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VIRTUOUS RACIAL STATES

The Possessive Logic of Patriarchal White Sovereignty and the United Nations Declaration on the Rights of Indigenous Peoples

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In this article, I demonstrate how patriarchal white sovereignty deploys virtue to dispossess Indigenous peoples from the ground of moral value by focusing on the United Nations Declaration of the Rights of Indigenous Peoples. This will be explicated through analysing the introduction and four key rights areas that were contested by Canada, Australia, the United States and New Zealand, and looking at core elements of their subsequent endorsement of the Declaration.

> For, indeed, in a society in which the machinations of racism are everywhere, white people are *the* problem. Said differently, racism is a *white* problem. People who are white created white supremacy and people who are white sustain it. Our actions, attitudes, and ways of being subvert justice, cross-racial solidarity, and reconciliation. More insidiously, we benefit profusely from the prevalence of racial injustice, even as we are spiritually, psychologically, and morally malformed by it.[1]

The contentions in the above quote, by white American scholar Jennifer Harvey, are not new to Indigenous people. We experience and tolerate racism on a daily basis, and its perpetration is usually invisible to those who practise it, particularly when it is exercised with a reliable self-calibrated moral compass. It would be a mistake, however, to place total responsibility with individual white subjects for their attitudes and behaviour when relations of force shape and produce the conditions under which racism flourishes. Governments were responsible for facilitating and appropriating Indigenous lands and through the use of law enabled the death of Indigenous peoples who impeded progress. Governments dehumanised Indigenous peoples in order to legitimise their actions and then sought to make us fully human by exercising benevolence and virtue in its many forms.[2] As Brickman argues, 'through the legal structures that

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[1] Harvey (2007), p 7.

[2] Dahlsgarrd et al (2005).

were the legacy of the Crusades, the necessity of converting [Indigenous] peoples to Christianity would provide the mandate for the conquest of their lands and the appropriation of their wealth and labour'.[3] In the twenty-first century, colonisation remains unfinished business within states such as Australia, New Zealand, Canada and the United States, as evidenced by the very existence of the Declaration on the Rights of Indigenous Peoples.

After more than two decades of deliberations, the Declaration on the Rights of Indigenous Peoples was tabled at the UN General Assembly for its consideration on 13 September 2007. The political roots of this declaration lie with Haudenosaunee Chief Deskaheh[4] and Maori TW Ratana, who in 1923 and 1925 respectively sought access to the League of Nations to bring to the attention of the international community Canada and New Zealand's violations of treaty agreements and rights.[5] They were both denied access to the League of Nations' assembly after successful lobbying by Britain, Canada and New Zealand, which argued that the issues raised were domestic rather than international matters and should be treated accordingly. Chief Deskaheh and TW Ratana, though unsuccessful in their advocacy, provided a pathway for the contemporary global Indigenous rights movement. Some 86 years later, Indigenous peoples continue to express the same concerns at the United Nations. The United Nations is primarily a statist organisation, as is evidenced in Article 2 of its Charter, which 'consecrates the doctrine of equal sovereignty, territorial integrity, and non-intervention'.[6] Australia, Canada, New Zealand and the United States are founding members and were instrumental in its development.

The UN Declaration on the Rights of Indigenous Peoples was the outcome of the accumulated efforts of Indigenous Non-Government Organisations (NGOs), activists and transnational networks. In the 1970s, they began to develop an international Indigenous rights document to protect the rights of Indigenous peoples.[7] Indigenous people from Australia, New Zealand, Canada and the United States played key roles in the deliberations. They advocated for the declaration to be a major objective of the UN International Decade of the World's Indigenous Peoples, from 1995–2004. However, it did not come to fruition until the United Nations' second Decade of the World's Indigenous Peoples, which started in 2005 and ends in 2015. The delay in finalising the Declaration was due in large part to the opposition and debates generated by several states as it moved through UN processes. In particular, Canada, New Zealand, Australia and the United States were persistent objectors on 'provisions relating to the

3 Brickman (2003), p 22.

4 Grace Li Xiu Woo (2003).

5 Corntassel (2008); see United Nations Permanent Forum on Indigenous Issues, www.un.org/esa/socdev/unpfii/en/history.html.

6 Jackson (2007), p 8.

7 Corntassel (2007); Davis (2008).

right to self-determination and lands, territories and resources'.[8] The United States, Canada, New Zealand and Australia were the only states to vote against the Declaration, which was endorsed by 144 member states constituting the majority of the UN General Assembly. Almost half of the Indigenous population of the world lives within the borders of these four states.

Anaya and Wiessner (2007) argue that there were very few changes made to the Draft Declaration after its endorsement by the Human Rights Council and transition to the General Assembly. They note that:

> Beyond recognition of the right to self-determination, the Council's text formulated an array of tailor-made collective rights, such as the right to maintain and develop their distinct political, economic, social and cultural identities and characteristics as well as their legal systems and to participate fully, 'if they so choose', in the political, economic, social and cultural life of the state. [Indigenous peoples] were guaranteed the right not to be subjected to genocide or ethnocide, ie action aimed at or affecting their integrity as distinct peoples, their cultural values and identities, including the dispossession of land, forced relocation, assimilation or integration, the imposition of foreign lifestyles and propaganda. The stated rights guaranteed … include the right to observe, teach and practise tribal spiritual and religious traditions; the right to maintain and protect manifestations of their cultures, archaeological-historical sites and artifacts; the right to restitution of spiritual property taken without their free and informed consent, including the right to repatriate [Indigenous] human remains; and the right to protection of sacred places and burial sites … the rights to maintain and use tribal languages, to transmit their oral histories and traditions, to education in their language and to control over their own educational systems … the right to maintain and develop their political, economic and social systems, and to determine and develop priorities and strategies for exercising their right to development. Their treaties with states should be recognised, observed and enforced … the Declaration supports the right of Indigenous people to own, develop, control, and use the lands and territories which they have traditionally owned or otherwise occupied and used, including the right to restitution of lands confiscated, occupied or otherwise taken without their free and informed consent, with the option of providing just and fair compensation wherever such return is not possible.[9]

Since the adoption of the Declaration, several legal scholars have examined the history of its development and the scope of its influence on international law.[10] Others have argued that the Declaration 'declares a set

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8 Davis (2008), p 9.

9 Anaya and Wiessner (2007), p 1. 'The UN Declaration on the Rights of Indigenous Peoples' (2007).

10 Fromherz (2008); Davies (2008); Kakungulu (2009); Wiessner (2008); Gilbert (2007).

of rights and morally obligates all declaring states to implement and enforce those rights'.[11] It 'lays a foundation for the creation of future binding international law, expressed primarily through multilateral treaties based on the [declaration's] principles and secondarily through the development of customary international law'.[12] However, state violation of Indigenous rights is not judicially enforceable within international courts. This body of literature responds implicitly or explicitly to two of the key assertions made by the states who voted against the Declaration. The first assertion is that the Declaration is a moral and political document, but not a legally binding one, and the second is that the internal laws of the state will prevail. These assertions were made by the dissenting states even though Article 46(1) of the Declaration qualifies the Indigenous rights encapsulated within the document. It does so by precluding the right to take any action by state, people, group or person contrary to the Charter of the United Nations or any that would 'dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States'.[13] Article 46(2) states that the exercising of the rights enshrined in the document are limited by law and human rights obligations.

The limitations imposed on Indigenous rights and the protection afforded state sovereignty by the Declaration raise a question. If, as Canada, New Zealand, the United States and Australia assert, the Declaration is a moral and political document that is not legally binding, what is operating discursively to affect their opposition and subsequent endorsement of it? In this article, I am not concerned with the function of the Declaration within international law; instead, my focus is on the ways in which morality and politics were deployed by nation-states. This will be demonstrated through analysing the introduction and four key rights areas that were contested by Canada, Australia, the United States and New Zealand, followed by an examination of the core elements of their subsequent endorsement of the Declaration.

Patriarchal White Sovereignty

In this article, I argue that the possessive logic of patriarchal white sovereignty operates discursively, deploying virtue as a strategic device to oppose and subsequently endorse the Declaration. As an attribute of patriarchal white sovereignty, virtue functions as a useable property to dispossess Indigenous peoples from the ground of moral value.[14] My concept of patriarchal white sovereignty draws on the work of Foucault, who argued that sovereignty is born of war enabled by a mythology of the

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11 Fromherz (2008), p 1343.

12 Fromherz (2008), p 1343.

13 United Nations Declaration on the Rights of Indigenous Peoples, General Assembly A/RES/61/295, adopted on 13 December 2007, http://daccess-dds-ny.un.org/doc/UNDOC/GEN/NO6/512/07/PDF/NO651207.pdf?OpenElement p12.

14 Nicoll (2000), p 382.

divine right of kings. Sovereign absolutism was marked by gender and race in the seventeenth century, though race was considered a linguistic marker. Patriarchal white sovereign absolutism, though internally fractured, waged war to appropriate land and resources. Thus the foundations of modern sovereignty have a gendered and racial ontology – that is, sovereignty's divine being as a regime of power is constituted by and through gender and race. The transition from sovereign absolutism to its modern form was produced through a counter-discourse of rights through the challenge to the King's power by his knights. Foucault argues that having become legitimate and normalised, the nobility's assertion of rights was utilised by the commoners as an impetus to the French Revolution; in this way, a 'partisan and strategic' truth became a weapon of war.[15] Within modernity, sovereignty shifts from being concerned with society defending itself against external threats to focus on its internal enemies. Race becomes the means through which the state's exercise of power is extended from one of 'to let live or die', to one of ' to let live and to make live'.[16] For Foucault, race and sovereignty have a symbiotic relationship. Goldberg further develops this point when he argues that sovereignty is the defining and refining condition of modern state formation, and the law is deeply embedded in intensifying and cementing 'lines of power in state formation'.[17] In discussing states of racial being, he argues that:

> It is important to recognise that the racial state trades on gendered determinations, reproducing its racial configurations in gendered terms and its gendered forms racially. Bodies are governed colonially and postcolonially, through their constitutive positioning as racially engendered and in the gendering of their racial configuration.[18]

Australia, Canada, the United States and New Zealand are racial states whereby patriarchal white sovereignty as a regime of power is the defining and refining condition of their formations, ordaining them ontologically with a sense of divinity. When Foucault argues metaphorically that sovereignty in its modern form is represented as a headless King whose body is still intact, he is talking about the manifestation of sovereign power within the modern state.[19] However, he leaves the trace metaphysical connection between head and body unexamined. Unlike Foucault, Derrida recognised this in his construction of sovereignty as a metaphysical category that encroaches on life, insofar as it nominates a power, potency or capability that is found in the very 'I can', thus 'there is no liberty

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15 Foucault (2004), p 57.

16 Foucault (2004), p 57.

17 Goldberg (2002), p154.

18 Goldberg (2002), p 99.

19 Neal (2004); Moreton-Robinson (2006).

without selfhood and no selfhood without liberty'.[20] Derrida's notion of 'I can' requires will as much as it requires freedom in his concept of popular sovereignty. However, there is a fundamental distinction between the sovereignty of the individual and the sovereignty of the state, though both require the prevention of intervention from outside. This protection from the intervention of others has its ontological roots in Christianity. Kahn argues that:

> historically it emerges directly from the wars of the reformation and represents the same kind of prudential response to diversity within the Christian faith that liberalism more generally represents. The prudential, however, rests on a deeper principle of Christian belief: The truth, and the true virtue of the individual, is located in the interior working of the will, in the way in which the subject brings himself into a relationship with God. Politically, this point supports a conception of truth of the [state] as a manifestation of interior self-realization, rather than outward power.[21]

In this way, sovereign power is a state's internal self-realisation of its truth and virtue, whereby will and possession operate discursively. Virtue functioned as useable property within the legal doctrine of discovery, which provided the rationale for sovereign wills to take possession of Indigenous peoples' lands from the sixteenth century onwards. This doctrine was developed in the fifteenth and sixteenth centuries by Spain, Portugal, England, France and the church to enable the theft of Indigenous peoples' lands.[22] It was their divinely ordained destiny to redeem the lesser humans of the world through the application of their unique moral virtues. In this way, virtue functions within the ontology of possession, which occurs through the imposition of sovereign will-to-be on Indigenous lands and peoples that are perceived to lack will, thus they are open to being possessed. This enables sovereignty to lay claim to own Indigenous lands and peoples because 'wilful possession of what was previously a will-less thing' is constitutive of its ontology.[23] It is invoked whenever the state proclaims its ownership. The state's assertion that it owns the land becomes part of normative behaviour, rules of interaction and social engagement embodied by its citizens. It is most acutely manifested in the form of the state and the judiciary. Thus possession and virtue form part of the ontological structure of patriarchal white sovereignty that is reinforced by its socio-discursive functioning within society enabled by the body of the state.

As part of state-formation and regulation, patriarchal white sovereignty is mobilised through a possessive logic that operates

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20 Derrida (2005), p 11.

21 Kahn (2004), p 260.

22 Miller (2008), p 5.

23 Nicolacoupoulos and Vassilacopoulos (2004), p 38.

ideologically and socio-discursively. Here I use the concept 'possessive logic' to denote a mode of rationalisation, rather than a set of positions that produce a more or less inevitable answer, which is underpinned by an excessive desire to invest in reproducing and reaffirming the state's ownership, control and domination. The possessive logic of patriarchal white sovereignty is compelled to deny and refuse what it cannot own – the sovereignty of the Indigenous other. This ontological disturbance/fracture is one of the reasons why the state deploys virtue when working hard at racial and gendered maintenance and domination in the guise of good government. Virtue functions through reason within sets of meanings about patriarchal white ownership of the nation within the law, as part of commonsense knowledge, decision-making and socially produced conventions by which societies live and govern behaviour. The possessive logic of patriarchal white sovereignty has served to define the attributes of personhood and property through the law. As Harris argues, the theft of Indigenous lands was ratified by bestowing and 'acknowledging the property rights of whites in [Indigenous lands]. Only white possession and occupation of land was validated and therefore privileged as a basis for property rights.'[24] The possessive logic of patriarchal white sovereignty was deployed in defining who was – and who was not – white, conferring privilege by identifying what legal entitlements accrued to those categorised as white. At the beginning of the twentieth century, this same logic operated, making whiteness itself a visible form of property – particularly through immigration laws and those affecting Indigenous peoples – and at the commencement of the twenty-first century it continues to function invisibly, informing the legal exclusion and regulation of those who transgress within and outside its borders. For example, after the 9/11 attacks on domestic soil, the US government increased domestic security measures through the law, which enabled the hyper-regulation and surveillance of citizens and visitors within its borders. It is no coincidence that Canada, Australia and New Zealand followed the United States, and implemented a similar domestic security regime. I will now turn to examine their collaborative efforts against the Declaration of Indigenous Rights.

Dis/senting States: Possessing the Moral High Ground

The endorsement of the Declaration by majority vote within the UN General Assembly produced an existential crisis for Australia, Canada, New Zealand and the United States, which responded to this overwhelming support as if their sovereignty had been transgressed. They operationalised their possessive logic by mobilising virtue as a strategic device to explain their dissent. Australia stated that it had 'actively worked to ensure the adoption of a meaningful declaration',[25] Canada noted that it had 'been an

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24 Harris (1993), p 1716.

25 UN Sixty-first session, A/61/PV.107, 2007, p 11.

active participant in its development'[26] and New Zealand said it had 'worked hard to the very end to narrow our concerns and to be able to support this text',[27] while the United States stated that it had 'worked hard for 11 years in Geneva for a consensus Declaration'.[28] In deploying the notion of 'working hard' as a virtue, these states are implicitly positioning the rest of the participants as not sharing their commitment and values, which is evidenced by their criticism of the process for the final drafting of the Declaration. Australia said it had engaged constructively in the elaboration of the text but was not given 'a chance to participate in the negotiations on the current text of the declaration'[29] to achieve consensus. Canada believed that 'had there been an appropriate process in place to address these concerns, and the concerns of other States, a stronger Declaration would have emerged',[30] while the United States asserted that:

> the document before us is a text that was prepared and submitted after the negotiations had concluded. States were given no opportunity to discuss it collectively. It is disappointing that the Human Rights Council did not respond to calls we made, in partnership with Council members, for States to undertake further work to generate a consensus text.[31]

These assertions of constructive participation in the development of the declaration belie their consistent objections during the 20 years of its formation. In a discursive turn, they operationalise virtue by positioning themselves as willing and constructive participants, implying that Indigenous participants were destructive and unwilling. This is why the process was inappropriate and their concerns were not addressed. The process is positioned as being flawed to the extent of the lack of prioritisation and inclusion of their concerns in the final text. Their assumed sovereign right to possess and control the process is asserted, notwithstanding their minority representation as dissenting states. This is evidenced by the way they exaggerate the degree of support from other states in order to amplify their opposition. The appeal to reaching consensus on the document, which they assert would have been made stronger by their involvement, is a disingenuous strategy aimed at recuperating virtue to mask how they actively worked against any consensual outcome.

In their opening remarks, Canada, New Zealand and the United States stated that they hoped the document would promote harmonious relations between states and Indigenous peoples. Canada noted: 'We have sought for

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26 UN Sixty-first session, A/61/PV.107, 2007, p 12.

27 UN Sixty-first session, A/61/PV.107, 2007, p 14.

28 UN Sixty-first session, A/61/PV.107, 2007, p 15.

29 UN Sixty-first session, A/61/PV.107, 2007, p 11.

30 UN Sixty-first session, A/61/PV.107, 2007, p 12.

31 UN Sixty-first session, A/61/PV.107, 2007, p 15.

many years, along with others, an aspirational document that would advance Indigenous rights and promote harmonious arrangements between Indigenous peoples and the states in which they live.'[32] New Zealand said that 'in our experience, the promotion and protection of Indigenous rights requires a partnership between the State and Indigenous peoples that is constructive and harmonious',[33] while the United States stated 'the declaration on the rights of Indigenous peoples, if it were to encourage harmonious and constructive relations, should have been written in terms that are transparent and capable of implementation'.[34] Australia did not mention that harmonious relations were an aspiration of the document, and all four states reiterated that they would continue to work to promote Indigenous rights nationally and internationally. By raising or ignoring the concern that the Declaration should have promoted harmonious relations between Indigenous peoples and states, these states are implicitly blaming it for promoting disharmony. By bringing the need for harmony to the surface, they are unconsciously acting out that which is repressed: their disharmonious relations with Indigenous peoples. If harmony existed between Indigenous peoples and states, then there would be no need to raise it as an issue to be promoted. They discursively deploy virtue through reiteratively stating that they are working to protect Indigenous rights while displacing the cause of their respective internal Indigenous/state conflict on to the document, and by default Indigenous peoples. They take possession of the moral high ground by blaming Indigenous peoples for not wanting to work in harmony. A strategy deployed is their opposition to core provisions of the Declaration.

Aspirations

In particular, the nature of the Declaration was a core shared concern. Australia stated that 'it is the clear intention of all States that it be an aspirational document with political and moral force but not legal force. It is not intended itself to be legally binding or reflective of international law.'[35] Canada noted that 'for clarity, we also underline our understanding that this Declaration is not a legally binding instrument. It has no legal effect in Canada, and its provisions do not represent customary international law.'[36] In contrast, New Zealand stated that while the Declaration was explained as being aspirational, 'intended to inspire rather than to have legal effect … [it] is unable to support a text that includes provisions that are so fundamentally incompatible with our democratic processes, our legislation and our constitutional arrangements'.[37] The

32 UN Sixty-first session, A/61/PV.107, 2007, p 12.

33 UN Sixty-first session, A/61/PV.107, 2007, p 14.

34 UN Sixty-first session, A/61/PV.107, 2007, p 15.

35 UN Sixty-first session, A/61/PV.107, 2007, p 12.

36 UN Sixty-first session, A/61/PV.107, 2007, p 13.

37 UN Sixty-first session, A/61/PV.107, 2007, p 14.

United States said 'it was the clear intention of all States that it be an aspirational declaration with political and moral, rather than legal force … The United States rejects any possibility that this document is or can become customary international law.'[38] If, as states stipulate, Indigenous rights are only aspirational – something desired to achieve – then why invoke the law, domestic or international, to refuse any legality? In so doing, they are staking a possessive claim to international law by defining its limits. They reduce the contents of the Declaration to mere aspiration, albeit with moral and political force, to argue against the legality of Indigenous rights. In doing so, they reveal a displaced desire to render the Declaration legally void in order to refuse Indigenous rights claims. They recuperate virtue by negation: Indigenous rights should have no legal status within international law because states are the primary subjects of international law and possess the greatest range of rights and obligations. It is interesting that these four states express no real concern about the moral and political force of the Declaration. This is because, as members of the United Nations, their sovereign independence is guaranteed. It is their sovereign *right* to subject Indigenous peoples to their law, morality and politics without intervention.

Self-determination

One of the core rights within the Declaration – the right to self-determination – was opposed by Australia and the United States. Australia argued that the right of self-determination only applied to 'situations of decolonisation and the breakup of states into smaller states within clearly defined population groups … it is not a right that attaches to an undefined sub-group of a population seeking to obtain political independence'.[39] The Australian state, by referring to Indigenous peoples as an 'undefined subgroup of a population', is clearly signifying what our status should be. The United States stipulated that the right to self-determination, which was extracted from Article 1 of the Covenant on Civil and Political Rights and the Covenant on Economic and Social Rights, is ambiguous.[40] However, it does not confer a right for Indigenous peoples to be independent or self-governing within nation states, nor does it confer permanent sovereignty over resources. The United States argued that this was the clear intent of states during consultations, whereas the Declaration implies a right that does not exist. The United States appears not to have a problem with the ambiguity of self-determination as defined within the respective covenants which it endorsed, but the right to self-determination within the Declaration on Indigenous Rights is a problem. Both Australia and the United States argue that the Indigenous right to self-determination is a false rights claim, which was not supported by other states. This is a spurious assertion, given

38 UN Sixty-first session, A/61/PV.107, 2007, p 15.

39 UN Sixty-first session, A/61/PV.107, 2007, p 11.

40 UN Sixty-first session, A/61/PV.107, 2007 p 15.

that the majority of states voted for the Declaration. Invoking state homogeneity within the United Nations on this provision is a way of positioning the document as being falsely representative of state views. Self-determination has been primarily a right of states, and is inextricably tied to exercising sovereignty. To deny this right to Indigenous peoples is a way of refusing and disavowing Indigenous sovereignty, which is consistent and all too evident in their respective treatment of Indigenous peoples. For example, the unresolved issues first brought to the League of Nations by Deskaheh continue today between the Six Nations Haudenosaunee and the Federal Government of Canada.[41] Virtue operates discursively to question the legitimacy of this provision within the Declaration by Australia and the United States reiterating a possessive claim to the integrity of their sovereignty against Indigenous counter-claims.

Lands and Resources

Their possessiveness was also exhibited in their response to the provisions on lands and resources contained within the Declaration. Australia asserted that they 'could be read to require recognition of Indigenous rights to lands without regard to other existing legal rights pertaining to land both Indigenous and non Indigenous … any right to traditional lands must be subject to national laws'.[42] Canada iterated that it had processes in place to deal with lands, territories and resources through its treaty mechanisms and constitution. It argued that the broad and unclear provisions could be susceptible to a number of interpretations, 'discounting the need to recognise a range of rights over land possibly putting into question matters that have already been settled by treaty in Canada'.[43] New Zealand stated that 'the provisions on lands and resources simply cannot be implemented'. Article 26 'appears to require recognition of rights to lands now lawfully owned by other citizens' and the entire country 'is potentially caught within the scope of the article'.[44] The United States asserted that 'the provisions on lands and resources are phrased in a manner that is particularly unworkable. The language is overly broad and inconsistent … article 26 appears to require recognition of Indigenous rights to lands without regard to other legal rights existing in lands.'[45] These states disavow the collective rights of Indigenous peoples by positioning themselves as virtuous states that govern in the interests of other legal rights in land. The discursive twist in the use of 'other legal rights' to implicitly appeal to diversity is an attempt to deflect attention away from the protection of their sovereign rights. In effect, they are proclaiming that

41 Aboriginal Affairs and Northern Development (nd).

42 UN Sixty-first session, A/61/PV.107, 2007, p 11

43 UN Sixty-first session, A/61/PV.107, 2007, p 12

44 UN Sixty-first session, A/61/PV.107, 2007, p 14

45 UN Sixty-first session, A/61/PV.107, 2007, p 15.

land already owned and occupied under state sovereignty will not be diminished or changed by Indigenous proprietary rights. With missionary zeal, these states have already determined what is best for 'their' Indigenous peoples by defining what Indigenous rights are acceptable; in this way, they stake a possessive claim to us.

Prior Free and Informed consent

The right to determine what constitutes Indigenous rights was also manifest in these states' opposition to the article on prior free and informed consent. Australia argued that 'any right to free, prior and informed consent' went too far. It would mean that states were obliged to consult with Indigenous peoples about every aspect of law that might affect them. That would 'not only be unworkable', but would a standard that others do not have.[46] Canada stated that this was unduly restrictive and that it had consultation processes in place supported by the law. It asserted that 'a complete veto power of legislative and administrative action for a particular group would be fundamentally incompatible with Canada's parliamentary system'.[47] New Zealand argued that it welcomed Maori involvement in its democratic process, but that 'these articles in the Declaration text imply different classes of citizenship, where Indigenous people have a right of veto that other groups or individuals do not have'.[48] New Zealand said it could not endorse a document that did not reflect state practice or could be recognised as general principles of law. The United States stated that it supported Indigenous peoples' involvement in government decision-making, 'but [it] could not accept the notion of a sub-national group having a "veto" power over the legislative process'.[49] The assertion that Article 19 confers a right that other citizens do not have is disingenuous to the extent that it is qualified by Article 46 within the Declaration. These four states rationalise their opposition on the grounds that all citizens should have the same rights and prior, free and informed consent is unworkable. They make a possessive claim that there is no space to negotiate the law's application. Yet they have created a distinct legal position for the Indigenous peoples who reside within their borders, one that is not shared by other citizens. The originary lack of prior, free and informed consent by states created a status of indigeneity, and the matters pertaining to it are already pre-possessed. States regulate and discipline Indigenous peoples on the basis of our different status and rights claims in ways that do not threaten their sovereignty. In negating a qualified Indigenous right to prior free and informed consent, these states turn equal rights for all citizens into a virtue of their own making as they claim to govern for the good of all.

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46 UN Sixty-first session, A/61/PV.107, 2007, p 12.

47 UN Sixty-first session, A/61/PV.107, 2007, p 11.

48 UN Sixty-first session, A/61/PV.107, 2007, p 11.

49 Observations of the United States with respect to the Rights of Indigenous Peoples, USUN Press Release, www.shunpiking.com/o10406/0406-IP-positionofUS.htm.

Repossessing the Declaration

In spite of these strenuous objections, Australia endorsed the Declaration on 3 April 2009, followed by New Zealand on 19 April 2010, Canada on 12 November 2010 and the United States on16 December 2010. In their statements of endorsement, these four states made a discursive shift from indignation to reconciliation. They mobilised virtue to stake a possessive claim to the Declaration while affirming patriarchal white sovereignty. All four states acknowledged that there were injustices committed in the past; Canada and the United States referred to their formal apologies as evidence that they were sincere, and are now transcending their histories. Australia stated that the Declaration offered 'a new era of relations between states and Indigenous peoples grounded in good faith, goodwill and mutual respect'.[50] The government would not forcibly remove Indigenous peoples from their lands or territories and nor would their culture be destroyed. There would be no repetition of past policies. Canada said the Declaration was important to Indigenous peoples throughout the world.[51] Endorsing the declaration would reconcile and enable stronger relations between the Canadian state and Aboriginal peoples. Canada stated that it had a productive and active partnership with Aboriginal peoples and had advanced Indigenous rights domestically and abroad. The principles of the declaration were consistent with the government's approach to working with Aboriginal peoples, while New Zealand noted that the principles of the Declaration were 'consistent with the duties and principles inherent in the Treaty, such as operating in the spirit of partnership and mutual respect'.[52] The announcement by the United States of its pending endorsement was made by President Obama to the Tribal Council's conference, which stated that the promises he made while on the campaign trail in 2007 would be kept.[53] This included Native Americans having a voice at the White House. The appointment of Native American advisers and convening the largest Native American conference to discuss the relationship between the government and Native Americans are evidence of his commitment. The endorsement by these four states functions as both confession and absolution. They have atoned for the past by apologising and recognising that injustices occurred. They are moving towards a more just future, based on a new relationship of working together to bring about change. Their virtue is now recuperated through faith and hope.

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50 Statement on the UN Declaration on the Rights of Indigenous Peoples by the Hon Jenny Macklin MP, www.jennymacklin.fahcsia.gov.au/statements/Pages/un_declaration_03apr09,April3, 2009.

51 Duncan (2010), p 1.

52 Sharples (2010), p 2.

53 Remarks by the president at the White House Tribal Nations Conference, www.whitehouse.gov/thepress-office/2010/12/16/remarks-president-white-house,December16,2010.

All four states outlined either directly or indirectly how they have acted to implement rights contained within the Declaration. Australia advised that it had returned large tracts of land and was committed to improving the social, cultural and economic aims of Indigenous people through an Indigenous Land Fund.[54] Australia acknowledged that Indigenous people do have the right to be free from discrimination and prejudice and said it would reinstate the *Racial Discrimination Act*, which had been suspended to allow the government to intervene into Indigenous communities. It further noted that vulnerable Indigenous people have the right to be free from violence and to lead safe and healthy lives, so policies were in place to achieve change. Australia stated that education is the key to economic and social prosperity and respect for Indigenous culture is part of this process. The issue of free, prior and informed consent will be interpreted by government in accordance with Article 46 of the Declaration. Australia will ensure that Indigenous involvement in the democratic process is enabled by the establishment of a national Indigenous representative body; public consultation on key policy decisions; support for Indigenous leadership; and constitutional recognition of Indigenous people. Canada argued that it was a leader in protecting Aboriginal peoples' rights, and that this was demonstrated by its initiatives in amending the Canadian *Human Rights Act* and changing the *Indian Registration Act* to enable gender equity concerning the matrimonial transfer of property.[55] Canada noted that its endorsement of the Declaration added scaffolding to the government's existing initiatives in the areas of 'education, economic development, housing, child and family services, access to safe drinking water, and the extension of human rights protection and matrimonial real property protection to First Nations on reserve'. New Zealand advised that it had transferred land and resources back to Maori and redress had been offered, constrained by monetary circumstances.[56] The principles for involvement in decision-making that are contained in the Declaration would be accommodated within the existing frameworks for Maori participation of which consent is a part. Recognition was given to Maori world-views and cultural heritage, which should be reflected in its laws and policies. New Zealand would continue to work for Indigenous peoples' human rights while understanding that there will be debate and dialogue about the meanings that may be given to the aspirations put forward by the Declaration. The United States outlined how the government was working with Native American tribes to improve

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54 Statement on the United Nations Declaration on the Rights of Indigenous Peoples by the Hon Jenny Macklin MP, www.jennymacklin.fahcsia.gov.au/statements/Pages/un_declaration_03apr09,April3, 2009.

55 Canada's Statement of Support on the United Nations Declaration on the Rights of Indigenous Peoples, 12 November 2010, pp 2–4.

56 'Supporting UN Declaration Restores NZ's *Mana*', Statement by Hon Dr Pita Sharples, Minister of Maori Affairs, 19 April 2010, p 2.

conditions on their lands.[57] The United States said it had committed funds for internet and physical infrastructure to improve economic growth on reservations, renovation of schools, increasing the size of tribal lands, improving health care and improving culturally relevant programs at tribal colleges. President Obama has also signed the *Tribal Law and Order Act* to enable the reduction of substance abuse and crime, settled disputes between Native American farmers and the Department of Agriculture and provided funds to settle outstanding law suits over water rights. Virtue circulates discursively through these good intentions. As benevolent states, they are working hard and consistently to improve the life chances of Indigenous peoples who live within their borders. They want to do the right thing to bring about change in accordance with the principles of the Declaration. They are contributing to the fulfilment of these rights and thereby the good life for Indigenous peoples.

Despite the deployment of virtue and the reconciliatory tone of their statements of endorsement, Australia, Canada, New Zealand and the United States repeated their core objection to the Declaration in their endorsement of it. Australia reaffirmed its position that the document was not legally binding and did not affect Australian law, but recognised that the principles of the Declaration were already mirrored in international human rights to which it is committed.[58] The Declaration cannot be used in any way to impair Australia's territorial integrity or political unity and current native title and land rights laws are not altered by supporting the declaration. Canada asserted that the document was aspirational and not legally binding, did not change Canadian law and was not reflective of international law, but its endorsement 'is a significant step forward in strengthening relations with Aboriginal peoples'.[59] Canada feels it can now 'interpret the principles expressed in the declaration in a manner that is consistent with [its] Constitution and legal framework' though the concerns raised in 2007 remain:

> Aboriginal and treaty rights are protected in Canada through a unique framework. These rights are enshrined in our Constitution, including our Charter of Rights and Freedoms, and are complemented by practical policies that adapt to our evolving reality. This framework will continue to be the cornerstone of our efforts to promote and protect the rights of Aboriginal Canadians.

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57 Remarks by the President at the White House Tribal Nations Conference, 16 December 2010, p 2.

58 Statement on the United Nations Declaration on the Rights of Indigenous Peoples by the Hon. Jenny Macklin MP, http://www.jennymacklin.fahcsia.gov.au/statements/Pages/un_declaration_03apr09, April3,2009.

59 Duncan (2010), pp 2–4.

New Zealand concluded that it has a 'strong commitment to human rights and Indigenous rights in particular', with the latter enshrined in the Treaty of Waitangi.[60] In supporting the rights in the Declaration, the existing legal and constitutional arrangements remain. Though they will evolve, they are the foundations that determine the boundaries of any engagement. These existing legal and constitutional arrangements will be maintained.

The United States stated that the Declaration was not legally binding or a statement of current international law, but acknowledged that it has moral and political force:

> It expresses the aspirations of the United States, aspirations that this country seeks to achieve within the structure of the U.S Constitution, laws, and international obligations, while also seeking, where appropriate, to improve our laws and policies.[61]

The United States believes that the concept of self-determination is not the same as in international law, and views it as being consistent with its federally recognised tribes to be self-governing and it will act to extend this to Native Hawaiians. The United States argued that the Declaration did not change or define the concept of self-determination under existing international law, stating that 'Article 46 … does not imply any right to take action that would dismember or impair totally or in part the territorial integrity or political unity of sovereign and independent states'. The United States qualified its acceptance of the right to prior free and informed consent by noting that while it would consult, it does not necessarily require the consent of tribal leaders to act. The message is clear from all four states: Indigenous rights shall be reconciled to their sovereignty. It is their divine right to demarcate the limits of what they are willing to do.

Conclusion

The Declaration's qualifications on Indigenous rights provide fertile ground for the application of exclusionary practices by states who discriminate in their favour, ensuring they protect and maintain their sovereign interests by the continuing denial of Indigenous sovereignty. Patriarchal white sovereignty's possessive logic determines what constitutes Indigenous peoples' rights, and what they will be subjected to in accordance with its authority and law. These subjections are always exclusionary for Indigenous peoples because the divine right of patriarchal

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60 Sharples (2010), p 3.

61 Announcement of US Support for the United Nations Declaration on the Rights of Indigenous Peoples: Initiatives to Promote the Government-to-Government Relationship and Improve the Lives of Indigenous Peoples, www.state.gov/documents/organization/153223.pdf 16 December 2010.

white sovereignty prevails and the definition and circumscription of rights become methods by which subjugation is carried out.[62]

The Declaration ontologically disturbed patriarchal white sovereignty, which retaliated through political, legal and moral force to disavow the virtue of Indigenous rights. The Declaration was treated as an outside intervention that required the containment of the enemy within its borders: Indigenous peoples whose existence threatens the self-realisation of patriarchal white sovereignty's interior truth. Canada, Australia, New Zealand and the United States position themselves as enlightened, tolerant and virtuous states. They want the United Nations to believe that deep in their hearts they have compassion for Indigenous peoples and are sorry about past injustices. They want the world to think highly of them, to admire their humanity, their sense of international responsibility and their acceptance of all races and religions. This is how virtue functions discursively within the possessive logic of patriarchal white sovereignty to dispossess Indigenous peoples from the ground of moral value, enabling racism to be exercised with the best of intentions.

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62 Foucault (2004).

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