

A Normative Nation: Examining UNDRIP, Canadian Reconciliation, and Nation-State Sovereignty

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With the election of the federal Liberal government in 2015 and the overdue adoption of the *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP) in 2016, Canada appears to have made a new commitment to reconciliation with Indigenous peoples. While UNDRIP has successfully led to international acknowledgment of the atrocities of colonialism, many Indigenous activists and scholars still question the extent to which its provisions can be realised in the current, liberal global order of Westphalian state sovereignty. Moreover, Canada's commitment to UNDRIP remains merely symbolic if the government does not actually deliver the right of Indigenous peoples to self-determination, sovereignty, and land rights. In this paper, I examine the complex history of UNDRIP and Canadian state sovereignty. Using Canada's tumultuous relationship with reconciliation as evidence, I argue that UNDRIP cannot effectively repair colonial injustice if the colonial nation-state is permitted to triumph over the inherent rights of Indigenous peoples.

Colonialism has had a devastating impact on Indigenous populations worldwide. While much of European colonialism officially ended in the mid-twentieth century, the legacies of colonial violence and the domination of settler-colonial states still have a significant impact on the economic, political, psychological, and cultural well-being of Indigenous peoples. The emergence of an international human rights agenda following the end of World War II made room for activists of various backgrounds to bring Indigenous issues to the international stage.¹ As Karen

Engle points out, Indigenous activists during the latter half of the twentieth century were able to capture the attention of the international community by strategically framing Indigenous rights through normative human rights discourse.² In 1982, the United Nation's Economic and Social Council created the Working Group on Indigenous Populations, establishing the need for a unique place for Indigenous rights within the *Universal Declaration of Human Rights*.³

After nearly thirty years of deliberation and negotiations, the UN General Assembly adopted UNDRIP on September 13, 2007 with 144 states in favour, four against, and eleven abstentions.⁴ The four member states that were originally against endorsing UNDRIP—Canada, the United States, New Zealand, and Australia—have since reversed their positions. The UN describes UNDRIP as “establishing a universal framework for the survival, dignity and well-being of the Indigenous peoples of the world.”⁵

Victoria Tauli-Corpuz, who was the Chair of the UN Permanent Forum on Indigenous Issues, stated that the day UNDRIP was officially adopted marked the day that the UN, its member states, and Indigenous peoples “reconciled with past painful histories and decided to march into the future on the path of human rights.”⁶ Thus, UNDRIP was understood as advancing Indigenous rights to the status of basic human rights as well as broadening the scope of the *Universal Declaration of Human Rights* by accounting for Indigenous peoples.⁷

While UNDRIP does not create new rights, Paul Joffe argues that it articulates political, social, economic, and cultural rights in a predominantly collective way, which has been relatively absent in previous human rights documents and discourse.⁸ For example, article 3 of UNDRIP carves out the right to self-determination, establishing the right for Indigenous peoples to “pursue their economic, social, and cultural development.” Article 4 then states that Indigenous peoples have the right to “self-government in matters relating to their internal or local affairs, as well as ways and means for financing their autonomous function.” Additionally, article 26 establishes the right of Indigenous peoples to “own, use, develop, and control the lands, territories and resources they possess.”⁹ These articles, compared to previous human rights documents and discourse, clearly incorporate a more robust interpretation of human rights and create a space for the collective rights of Indigenous people.

Having taken nearly thirty years to adopt, and nearly another ten for full endorsement, UNDRIP was one of the most laborious international human rights campaigns in history. Sheryl Lightfoot notes that it required a “rearticulation of the international consensus on human rights to include collective rights.”¹⁰ While Indigenous activists have made use of conventional human rights discourse to advance their claims for reconciliation, Engle points out that they have generally been wary of the dominant model of human rights, for it tends to reduce human rights to the individual rather than the collective. The inclusion of group rights into the UN human rights framework through UNDRIP has been a prominent point of contention between Indigenous activists and member states during negotiations, for it was poised to threaten the liberal global order that emphasises individualism.¹¹

Modern notions of statehood, solidified after the 1648 Peace of Westphalia, were premised on the erasure of pre-existing sovereign nations of Indigenous peoples and the endowment of absolute sovereign authority to European settler nations. The inclusion of Indigenous rights in UNDRIP challenges this notion. While the collective rights that ultimately made it onto the pages of UNDRIP included more easily accepted ‘soft rights’—such as that to culture, language, and identity—it was the inclusion of ‘hard rights’—such as the right to land, self-determination, and self-government—that were more controversial. The re-articulation of Indigenous sovereignty through an established right to collective self-determination and self-government threatens modern Westphalian sovereignty and the liberal global order, which was built upon their exclusion.¹²

Although UNDRIP was established more than ten years ago, it remains difficult to find contemporary cases of settler-colonial states relinquishing their authority and allowing full recognition of the collective rights of Indigenous peoples, particularly the right to self-determination and self-government as allocated in UNDRIP. Taiaiake Alfred argues that this action is lacking because the modern notion of sovereignty is “an exclusionary concept rooted in an adversarial and coercive Western notion of power” and only allows for reconciliation insofar as it does not challenge the legitimacy of the nation-state.¹³ He contends that by assigning mere administrative functions to Indigenous communities, such as the control of education or health, rather than allowing for the full establishment of Indigenous sovereignty on a nation-to-nation

basis, “the state has created incentives for integration into its own sovereign framework.”¹⁴

The rights of Indigenous peoples to self-government, self-determination, and land control directly challenge colonial frameworks, and they are thus systematically refused.¹⁵ It is important to reiterate that while UNDRIP does provide the necessary legitimisation of Indigenous peoples’ hard rights, it lacks a legal mechanism for its enforcement. As long as the provisions of UNDRIP are interpreted and articulated by an international community that maintains Westphalian notions of state power and legitimacy, colonial dominance will “[preserve] the state’s superior position relative to [Indigenous nations],” and authentic reconciliation will continue to fall short.¹⁶ These notions continue to muddy the waters of reconciliation in Canada.

Indigenous activists have long called on the Government of Canada to address the legacies of colonial oppression. Yet, despite a growing Indigenous rights movement and well-organised activism on the part of Indigenous groups, it has taken until the last half-century for Indigenous rights to occupy a prominent place within Canadian discourse and public policy.¹⁷ Although the Canadian government eventually did ratify UNDRIP, Canada has historically had a poor relationship with Indigenous communities.

For instance, on August 11, 1980, Prime Minister Pierre Trudeau sent a letter to Chief Starblanket explaining the proposed interpretation of Indigenous rights for the new Canadian Charter of Rights and Freedoms. He stated that constitutional rights for Indigenous peoples would guarantee treaty rights, self-government, political representation, and the responsibility “of the federal and provincial governments for the provision of services to Native people.”¹⁸ While this appeared to be a step forward after centuries of colonial rule, “the federal and provincial governments dominated the debates” during the negotiations leading up to the constitutional amendment in 1982, and their priorities often eschewed Indigenous voices.¹⁹ This dominance is reflected in the language used, which implied that the Crown was planning to hold on to its paternalistic method of articulating Indigenous rights. James Youngblood Henderson argues that although the purpose of section 35(1) of the Constitution Act (1982) is to “reconcile the Aboriginal framework with sovereignty of the Crown,” it fails to comprehensively define Indigenous rights. While the government seems to have been aware

of and even committed to the Indigenous right to self-government in 1980, the finalised constitution in 1982 omitted this.²⁰ Indigenous activists have since continued to challenge the sovereign superiority granted to the Crown by the Constitution, calling on the Supreme Court to rearticulate its interpretation of section 35 to include land rights and self-determination.²¹

While they have yet to dismantle the paternalistic nation-state, the efforts of Indigenous activists have had a significant impact in Canadian politics. For example, the Wet'suwet'en Nations successfully claimed ownership and jurisdiction of over 133 hereditary territories in 1997 from a court case begun in 1984.²² In 1995, the Canadian Government acknowledged the inherent right of First Nations to self-government as a constitutional right under section 35, with the Inherent Right to Self-Government Act.²³ Furthermore, during *Delgamuukw v. British Columbia* in 1997, the Supreme Court acknowledged Indigenous title to the land "as a form of ownership." The Supreme Court later established the Crown's duty to "consult and accommodate Aboriginal rights and title" in 2004 with the *Haida Nation Decision*.²⁴

All of these cases are historic legal victories for Indigenous peoples in Canada, but they have not been fairly interpreted by the Canadian federal or provincial governments. Arthur Manuel asserts that since these rulings, the Crown has not made any significant material concessions; rather, "all real power [has been] deposited back in the firm control of the federal and provincial governments."²⁵ This disproportionate power dynamic between Indigenous groups and the Crown can be observed in the ongoing British Columbia Treaty Process. Since 1993, Indigenous groups have been calling on the British Columbian government to recognise their rights to self-government, land, fishing, and forestry, and to establish a government-to-government relationship with Indigenous nations. While the British Columbia Treaty Process has resulted in the creation of the Nisga'a Treaty and the establishment of the Nisga'a Government, the latter remains under federal and provincial laws, signifying an affirmation of Crown superiority.²⁶

In 2007, following its vote against UNDRIP, Canada's ambassador to the UN stated in his address to the General Assembly that Canada had "'significant concerns' over the Declaration's wording on provisions addressing lands and resources," as well as its provision for states to gain prior informed consent from Indigenous communities before enacting

new laws or administrative duties.²⁷ These concerns were raised by Canada's ambassador, since they directly challenged Canada's state-centric model of sovereignty. Manuel and Derrickson assert that Canada opposed UNDRIP because "it guarantees Indigenous peoples the right to [their] nationality, which the government does everything it can to undermine."²⁸ Canada's refusal to endorse UNDRIP in 2007 can thus be attributed to its explicit reluctance to reconceptualise its commitment to nation-state sovereignty.

In the years following Canada's vote against UNDRIP, concern with the status of Indigenous peoples in Canada grew, culminating in the *UN Report on Canada's Treatment of Aboriginal People* published by the Human Rights Council in 2013. In this report, the Special Rapporteur on the rights of Indigenous peoples identified a number of issues, including the "well-being gap" between Indigenous and non-Indigenous people, treaty and land rights, missing and murdered Indigenous women, and a general feeling of mistrust toward the federal and provincial governments.²⁹

When Harper's Conservative government was replaced by the Liberal Party in 2015, Canada appeared to have made a new commitment to Indigenous rights. Headed by Prime Minister Justin Trudeau, the Canadian government made some progress toward recognising the rights of Indigenous peoples, including adopting UNDRIP in 2016. However, the possibility of reconciliation facilitated by UNDRIP seems to have remained merely symbolic. A particularly striking example of Trudeau's disregard of the rights of Indigenous peoples defined in UNDRIP is his approval of the expansion of the Trans Mountain pipeline project in 2016. The project was positioned to cross three different reserve lands in British Columbia, including that of the Waututh Nation, who fiercely opposed it. While Ottawa's approval of the Trans Mountain pipeline was eventually overturned in 2017 by the Federal Court of Appeal for its failure to address the concerns of Indigenous communities, Trudeau's disregard of Indigenous rights for the sake of national profit demonstrates that his commitment to reconciliation is secondary to Canadian state sovereignty.³⁰

Nonetheless, in 2018 the federal government continued its attempts to reconcile with Indigenous peoples by publishing the "Principles Respecting the Government of Canada's Relationship with Indigenous Peoples" and declaring their intention to create a Recognition and

Implementation of Rights Framework (RIIRF). Both of these projects adhere to UNDRIP, as they acknowledge the importance of self-government and work to establish nation-to-nation relationships.³¹ However, King and Pasternak argue that the possibility of reconciliation is implausible if the “government of Canada’s relationship with Indigenous peoples continues to emphasize the supremacy of the Canadian constitutional framework.”³²

For example, on January 8, 2019, the priority of Canadian Crown supremacy was made clear during the armed invasion of the Gidumdt’*en* checkpoint in Unist’ot’*en*. Canadian RCMP entered un-ceded Wets’uwet’*en* territory in northern British Columbia to enforce a Supreme Court injunction. This allowed authorities to forcibly remove Indigenous land defenders from their territory to make way for TransCanada to build the Coastal GasLink pipeline. Fourteen land defenders, including an elder, were arrested for opposing the non-consensual construction of the pipeline. It is crucial to note that the Wets’uwet’*en* people have never surrendered their land or signed treaties with the Crown. Moreover, they have their own, distinct systems of governance and have operated independently from the Crown since the inception of the Canadian state.³³

Not only is the militarised invasion of Wets’uwet’*en* territory by the state grossly opposed to Canada’s renewed commitment to reconciliation, it is in direct violation of UNDRIP. Article 10 states that “Indigenous peoples shall not be forcibly removed from their lands or territories. No relocation shall take place without the free, prior and informed consent of the Indigenous peoples concerned.” Article 26 states that “Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired.”³⁴ The ongoing fight for control of land in Unist’ot’*en* reveals Canada’s failure to genuinely honour the requirements of UNDRIP, as no consent has been given for the removal of Indigenous protestors from their own land. Moreover, it is evident that the Crown is more than willing to nonconsensually occupy traditional Wets’uwet’*en* territory. Ultimately, Canada is still unwilling to fulfill its commitment to UNDRIP and move away from prioritising Crown sovereignty over Indigenous rights.

Examining UNDRIP and its impact on reconciliation in Canada provides an important criticism of the dominance of Westphalian sovereignty

which has been credited with the legitimisation of dominant settler authority and interests. While UNDRIP has allowed for the atrocities of colonialism to be acknowledged internationally, many Indigenous activists and scholars question the extent to which UNDRIP's declarations can be materially realised in the current liberal global order that is characterised by sovereign nation-states. I conclude that in order to accord Indigenous communities the full provisions described in UNDRIP and to actualise its commitment to reconciliation, Canada must shift away from the paternalistic, state-centred model of sovereignty that characterises contemporary international politics.

NOTES

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