifestyle that has brought health problems and alcoholism.\textsuperscript{34}

Despite the denial of Article 1 as a means of redress, the Committee’s interpretation of Article 27 clearly imports a collective dimension. That interpretation is supported by the wording of the provision itself that the right is to be enjoyed “in community with the other members of

\begin{thebibliography}{9}
\bibitem{29} Patrick Macklem, \textit{Indigenous Difference and the Constitution of Canada} (Toronto: University of Toronto Press, 2001) at 69.
\bibitem{31} \textit{Ibid.}
\bibitem{32} \textit{Ibid.} at 13.4.
\bibitem{33} \textit{Ibid.} at 16.4.
\bibitem{34} \textit{Ibid.} at 23.2.
\end{thebibliography}
their group” as well as by the Article’s main interpretive guide, General Comment 23.\textsuperscript{35} In more recent decisions, the Human Rights Committee has reiterated the view that Article 1 can’t itself be a basis for a claim but the right of self-determination may affect other provisions of the Covenant, including the right to culture under Article 27.\textsuperscript{36}

The complaint is not simply that the Committee is doing with one Article what it claimed to be unable to do with another. It is rather that cutting off Article 1 as an avenue for indigenous claims, and interpreting Article 27 in a particular way as it relates to indigenous peoples, has the effect of perpetuating some of the dangers of pinning claims on a right to culture that Engle flags. General Comment 23, for example, states that

\begin{quote}
  culture manifests itself in many forms, including a particular way of life associated with the use of land resources, especially in the case of indigenous peoples. That right might include such traditional activities as fishing or hunting and the right to live in reserves protected by law.\textsuperscript{37}
\end{quote}

There is nothing wrong with fishing and hunting per se – indeed the Lubicon Lake Band, who live in a remote part of northern Alberta with, until recently, very little contact with the outside world wanted to preserve just that.\textsuperscript{38} But for many other groups, that ship has sailed. Development, urbanisation, environmental degradation and economic realities make maintaining what was once traditional impossible for many groups, and in some cases undesirable. In his separate opinion in the Lubicon Lake decision, Nisuke Ando expressed discomfort at the possible implications of linking indigenous traditions with particular traditional modes of production and enshrining them as part of a right to culture, and seemed to advert to the trap of essentialising and romanticising:

\begin{footnotes}
\item[35] General Comment No. 23: The rights of minorities (Art. 27) 50\textsuperscript{th} Sess., UN Doc. CCPR/C/21/Rev.1/Add. 5 (1994).
\item[36] Supra note 28 at 13.
\item[37] Supra note 35 at 7.
\item[38] Supra note 39 at 2.2.
\end{footnotes}
It is not impossible that a certain culture is closely linked to a particular way of life and that industrial exploration of natural resources may affect the Band's traditional way of life, including hunting and fishing. In my opinion, however, the right to enjoy one's own culture should not be understood to imply that the Band's traditional way of life must be preserved intact at all costs. Past history of mankind bears out that technical development has brought about various changes to existing ways of life and thus affected a culture sustained thereon.39

Attempts to define aboriginal cultural identity solely by reference to pre-contact ways of life risks stereotyping indigenous groups in terms of historical difference that may or may not have existed in the distant past.40 Engle also warns of the self-perpetuating nature of the problem, noting that as long as unrealistically coherent stories of culture are offered to fit into what advocates see as requirements of the law, the law will continue to require such narratives.41

Indeed, domestic jurisdictions have grappled with the same dilemma regarding the interpretation of indigenous rights. In Australia, for example, native title is seen as grounded in the customary beliefs and practices of indigenous peoples, and can be extinguished if those beliefs and practices are severed.42 In the leading Australian case on native title, *Eddie Mabo and Others v. The State of Queensland*,43 Brennan J. held that native title is given its content by the traditional laws and customs observed by the indigenous inhabitants of a territory,44 and a native title “which has ceased with the abandoning of laws and customs based on tradition cannot be revived for contemporary recognition”.45

39 Supra note 30 at 28.
40 Supra note 24 at 55.
41 Supra note 4 at 12.
44 Ibid. at 64.
45 Ibid. at 66.
Canadian courts have similarly emphasised culture – and a certain notion of culture – as a basis for granting indigenous claims. In *R. v. Van der Peet*, the majority held that “in order to be an aboriginal right an activity must be an element of a practice, custom or tradition integral to the distinctive culture of the aboriginal group claiming the right” at the time of contact. The requirement of a pre-contact referent in particular has been criticised. As McLachlin J. said in dissent, while rights are constant over time, the ways in which they are expressed may change; focusing on specific practices will invariably freeze the right. Further, with its focus on a certain notion of culture, the court treats cultural difference as the only aspect of indigenous difference that possesses constitutional significance, without explaining why it is worthy of protection at all.

In common with these interpretations is a notion of culture that places inherent limits on economic development. If the right to culture has proved unsatisfactory as a means to address indigenous development, what of Engle’s alternative of self-determination? Engle states that this has always been more a feature of North American indigenous movements than Latin American ones. This was largely because of the differing political contexts within which the groups were working, and because for some groups that did not want to pursue strong claims to self-determination, the right to culture was a viable alternative to support collective title and economic resources for development. For many years, self-determination as a concept was seen as simply too threatening and potentially destabilising to consider. Although the UN Declaration

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49 *Supra* note 29 at 59-60.
50 *Supra* note 4 at 8.
on the Rights of Indigenous Peoples forecloses external self-determination, the United States, Canada, New Zealand and Australia opposed the use of the term altogether fearing that it would be used to claim full independence. But Engle never fully explores the possible implications for indigenous peoples of the changing meaning of the term and how those changes might bear on the continued utility of grounding claims on a right to culture.

This is surprising, given the ways in which indigenous advocacy itself has contributed to that changing meaning. In its fullest sense, self-determination is a right to independent statehood. But as Anaya argues, the importance of the state is diminishing. The emerging model sees indigenous peoples as simultaneously distinct from, and part of, the state. In that account, self-determination is not achieved by independence, but by the consensual development of context-specific arrangements “that uphold for indigenous peoples both spheres of autonomy commensurate with relevant cultural patterns and rights of participation in the political processes of the states in which they live”.

In many ways this articulation maps on to the ideal form of the right to culture that Engle advocates for, but her understanding of self-determination seems to foreclose the possibility of her embracing it as an alternative. On the one hand, she acknowledges that the willingness of representatives to accept the term in the UN Declaration suggests that the strong meaning of self-determination had less currency in 2007 than it did in the 1980s and early 1990s. However, Engle also says the self-determination strategy has largely given way to models based on human

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51 Declaration on the Rights of Indigenous Peoples, GA Res. 61/295, UN GAOR (2007). Article 3 states that “Indigenous peoples have the right to self-determination”. But Article 46 says that nothing in the Declaration may be interpreted as authorising for any peoples action which would impair the territorial integrity or political unity of sovereign states.
52 Supra note 4 at 82.
53 Supra note 2.
54 Ibid. at 115
55 Ibid. at 116.
56 Supra note 4 at 88.
rights – especially the human right to culture.\textsuperscript{57} That comment seems to set up self-determination as something apart from human rights. But as Anaya and others point out, indigenous peoples themselves have been at the forefront of changing the meaning of self-determination in international law from a right associated with political power – and therefore threatening to the integrity of states – to a human right to be drawn down by groups within sovereign states as a means to, among other things, pursue economic development on their own terms.

Moreover, returning to Engle’s theme of development, the right to culture seems only meaningful in terms of development outcomes when its meaning is stretched to the point of self-determination. The interim report of the UN Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous peoples, for example, speaks to development with identity and culture, stressing mechanisms for participation of indigenous peoples in the design and implementation of development projects and noting that enhanced participation is conducive to successful outcomes.\textsuperscript{58} The report advocates governments advancing self-determination alongside the rights of indigenous communities to maintain cultural identities, and states that the capacity of indigenous peoples to pursue their own development priorities requires strengthening their own institutions and government structures.\textsuperscript{59} In discussing the ways in which the law has begun to demand certain conceptions of indigenous culture as a precondition to extending protections, Engle acknowledges that movements don’t merely defend identities, they also develop them.\textsuperscript{60} Thus a movement based around cultural identity faces the paradox that the culture changes as the group uses it. Nonetheless, she maintains that it can be salvaged, in

\textsuperscript{57} \textit{Supra} note 4 at 73.
\textsuperscript{58} \textit{Supra} note 3 at 8-15.
\textsuperscript{59} \textit{Ibid.} at 11.
\textsuperscript{60} \textit{Supra} note 24 at 50.
contrast to the alternative view that “this intrinsic irony can be resolved only by a focus on self-determination rather than concrete cultural content.”

**The Invisible Asterisk: When do International Human Rights Apply?**

In Engle’s view, apart from its shortcomings in achieving development goals, the right to culture has been incapable of fully mediating the tension represented by the commitment to both cultural difference and the human rights regime. Engle illustrates this tension by invoking the image of the “invisible asterisk”, which she describes as a proviso hanging over every protection of indigenous custom: ‘provided it is not so repugnant’. This section of the paper will examine Engle’s use and understanding of the term. It will look at the way the asterisk interacts with claims based on rights to culture, and briefly survey the different ways Engle invokes the term throughout her book. It will then make two arguments with regard to the invisible asterisk. First, one of Engle’s themes with regard to culture is her plea not to essentialise – for strategic reasons or otherwise – indigenous cultures, given the unintended consequences that often have the effect of limiting development. Yet in invoking the invisible asterisk with regard to cultural practices that might conflict with international human rights aimed at protecting individuals, she seems to imply a certain static view of culture. That is, while indigenous cultures must not be hemmed in by stereotypes about how they “should” operate in making claims based on culture, when it comes to cultural practices that conflict with human rights norms, change to accord with those norms is seen as a threat to the integrity of the culture. I will argue that this results in essentialising of a different sort. Second, Engle seems to posit an either-or distinction between cultural difference and universalism, which she equates with Western values. The final part of

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62 *Supra* note 4 at 105.
this section will argue, however, that universalism is capable of accommodating plurality without erasing the cultural difference that indigenous groups are seeking to protect. The point is not to wade too deeply into debates about universalism versus relativism, but to express dissatisfaction with the way that Engle at times collapses colonialist critiques of indigenous culture with critiques that stem from concern for protecting individual rights.

Engle borrows the term “invisible asterisk” from anthropologist Elizabeth Povinelli, who used it in relation to her study of Australian indigenous groups. Among the questions that Povinelli poses in her study, is on what basis a practice or belief switches from being an instance of cultural difference to being a source of repugnance for that culture. Povinelli highlights two aspects of this inquiry which map on to Engle’s discomfort with the unspoken proviso. First, in terms of claims to culture, indigenous peoples are left in an untenable position if they must show attachment to culture traditions in order to ground a claim and then have those traditions be deemed to run afoul of dominant norms.

Povinelli uses the example of the *The Members of the Yorta Yorta Aboriginal Community v. the State of Victoria* to illustrate this bind. In that case the claimants, primarily urban Aborigines, conceded that they had long since stopped observing traditional practices in relation to initiation activities or “indicative of spiritual attachment to the land.” The court rejected their claim on the basis that native title had been extinguished through the lack of maintenance of beliefs and practices giving cultural rights their content. Yet given that some of those traditional practices entailed the man being “despotic in his own hut” and children as belonging to the

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64 *Supra* note 42.
65 *Ibid.* at 164-166
67 *Supra* note 42 at 166.
68 *Ibid.* at 166. Povinelli was citing Edward Curr, an anthropologist who testified as to Yorta Yorta culture.
tribe of the husband, were those practices found to continue to the present day, they might fall afoul of Australian civil and possibly criminal law.\textsuperscript{69}

Secondly, Povinelli offers examples which illustrate what Engle fears in using “western” values as a yardstick by which to judge certain aspects of cultural difference over others. Australian history (and Canadian for that matter) is full of instances in which a moral sensibility of just action was in retrospect seen as prejudicial reaction,\textsuperscript{70} one of the most infamous examples in both countries being the sending of native children to residential schools. The worry then, is an understandable one – that the right to culture as judged by Western courts will result in those aspects of difference that are compatible with, or romanticised by the dominant culture, being preserved at the expense of traditions indigenous groups might see as crucial to their identities.

In Engle’s book, the invisible asterisk is invoked at varying instances to support her argument that the limits on difference are built into the international legal protection of cultural rights. In her discussion of culture as heritage, for example, the asterisk manifests itself in the way states and international institutions pick and choose parts of the heritage they believe are worth protecting, and suppress those parts of which they don’t approve.\textsuperscript{71} In that framework, the right to culture provides an avenue for dominant societies to fail to protect those parts of indigenous culture that appear uncivilized.\textsuperscript{72} In the conception of culture as land, indigenous peoples are expected to be protectors and guardians of the land, yet at the same time states

\textsuperscript{69} Supra note 42 at 169.  
\textsuperscript{70} Ibid. at 12.  
\textsuperscript{71} Supra note 4 at 143  
\textsuperscript{72} Ibid. at 148-149.
prohibit groups from using that land in a way that goes against what the state sees as the group’s purported attachment to it.\textsuperscript{73}

At other points, Engle’s conception of the asterisk goes beyond an objection to outside actors picking and choosing which aspects of an indigenous culture are worth protecting, to an assault on the international human rights regime itself as a construct that is Western, and in tension with indigenous traditions. In stating for example, that “the right to culture has been incapable of fully mediating the tension represented by th[e] dual commitment to cultural difference and to the human rights regime”\textsuperscript{74} she sets up the two in opposition – the rights regime being something foreign to, and therefore threatening to, indigenous culture. Engle further states that restraints on rights to culture find their sources in the language of human rights, with values of Western culture used as a yardstick.\textsuperscript{75} Again, she implies both that human rights are not universal at all, but a Western construct and a challenge to indigenous cultural integrity. Engle goes on to say that the asterisk limits the right to culture at the moment the practice violates “universal” human rights.\textsuperscript{76} In doing so, she rejects the very premise of the international human rights regime – universalism – seeing it as unable to accommodate cultural difference.

If Engle explicitly argued for a relativist position, the parameters of the asterisk as she invokes it might be defensible. However, she never fully grapples with concepts of moral universalism, nor shows why universalism is unable to accommodate difference. Defenders of universal human rights see it as protecting essential features of humanity, in philosopher James Griffin’s words, protecting our human standing. In his account, that can be distilled to protecting

\textsuperscript{73} Ibid. at 169-71.
\textsuperscript{74} Ibid. at 105.
\textsuperscript{75} Ibid. at 133.
\textsuperscript{76} Ibid. at 134.
the autonomy and liberty of individuals. Others argue that moral universalism is not opposed to plurality, it presupposes it. The question is not whether the framework allows for difference, but which forms of pluralism can be accommodated within it, on both a normative and practical level. If cultures and societies are dynamic and fluid in the way that Engle would like them to be seen, there is no inherent reason why changes that improve respect for human rights should threaten cultural integrity or other aspects of a society’s identity.

Even if it is assumed that the international human rights regime presupposes a Western bias, there are ways to handle their implementation so that those who do not correspond to the implicit reference point do not experience a form of exclusion. Eva Brems, for example, argues for two flexibility devices as a means of achieving universality. The first she articulates as a margin of appreciation, looking at the way that the European Court of Human Rights balances individual rights claims with sensitivity to local differences. Its approach extends to national authorities a margin of appreciation to determine when a restriction is legitimate in the context of that society. Brems laments the lack of debate as to how a similar approach could work globally.

Brems’ second device is progressive realisation, which, rather than accounting for spatial difference, accommodates diversity through sequencing in time. While “core” human rights obligations, that is, civil and political rights, have been seen as conferring immediate obligations, sequencing has been used as a tool to accommodate economic diversity across states in measuring their achievement of economic, social and cultural rights. But Brems sees the distinction as a false one. First, because there is a link between economic status and the ability to

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80 Ibid. at 67.
access rights frameworks.\(^81\) And second, because progressive standards could be applied to cultural diversity as well as economic diversity, adapting legal obligations to the reality that cultural change is slow, while still holding states accountable.\(^82\) As Brems argues, human rights are a revolutionary discourse as applied to \textit{all} cultures. Assuming that all cultures are patriarchal, for example, women’s rights are inherently countercultural.\(^83\) Yet states have, to greater or lesser degrees, come to terms with the limitations on their exercise of authority imposed by the UN Charter and the duty to act in accordance with the international human rights regime.

In Engle’s analysis, however, she seems to see protection of individual rights as threatening to the collective, and the two as necessarily in conflict. But there is potential, for example, for the two to come together in the evolving conception of self-determination as human right, rather than a political right to sovereign territory.

Indigenous peoples typically assert their political rights, which they encapsulate under the rubric of self-determination, not by invoking power … which international law typically associates with statehood, but by evoking need …, which international law typically associates with human rights. In this regard, indigenous peoples are creating a provocative connection between two international law domains that have hitherto been conceptually segregated.\(^84\)

While Engle on one level acknowledges that, she seems to shunt it aside in comments, for example, that there is something uncomfortable about ‘white men saving brown women from brown men’.\(^85\) But it seems churlish to deny individuals within indigenous collectivities certain human rights protections simply because the culture she sees as imposing those protections is itself imperfect.

\(^{81}\) \textit{Supra} note 1 at 859.
\(^{82}\) \textit{Supra} note 79 at 73-75.
\(^{83}\) \textit{Ibid.} at 73.
\(^{84}\) \textit{Supra} note 4 at 99, quoting Maivan Lam, \textit{At the Edge of the State: Indigenous Peoples and Self-Determination} (Ardsley: N.Y. Transnational, 2000).
\(^{85}\) \textit{Ibid.} at 137.
The same notion that protection for the collective necessarily brackets the rights of the individual is seen in arguments that certain aboriginal interests give rise to a right of self-government that may authorise enforcement of cultural norms against unwilling individuals.\footnote{Supra note 29 at 51.} Macklem argues that the authority to enforce those norms depends on the scope of their governmental authority.\footnote{Ibid. at 52.} But it would seem that the relationship works more logically in the inverse. Part of the corollary of self-determination is that the indigenous groups itself takes on some of the attributes of a state – it governs, at least to an extent, its own affairs. The trade-off is that it also then bears duties to its members in the same way that the outer bounds of states’ authority over their citizens are policed by the international human rights regime.

To suggest that the imposition of such duties would result in a degradation of culture is to deny the dynamism of cultures and to freeze them in pre-modern times in just the way that Engle objects to. The Canadian case of Norris v. Thomas\footnote{Norris v. Thomas, [1992] 2 C.N.L.R. 139.} is illustrative. In that case, the plaintiff, a member of a Coast Salish nation, brought a claim for damages against other members of the band, alleging that they had grabbed him and taken him against his will to a four-day initiation ceremony, during which he was forcibly confined, physically assaulted, and denied food and water. The defendants argued that they lacked the intent to harm him. They also invoked a constitutional defence related to their indigeneity – that they had the legal right to initiate the plaintiff pursuant to s. 35(1) of Canada’s Constitution Act, 1982,\footnote{Ibid. at 4.} which “recognizes and affirms” aboriginal and treaty rights. Hood J. for the Supreme Court of British Columbia agreed that the plaintiff had been taken against his will and rejected the argument based on s. 35(1). This was in part because the spirit dance was found not to meet the test set out by Canada’s Supreme Court
to establish a practice as an aboriginal right. But more importantly for the purposes of this discussion, Hood J. concluded that a tradition that involved force and assault could not be said to be a continuing aboriginal right.\textsuperscript{90} He then went on to say that assuming that spirit dancing was an aboriginal right, on the evidence it was not clear that forcing an initiate to participate was an integral part of that right;\textsuperscript{91} the right, if it existed was not absolute;\textsuperscript{92} and that the imposed parameters in no way threatened the continuance of the Coast Salish tradition.\textsuperscript{93}

**Indigeneity: The Parameters of Difference**

All of the themes of Engle’s book discussed above – the right to culture, self-determination as a human right, and the way in which Western norms may shape or limit the content of indigenous rights – challenge the traditional view of individuals as the subjects of international human rights law. Those areas implicate collectives as well as individuals, and the two overlap in complicated ways. But part of what may be behind the unsatisfying elements of Engle’s analysis discussed in this paper is the fact that she does not adequately probe what it is about indigeneity that makes it deserving of differential treatment in international law, and differential treatment in terms of human rights law. Implicit throughout her book are two threads of reasons. The structural account, stemming from international law’s complicity in colonialism and the historic exclusion of indigenous peoples from the distribution of sovereignty,\textsuperscript{94} and normative reasons, in terms states’ appalling mistreatment of indigenous peoples. But Engle never explicitly probes whether there is something specific to indigenous peoples per se that grounds her analysis. Some inquiry into the boundaries of a justification for indigenous difference may clarify the

\textsuperscript{90} Ibid. at 40.
\textsuperscript{91} Ibid. at 43.
\textsuperscript{92} Ibid. at 48
\textsuperscript{93} Ibid. at 43.
appropriate balancing of individual and collective rights, or the parameters of a right to culture, or justify the potentially more radical right of self-determination.

Why, for example, is the situation of indigenous peoples different from that of any other minority? To an extent, Engle answers that question from the outset, with her premise that economic development, and its ‘elusive promise’ of her title are the underlying goal of indigenous claims to culture and self-determination. Presumably minorities, as a broader category, might at least in part have different goals and not all would be coming from a starting point of economic exclusion. But a large number of them likely would, including the very example Engle uses in her case study, that of Afro-Colombians. In those chapters, Engle examines the impact of Colombia’s Law 70, adopted in 1993, to recognise the right to collective property of black communities (the descendants of slaves) and to protect their cultural identity. Engle details the ways in which Afro-Colombians face much of the same marginalisation as that country’s indigenous peoples, and have asserted cultural rights in response as a political strategy. But while she argues that Afro-Colombian communities are vulnerable to some of the same pitfalls as indigenous groups in terms of facing unintended consequences of advocacy strategies grounded in culture, Engle does not probe what, if any, difference in legal treatment is justified for one group over the other.

What are the justifications for granting rights based on the recognition of a distinct category of indigenous peoples? To what extent are the same justifications applicable to all minorities? Benedict Kingsbury attempts to tackle that question with a schema to define indigenous peoples, arguing for a definition of “indigenous” that is sufficiently flexible to accommodate a range of

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95 Supra note 4, 224-253.
96 Ibid. at 228.
justifications\textsuperscript{97} but less “general and ubiquitous” than the concept of minority.\textsuperscript{98} Instead of a positivist approach, treating indigenous peoples as a legal category requiring precise definition, Kingsbury argues for a constructivist approach that can accommodate groups beyond the settler society context of North America and Latin America. He points to four justifications in particular: a special relationship to the land—though not necessarily one that extends through time immemorial; experience of severe dislocation or exploitation; the wish to maintain a distinct identity; and self-identification of the group as indigenous peoples.\textsuperscript{99}

Again, however, there is a lack of clarity as to why those factors make indigenous peoples sufficiently distinct from other marginalised minorities in order to justify the granting of certain rights or a certain treatment in international law. That question becomes acute for two reasons. First, because collective claims of indigenous peoples are up against a powerful strand of Western liberalism that takes the individual as its essential subject and is wary of slippage into “ethnicized politics”.\textsuperscript{100} This tension was seen in the discussion of the invisible asterisk—while there is commonly agreement that some measure of legal protection is justified, the parameters are deeply contested. Second, many of the claims by indigenous peoples in international law do not depend on their status as indigenous. A case in point is the right to culture, which, as articulated in Article 27, is available to any individual member of a minority. But again, while Engle analyzes the way in which the right to culture has been shaped in the indigenous context, she does not probe the question of whether a generic right such as that of cultural protection justifies a different or broader array of entitlements within that context.

\textsuperscript{98} Ibid. at 450.
\textsuperscript{99} Ibid.
\textsuperscript{100} Ibid. at 425.
Prior sovereignty may justify some claims, though that justification would necessarily leave out those groups outside of the settler society context. Moreover, the fact of prior sovereignty does not explain any parameters of indigenous rights, short of self-government. In Canada, for example, the courts have elevated aboriginal cultural difference to something deserving of constitutional protection, without any real justification for why that aspect of difference is singled out.\(^\text{101}\) Why, for example, should prior occupancy ground a positive claim that aboriginal cultural practices deserve protections?\(^\text{102}\) And, as Engle illustrates in her discussion of culture as development, seizing on culture as an area deserving of special protection has consequences for paths of development available to indigenous groups. It may foreclose the possibility, for example, of pursuing gaming as a means to economic development. Indeed in the Canadian case of \textit{R. v. Pamajewon}, the court rejected a claim that gaming on the Eagle Lake First Nation was lawful as part of the band’s aboriginal right to manage its own economic affairs on reserve land.\(^\text{103}\) By contrast, the U.S. permits Indian tribes to run gaming operations as a means to facilitate economic development.\(^\text{104}\) Engle uses this example to question the extent to which, in the U.S., the goal of preserving cultural identity has been divorced from legal justifications for the economic activity.\(^\text{105}\) Another possible justification to ground claims is based on the idea of redress for historic acts of oppression, and more importantly that these past acts translate into current and ongoing inequities.\(^\text{106}\) In that sense, the process of redefining the parameters of the

\(^{101}\) \textit{Supra} note 29 at 59.

\(^{102}\) \textit{Supra} note at 69.


\(^{104}\) \textit{Supra} note 4 at 211. Engle also notes that some tribes, including the Navajo and Hopi, have refused to engage in gaming operations in part because of concerns over its assimilative effects.

\(^{105}\) \textit{Supra} note 4 at 212.

\(^{106}\) \textit{Supra} note 2.
rights of indigenous peoples has been described as a kind of “belated State-building”, involving incorporating indigenous groups into the fabric of the state on agreed terms.\textsuperscript{107}

Defining the parameters of indigenous difference and the significance of those parameters for attempts to draw down international human rights protections, is the subject of another paper. The point here though, is that an attempt on the part of Engle to grapple more explicitly with those questions might help to resolve some of what is unsatisfying about her otherwise rich and layered approach to the impact of legal advocacy strategies on indigenous cultures and indigenous development. It might also contribute to her analysis of how indigenous advocacy can more effectively achieve its goals. Is part of the reason the right to culture is unsatisfying as a basis for redressing development disparities among indigenous communities, for example, because the right was intended for a broader subset – minorities – and is somehow ill-suited to indigenous particularity? Or is the issue not indigenous difference itself, but a certain perception of difference imposed by courts and governments. Such an inquiry might help unravel part of what, to use Engle’s term, is “elusive” about indigenous development.

\textsuperscript{107} This argument was made by Erica-Irene Daes, former chair of the UN Working Group on Indigenous Populations, described by Anaya, \textit{Ibid.} at 116.