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I saw it first!

The Doctrine of Discovery in an Indigenous Rights perspective

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Contents

Summary

In this essay, I will study the Doctrine of Discovery in an Indigenous Rights perspective. The aim of the essay is to examine the legitimacy of the doctrine in light of the United Nations Declaration on the Rights of Indigenous Peoples. To complete this purpose, I map the substance of the doctrine and analyze the relevant provisions of the declaration. In my analysis, I apply the provisions of the declaration on the doctrine, to inquire the legitimacy of the doctrine. The result of this analysis is that the doctrine is incompatible with key provisions of the declaration, and I consequently conclude that the doctrine is illegitimate.

Sammanfattning

I den här uppsatsen studerar jag the Doctrine of Discovery mot bakgrund av ursprungsbefolkningars rättigheter. Syftet med uppsatsen är att undersöka doktrinens förenlighet med FN:s deklaration om ursprungsbefolkningars rättigheter. Jag beskriver doktrinens och deklarationens relevanta innehåll för att uppnå detta syfte. I min analys applicerar jag deklarationens bestämmelser på doktrinen, med ändamålet att bestämma doktrinens legitimitet. Analysens resultat är att doktrinen är inkompatibel med fundamentala bestämmelser i deklarationen, och jag drar följaktligen slutsatsen att doktrinen är oförenlig med deklarationen.

1 Introduction

1.1 Background

As unlikely as it might sound, "calling dibs" has been a legal practice used by European colonists to seize indigenous territories. Unlike childish play however, the effect has been far from trivial. The "I saw it first" adaption, carried out since the middle ages, has contributed to the historic and ongoing oppression of indigenous peoples. This year (2017) is the tenth anniversary of the adoption of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP or "the declaration"). Demonstrably, indigenous peoples' situation is now recognized as an urgent object of international concern.[1] However, contemporary societies have been built upon and enabled by the exploitation of indigenous peoples[2], of which effects are probably immeasurable. A legal doctrine called the Doctrine of discovery ("the doctrine" or "the Discovery Doctrine")[3], or simply put "I call dibs", is one of the practices that has played a role in the state-building on indigenous territories. Considering that the case which embodies the doctrine is referred to in modern jurisprudence, that US legislation derives from it, and that modern states exist on the justification from it [4], the doctrine is relevant in contemporary society. In 2012, speakers during a session in the United Nations Permanent Forum on Indigenous Issues[5]

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[1] See, preambular paragraph 7 and 8 of the UNDRIP.

[2] See, preambular paragraph 6 of the UNDRIP and chapter 2 of the essay.

[3] Also called the Doctrine of Christian Discovery.

[4] See chapter 2 of the essay.

[5] The Permanent Forum is a high- level advisory body to the Economic and Social Council, with the mandate to deal with indigenous issues.

called for a repudiation of this doctrine by the UN.[6] I hope that you will understand the reason for this demand after reading this essay.

1.2 Purpose and research questions

In this essay, I will examine the legitimacy of the Doctrine of Discovery in light of the United Nations Declaration on the Rights of Indigenous Peoples. My interpretation is that the doctrine is illegitimate if it is not in accordance with the provisions of the UNDRIP.

The research questions are the following:

- **What are the current and historic elements of the Doctrine of Discovery?** I will answer this question in the second chapter of the essay.
- **What is the content of the provisions of the declaration, with a relevance to the Discovery doctrine, and how are they interpreted?** I will present my findings regarding this examination in the third chapter of the essay.
- **How can the relevant provisions of the declaration be applied on the Doctrine of Discovery?** I will respond to this question in the fourth chapter of the essay.

These just mentioned research questions will provide the foundation of my conclusions in the fifth chapter, which correspond to the essay's purpose.

1.3 Limitations

This essay is subjected to both time and scope limitations. For this reason and others, I have made the following limitations.

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[6] Permanent Forum on Indigenous Issues, *'Doctrine of Discovery', Used for Centuries to Justify Seizure of Indigenous Land, Subjugate Peoples, Must Be Repudiated by United Nations, Permanent Forum Told* [press release], 2012, available at: https://www.un.org/press/en/2012/hr5088.doc.htm, (accessed 20 April 2017).

Firstly, I acknowledge that the Doctrine of Discovery has a global scope, however, this essay will focus on the usage of the doctrine by four Anglo-Saxon countries: Australia, USA, Canada and New Zealand. The reasons for this choice are that they have relied on a precedent, Johnson v M'Intosh, when developing their domestic policies. Additionally, the research regarding the doctrine's relevance in these countries has been more substantial.

Secondly, my purpose is not to discuss whether the doctrine should be repudiated, regardless of my conclusions on the legitimacy of the doctrine.

Lastly, I will not include a chapter on the history of indigenous rights under international law generally. This history has however been beneficial in my understanding of the aspects featured in this essay. I refer to James Anaya's book *Indigenous peoples in international law*[7] for an interesting depiction of the subject.

1.4 Disposition, method and materials

The second and third chapters are similar since they are intended to give the means to understand and validate the discussion in the fourth chapter. The second chapter will begin with a depiction of the development of the Discovery Doctrine, which will rely on secondary sources. In that chapter, I will also describe the content of the Johnson case, using the case as a primary source. The third chapter builds on the UNDRIP as a primary source, but I will interpret its provisions with the use of previous research. I have relied additionally on research of the rights of indigenous peoples conducted prior to the adoption of the declaration. The declaration is famously said to not create any new rights, and is instead perceived to clarify already existing rights. For this reason, I believe that the prior

[7] S.J. Anaya, *Indigenous Peoples in International Law*, 2nd edition, Oxford, Oxford University Press, 2004.

research is relevant in interpreting the provisions of the declaration. I will not account for all of the provisions of the UNDRIP. Instead, I have chosen the provisions of the declaration that are significant to the elements of the UNDRIP that I will use in my analysis (see chapter 2.4 below), meaning that I will either directly apply those provisions in the analysis or that they will enhance the understanding thereof. The analysis I make in the fourth chapter will be based on the content presented in the earlier chapters. I will examine the elements of the Discovery Doctrine with the provisions of the UNDRIP as analytical tools.

1.5 Prior research

Research on indigenous issues is multi-disciplinary, including: sociology, anthropology, law, ethnography, et cetera.

Several scholars have mapped the Discovery Doctrine, amongst them, the scholars that I have referenced in my essay. The Johnson case is commonly studied in US law schools, and is thus subjected to substantial academic examination. Different researches have interpreted the provisions of the UNDRIP and the content of indigenous rights prior to the declaration.

This essay will contribute to the discussion regarding the doctrine and the declaration by putting these two concept within the same discourse: examining the compatibility of the doctrine with the declaration.

2 The doctrine of discovery

Imagine the following: the parties in a court case are secretly collaborating for personal gain. Their plan goes horribly wrong as the case lands in the hands of a judge who has a private agenda of his own. But, as a final plot twist, the judge loses control over the precedent he has created and it has eroding consequences he did not foresee. Is it the plot to the latest block-buster? No, surprisingly, it is a historical account of the setting of the Johnson v M'Intosh case (Johnson case). The Johnson case is the judicial ratification of the Discovery Doctrine, of which I will describe the elements in this chapter.

The dramatic opening depiction is a brief of Lindsay Robertson's book *Conquest by law: How the Discovery of America Dispossessed Indigenous Peoples of Their Lands*[8] in which he uncovers and reveals the context to the Johnson case. This essay is too limited to present his intriguing and equally troubling findings, but I think it is important to know that there is a context to the case which shaped its content. Justice Marshall also tried, unsuccessfully, to modify his precedent.[9] However, now, almost 200 years later, the Johnson case has not been overruled, and the doctrine was most recently mentioned in a case from 2005[10].

2.1 Starting point: therories of dispossession

According to Jérémie Gilbert, international law has featured two separate arguments of dispossession of indigenous land: "indigenous peoples do not

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[8] L. Robertson, *Conquest by law: How the Discovery of America Dispossessed Indigenous Peoples of Their Lands,* New York: Oxford University Press, 2005. Available from: Online access for Lund University Oxford Scholarship Online (History), (accessed 20 April 2017).

[9] See generally, ibid.

[10] *City of Sherrill* v. *Oneida Indian Nation of New York*, 125 S. Ct. 1478, 148384 (2005), see footnote number one of the decision.

legally exist—thus their lands can be acquired; or indigenous peoples exist but are inferior—thus their right to occupy their homelands can be extinguished".[11] These two arguments underpin the two separate means of dispossession: the means of acquisition and the means of extinguishment. Gilbert describes them as "waves of the same movement", used complementarily by the states in their approach to indigenous peoples' rights.[12] My perception of the development of the doctrine, which at times is inconsistent, is that its elements are "waves of the same movement".

2.2 Development

2.2.1 Papal justification for conquest

Researchers have traced the doctrine of discovery to the middle ages and the discovery of the New world by Spanish and Portuguese colonists.[13] The Catholic church had bestowed universal papal jurisdiction on themselves during the Crusades. This universal authority was exercised through papal bulls in the 15th century, granting European settlers the right to seize indigenous territories they had "discovered" and establish dominion over them. Land was deemed "undiscovered" until a European Christian country had "discovered" it. The dispossession of land was justified by referencing

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[11] J. Gilbert, *Indigenous peoples' land rights under international law: from victims to actors*, Martinus Nijhoff Publishers, 2006, p. 1. Available from: Online access for Lund University Human Rights and Humanitarian Law E-Books Online, Collection 2007 (accessed 18 May 2017) [Hereinafter: Gilbert, Indigenous peoples' land rights].

[12] Gilbert, Indigenous Peoples' land rights, p 2.

[13] Permanent Forum on Indigenous Issues, *Impact on Indigenous Peoples of the International Legal construct known as the Doctrine of Discovery, which has served as the Foundation of the Violation of their Human Rights* UN doc E/C.19/2010/13 (4 February 2010), [Hereinafter: PFII, Impact] par. 9; M.C Blumm, *"Retracing the Discovery Doctrine: Aboriginal Title, Tribal Sovereignty, and their Significance to Treaty-Making and Modern Natural Resources Policy in Indian Country"* (2004), Aboriginal Policy Research Consortium International (APRCi), Paper 203, [Hereinafter: Blumm, Retracing the Discovery Doctrine], p. 719.

to the mission that the church deemed it had, which extended to the colonizers through the bulls: to spread Christianity.[14]

2.2.2 Just war

During the 16th century, the naturalist theologist Francis de Vittoria argued that natives have natural rights, including property- and self-determination rights, which are not lost at the sole cause of discovery nor exercise of papal authority. However, he launched the idea of "Just war". A "just war", meaning a justified conquest, followed if the natives opposed certain obligations. Vittoria argued that they were obligated, at the risk of a "Just war", to tolerate commercial activity and proselytization within their territories.[15] Vittoria's theory dominated the development of international law during the 16th and 17th century.[16] The Spaniards enforced a system in South America at this time, which granted colonizers land and obligated the natives to work it, with the threat of a "Just war". The system deprived the natives of the ownership to their land.[17]

2.2.3 Non-recognition of Indigenous peoples' international existence

The treaty of Westphalia, signed in 1648, changed the foundation of international law. It had many implications, but of primary interest for this essay, is that it prompted international law to only regard "nation states" as subjects. Considering that indigenous peoples almost never fulfilled the

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[14] R.J Miller, et al., *Discovering indigenous lands: the doctrine of discovery in the English colonies*, Oxford, Oxford University Press, 2010, [Hereinafter: Miller, Discovering indigenous lands] pp. 10-13.

[15] Blumm, *Retracing the Discovery Doctrine*, pp. 719-720; Miller, Discovering Indigenous Lands, pp. 14-16; Gilbert, Indigenous Peoples' land rights, pp. 9-10.

[16] Gilbert, Indigenous Peoples' land rights, p. 12.

[17] Ibid, pp. 6-8.

(Eurocentric) criteria of "nation states", their existence in international law was obliterated.[18]

Gilbert argues that this non-existence justified new theories of dispossession.[19] One of these theories was *terra nullius,* developed during the 18th century, which translates to an "empty territory". The reference to "emptiness" meant that it was not inhabited by "civilized" people. The land was thus possible to "discover", conquer and occupy.[20] Since indigenous peoples were not perceived as subjects in international law, the colonists did not need to recognize the sovereign- or property rights of the natives inhabiting the "empty land".[21] The *terra nullius* principle was discarded in the 20th century.[22]

French and English colonists advanced the doctrine during the 16th to 18th century, as a consequence of territorial conflicts with other European countries. They added a new element to the doctrine: occupation and possession of the discovered land. Only "discovering" the land was insufficient, as occupation and possession were required to complete claims in the discovered land.[23] Later, international judicial bodies called this element *effective occupation.* Indigenous peoples were regarded as too uncivilized to "effectively occupy" their land, and thus, their occupation was not acknowledged.[24]

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[18] Ibid pp. 22-26.

[19] Ibid pp. 20-22.

[20] Miller, Discovering Indigenous Lands, pp. 16-25; Gilbert, Indigenous Peoples' land rights, pp. 26-27.

[21] Gilbert, Indigenous Peoples' land rights, pp 26-27.

[22] Ibid, pp. 28-30.

[23] Miller, Discovering Indigenous Lands, pp. 16-25.

[24] Gilbert, Indigenous Peoples' land rights, pp. 32-33.

2.2.4 The adoption of the doctrine in the United States

The title by discovery to indigenous lands transferred from the English Crown to the latterly established American colonies. All colonies enacted laws that preempted sales of indigenous lands to other European countries or individuals. The preemption means that the US government had a right to exclude (or preempt) any other of buying the land. The colonies additionally regulated native's commercial and sovereign activity, and established "trust relationships" to provide "civilization" to and "protect" the indigenous people.[25] The trust relationship-policy is still a part of the Indian federal law in the US.[26]

2.3 Johnson v M'Intosh

The judicial adoption of the doctrine arrived with the Johnson case[27], which is a US Supreme court case rendered in 1823. The case encapsulates several of the above described elements of the doctrine that had been developed earlier. Justice John Marshall wrote the court's unanimous opinion. The appellant, Johnson, wanted the court to recognize title to land purchased from the Piankeshaw nation (a Native American tribal nation). The defendant, M'Intosh, claimed a competing title to the same land, which the US had granted to him. The tribe was not represented in the case.

Justice Marshall wrote a long and thorough opinion, with an exhaustive account of the Discovery Doctrine. The court stated that the US had gained

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[25] See Miller, Discovering Indigenous Lands, pp. 27-66

[26] Matthew L.M. Fletcher, *The Supreme Court's Indian Problem, 59 Hastings L.J. 579 (2008),* [Hereinafter: Fletcher, SCIP] p. 596.

[27] *Johnson v. M'Intosh*, 21 U.S. (8 wheat.) 543 (1823)

title to land because of their "discovery" of it, which was only limited by natives right of occupancy.[28] Marshall declared that:

" [The United States] maintain /.../ that discovery gave an exclusive right to extinguish the Indian title of occupancy, either by purchase or by conquest; and gave also a right to such a degree of sovereignty, as the circumstances of the people would allow them to exercise."[29]

Justice Marshall wrote that the US asserted these just mentioned rights through conquest. He recognized that international law at the time did not limit indigenous peoples' property rights at the account of conquest.[30] The applicable law required the conqueror to govern the conquered people as "distinct people", live alongside the white population, or be left on their own.[31] However, Marshall argued that these rules could not be applied in the US, due to the "character and habits"[32] of the natives, whom he described as

"fierce savages, whose occupation was war, and whose subsistence was drawn chiefly from the forest, [and] ready to repel by arms every attempt on their independence".[33]

Consequently, the US did not need to acknowledge the rights that indigenous peoples otherwise were entitled to according to international law. The US thus adopted "new and different rules better adapted to the actual state of things".[34]

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[28] Ibid. pp. 585-588

[29] Ibid. pp. 587

[30] Ibid. pp. 588-590

[31] Ibid. pp. 590-591.

[32] Ibid. p. 590.

[33] Ibid.

[34] Ibid. pp. 592.

In conclusion, Marshall's opinion was that:

- the natives did not have a complete title to the land: they only had a right of occupancy
- this right of occupancy could be distinguished by the US through purchase or conquest
- the natives only had limited sovereign rights

The court supported this conclusion, by declaring that the country is premised on these principles.[35]

2.4 Progress since the Johnson case

The Johnson case was influential. Several cases before the US Supreme court have relied on the Discovery Doctrine as prescribed in the Johnson Case.[36] Furthermore, The Johnson case has been referred as "the conceptual starting point or premise of the /…/ overall [US federal Indian law] system".[37] Numerous authors points out that the Discovery Doctrine as interpreted by the Supreme court have influenced contemporary Indian law.[38] Moreover, the case has been cited in Australian, Zelanian and Canadian courts.[39]

However, Michael Blumm claims that courts and legislators have misinterpreted the Johnson case, and, misguidedly, further limited natives sovereign and land rights. For example, US criminal jurisdiction was

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[35] Ibid. pp. 592-593.

[36] *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831); *Tee Hit Ton Indians* v. *The United States*, 348 U.S. 273 (1955); *City of Sherrill* v. *Oneida Indian Nation of New York*, 125 S. Ct. 1478, 148384 (2005).

[37] PFII, Impact, par. 24.

[38] Due to scope limitations, I cannot make an exhaustive account of this influence. I refer for further reading to: Fletcher, SCIP pp. 592-593; and generally: Harvard Law Review, *International Law as an Interpretive Force in Federal Indian Law*, Vol. 116, No. 6 (2003), pp. 1751-1773.

[39] See Miller, Discovering Indigenous Lands, chapters 4-9.

extended into native country, native land was divided detrimentally to them and in favor of non-indigenous interests, and they were denied compensation when the government dispossessed their land.[40]

2.5 Summary

States used the Doctrine of Discovery for centuries, as I have demonstrated above. Different actors have developed the doctrine for different purposes, which makes it impossible to pinpoint the exact content of the doctrine. Distinguishing between contemporary and historical definitions of the doctrine is therefore difficult. Even though some of the elements of the doctrine would be illegal under international law today, for example Vittoria's theory of just war, it still premises some contemporary titles.

I will constitute my pending analysis on the following attributes of the doctrine, based on their continuity:

- Limitation of sovereign and property rights (including the right of preemption and the native title limited to occupancy)
- Trust relationship
- First discovery
- Euro- and Christian centric justifications

[40] Blumm, Retracing the Discovery Doctrine, pp. 759-760.

3 United Nations Declaration on the Rights of Indigenous Peoples

The General Assembly adopted the UNDRIP in 2007 by 143 votes in favor, 4 against (USA, Canada, Australia and New Zealand), and 11 abstentions.[41] The starting point of the declaration was when the Working Group on Indigenous Populations (WGIP) received the mission to draft a declaration on the rights of indigenous people in 1985,[42] which means that the drafting process spanned over 20 years. The declaration is unique in relation to other human rights instrument, as its intended beneficiaries (indigenous people) were directly involved in the standard-setting process. Additionally, the circumstances regarding the drafting of the declaration were unprecedentedly liberal and democratic.[43]

From the outset of the drafting of the declaration in the WGIP, to the very end of the negotiations in the General Assembly, the topics of a definition of

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[41] General Assembly "Resolution 61/295: Declaration on the Rights of Indigenous Peoples" UN Doc A/61/67 (13 September 2007)

[42] UN Sub-commission on the promotion of Human Rights and protection of Minorities UN doc E/CN4/Sub2, Ann 11 (1985)

[43] E-I. A., Daes, *The contribution of the Working Group on Indigenous Populations to the genesis and evolution of the UN Declaration on the Right of Indigenous Peoples,* in C. Charters & R. Stavenhagen, Making the Declaration work: the United Nations Declaration on the Rights of Indigenous Peoples, Copenhagen, IWGIA & Distributors Transaction Publisher & Central Books, 2009, [Hereinafter: Making the Declaration work], p. 74; J. B. Henriksen, *The UN Declaration on the Rights of Indigenous Peoples: some key issues and events in the process*, in Making the Declaration Work, p. 79.

"indigenous peoples"[44], the scope of the right to self-determination and land rights, proved difficult for the parties to agree on. [45]

3.1 The nature of the provisions

Siegfried Wiessner reasons that a key aspect of the declaration is the emphasis on protection of indigenous peoples' cultural identity. For this reason, he states that the rights to land and self-determination are "culturally bounded" and a part of indigenous peoples' cultural rights.[46] The importance of cultural identity is also supported by the fact that it is regarded in 18 of the 46 articles of the declaration.[47]

The history of discrimination and oppression of indigenous peoples is stressed in the preambular paragraphs, as is the urgent need to protect their rights.[48] Article 2 of the declaration declares a right of non-discrimination in the exercise of the rights in the declaration.

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[44]In this essay, I will not elaborate on the definition of "indigenous peoples" due to scope limitations. For commonly used definitions, see for example: International Labour Organisation (ILO) Convention on Indigenous and Tribal Peoples, 1989 (No 169) adopted on 27 June 1989 by the General Conference of the ILO at its seventy-sixth session; Cobo, M, *Study of the Problem of Discrimination against Indigenous Peoples*, UN Docs E/CN.4/Sub.2/476; E/CN.4/Sub.2/1982/2; E/CN.4/Sub.2/1983/21 (1981-1983). For a critical analysis on the definitions of Indigenous Peoples, see: Newcomb, S.T, *The UN Declaration on the Rights of Indigenous Peoples and the paradigm of domination*, Griffith Law Review, (2011) VOL No 3, pp. 579-607.

[45]For exempla, see E-I. A., Daes, *The contribution of the Working Group on Indigenous Populations to the genesis and evolution of the UN Declaration on the Right of Indigenous Peoples,* in Making the Declaration work, pp. 52-59; A.K. Barume, *Responding to the concerns of the African States*, in Making the Declaration work, pp. 176-181; A.R., Montes, *The UNDRIP: the foundation of a new relationship between the IP, states and societies*, in Making the Declaration work, pp.152-162.

[46]S. Wiessner, *Indigenous self-determination, culture, and land: A reassessment in light of the 2007 UN Declaration on the Rights of Indigenous Peoples*, in P. Elvira (ed.), *Indigenous Rights in the Age of the UN Declaration,* Cambridge, Cambridge University Press, 2012, [Hereinafter: Wiessner, A reassessment in light of the UNDRIP], pp. 47-50. Available from: Online access for Lund University (accessed 26 April 2017).

[47] Articles 2-3, 5, 8-9, 11-15, 31-32 and 36.

[48] Preambular paragraphs 6-8 of the UNDRIP.

The fourth preambular paragraph of the declaration affirms:

> *"that all doctrines /.../ based on or advocating superiority of peoples or individuals on the basis of national origin or racial, religious, ethnic or cultural differences are /.../ legally invalid"*

7 of the 46 articles of the Declaration regards indigenous peoples' participation in decisions that will affect their lives.[49]

3.2 Self-determination

The right to self-determination is emphasized as the cornerstone of the UNDRIP, which the rest of the provisions emanate from, strengthen, or clarify.[50] Article 3 of the declaration grants self-determination to indigenous peoples, and proclaims that they by that virtue "freely determine their political status and freely pursue their economic, social and cultural development". The right to self-determination includes a right to autonomy and self-government of internal and local matters, according to article 4.

3.2.1 Internal self-determination

Erica-Irene Daes distinguishes between "internal self-determination" and "external self-determination". Internal self-determination represents an exercise of the right within the existing boundaries of the state.[51] It encompasses a right to freely choose a form of government, and respect for

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[49] Article 5, 18-19, 23, 27, 32 and 41.

[50] For example, see A. Xanthaki, *Indigenous rights and United Nations standards – self-determination, culture and land*, Cambridge, Cambridge Univ. Press, 2007, [Hereinafter: Xanthaki, Indigenous rights and United Nations standards] p. 131; S.J Anaya, *The right of indigenous peoples to self-determination in the post-declaration era,* in Making the Declaration work, [Hereinafter: Anaya, Self-determination in the post-declaration era] p. 184.

[51] Daes, E.-I. *Explanatory note concerning the draft declaration on the rights of IP*, 1993 UN Doc E/CN.4/Sub.2/1993/26/Add.1, [Hereinafter: Daes, Explanatory note] par. 17.

the decisions taken by that government.[52] Wiessner argues that it must "reflect a crucial aspect of their cultural identity" in order to fall within the framework of self-government.[53] Internal self-determination also refers to equal participation in and influence on governmental institutions in the state they inhabit. Such participation should not, however, be a form of assimilation. The state should concurrently preserve the distinct Indigenous identity.[54] Furthermore, internal self-determination includes a right to freely choose democratic relationships.[55] In summary, self-determination is double-edged, since it grants, as Anaya puts it: "on the one hand, autonomous governance and, on the other, participatory engagement".[56]

3.2.2 External self-determination

External self-determination goes beyond the boundaries of the state. It entails some form of liberation of or independency from the sovereign control of the state.[57] Secession[58] is thus an exercise of external self-determination. It is linked to the decolonization in the 20th century. [59] Needless to say, external self-determination is more controversial than internal, since it implicates dismemberment of existing states by forming new independent states. To accommodate state's concern regarding secession as a part of self-determination, article 46(1) was included in the

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[52] Daes, *Explanatory note*, par. 17; Wiessner, A reassessment in light of the UNDRIP, pp. 45-46.

[53] Wiessner, A reassessment in light of the UNDRIP, p. 45.

[54] Daes, Explanatory note par. 19 and 26. See also, Anaya, aelf-determination in the post-declaration era, p. 188, who, however, does not use the terminology "internal and external self-determination".

[55] Daes, Explanatory note, par. 19.

[56] Anaya, self-determination in the post-declaration era, p. 193

[57] Daes, Explanatory note, par. 17.

[58] Secession defines as unilaterally withdrawal from a state to form a new independent state.

[59] For example, see Xanthaki, Indigenous rights and United Nations standards, pp. 146-152

declaration.[60] However, article 46(1) does not explicitly exclude secession. Article 46.1 prohibits interpretations that would "dismember /…/ the territorial integrity or political unity of /…/ states".

Daes suggests that the declaration might include a right to external self-determination, but that this right, in that case, is secondary to internal self-determination. Only if the state fails to provide or protect indigenous peoples' internal self-determination, can the people make claims of secession.[61]

Anaya is however more ambiguous when interpreting the declaration as including a right to secede.[62] Moreover, he describes state sovereignty as "potentially limiting" the implementation of self-determination, through two norms in international law: the principle of non-intervention and the protection of territorial integrity and political unity of states (compare with article 46(1)). Anaya believes that these norms are principally compatible with self-determination. However, if there would be an instance of incompatibility, Anaya suggests that the norms in dubio trump self-determination.[63]

Noteworthy is that indigenous peoples continuously deny aspiring to form independent states. Instead, they stress their goal to preserve their distinct ways of life.[64]

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[60] See Montes, A.R. & Torres Cisneros, G, *The United Nations Declaration on the Right of Indigenous Peoples: The foundation of a new relationship between indigenous peoples, states and societies*, in Making the Declaration work, pp. 154-157

[61] Daes, Explanatory note, par. 20-25.

[62] See Anaya, Self-determination in the post-declaration era, p. 185, where he writes self-determination in the declaration not "necessarily entails a right to independent statehood [but], must be somehow linked to the independent state outcome".

[63] Anaya, Self-determination in the post-declaration era, pp. 194-196.

[64] Daes, Explanatory note, par. 28.

3.2.3 Remedial self-determination

Daes regards the right to self-determination as dynamic, exercisable when states fail to protect or provide fundamental freedoms.[65] This interpretation has similarities with a theory by Anaya, who launches the terminology "remedial self-determination". He perceives decolonization as a response to a violation of peoples' right to self-determination (the violation being colonization), in other words, the hindrance of those peoples' exercise of democracy. Decolonization is thus a remedy for this violation. Logically, only people who have suffered such a violation is granted a right to (remedial) self-determination. Since the UNDRIP is properly observed as a result of violations of indigenous peoples' democratic rights, that is of their self-determination, their right to self-determination is likewise remedial.[66]

However, Anaya points out, since the right is essentially a remedy for a violation, the rights of various peoples differ in accordance with the differences of their suffered violations. The right of a people to remedial self-determination is thereby governed by the sui generis violation of their self-determination.[67]

The conclusion based on Anaya's theory is that the right in article 3 should be regarded as the same right enjoyed by other peoples, but be interpreted in the context of the specific history of indigenous peoples and their contemporary issues.[68]

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[65] Ibid. par. 22.

[66] Anaya, Self-determination in the post-declaration era, pp. 189-191.

[67] Ibid. pp. 189-194.

[68] Ibid. p. 191.

3.3 Right to land, territories and resources

Articles 25, 26 and 28 construct the package of indigenous peoples' right to land, territories and resources (LTR).

Indigenous peoples' perception of land ownership differs from the common western one, because of their spiritual and cultural connection with the land.[69] Indigenous people have also stressed that obtaining land rights are essential to protecting their culture, as dispossession of their lands has historically resulted in the disintegration of their communities.[70]

Mattias Åhrén argues that there is an implementation gap regarding indigenous peoples' right to LTR. Most states recognize indigenous peoples' property and cultural rights to LTR and that they have treated indigenous people unjust in the past. However, it is rare that this recognition is reflected in the domestic judicial systems. Åhrén suggests that the reason is primarily financial. States have systematically breached LTR rights during their state-building, and therefore, "turning back the clock" is deemed too difficult and costly.[71]

3.3.1 Right to LTR which indigenous peoples' traditionally owned

Article 26(1) of the Declaration affirms that:

"[i]ndigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or used".

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[69] Article 25 and preambular paragraph 10 of the UNDRIP.

[70] United Nations Commission on Human Rights, *Report of the Working Group on the Draft Declaration on Indigenous Peoples* UN Doc. E/CN.4/2002/98, (6 Mars 2002), p. 18.

[71] M. Åhrén, *The provisions on lands, territories and natural resources in the UN Declaration on the Rights of indigenous peoples: an introduction*, in Making the Declaration work, [Hereinafter: Åhrén, The provisions on LTR] pp. 204-205.

The declaration does not qualify what this right entails, for example, if they can claim ownership to this land based on the provision. Whether indigenous peoples can claim ownership to LTR they have traditionally occupied but not currently occupy is in other words not explicitly determined in the declaration. This construction is probably the result of an "ambiguous compromise" between the drafting parties, leaving the final say in the matter to the judicial implementation.[72] Åhrén argues that the right to LTR in article 26 includes both property and cultural rights.[73] Regarding LTR that indigenous peoples traditionally and *currently* possess, article 26(2) grants a right to own, use, develop and control the LTR. The question is then, how to interpret the word "possess". Åhrén proposes that the term might include indigenous peoples' use of land (which traditionally, in a discriminatory conduct, has not given rise to property rights)[74]. He argues that state's domestic implementation of rights to LTR must take the distinct nature of indigenous land use into account when evaluating the indigenous peoples' possession. A conventional non-indigenous land use should, in other words, not be the measuring stick.[75]

3.3.2 Legal recognition and protection of the LTR

Article 26(3) proclaims:

> *"States shall give legal recognition and protection to [the LTR which indigenous peoples have traditionally owned]. Such recognition shall be*

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[72] An idea proposed by Gilbert and Doyle in J. Gilbert, & C. Doyle, 'A new dawn over the land: shedding light on collective ownership and consent', in S Allen & A Xanthaki (eds.), *Reflections on the Declaration on the Right of indigenous peoples*, Hart Publishing, 2011, p. 298.

[73] Åhrén, The provisions on LTR, p. 209

[74] Regarding the discriminatory perception of "native/aboriginal title", see Xanthaki, Indigenous rights and United Nations standards, pp. 246-249.

[75] Åhrén, The provisions on LTR, pp. 209-211

conducted with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned."

3.3.3 Right to redress

Since many indigenous people have been subjected to unjust dispossession of their lands[76] the criterium of current possession in article 26(2) poses a problem. The declaration recognizes this problem, and therefor grants the right to redress in article 28. The provisions in article 28 have been amended in relation to the draft declaration, as States expressed concerns with the right to restitution in regard to third party rights.[77]

Restitution and compensation are part of the redress-package delivered in the article, wherein restitution is the primary alternative, and compensation is a secondary alternative. Redress is pertinent when the "[LTR] which they have traditionally owned /…/ have been confiscated, taken, occupied, used or damaged without their free, prior and informed consent.". Compensation shall, according to the article, primarily be in the form of equitable LTR.

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[76] As affirmed in the sixth preambular paragraph of the UNDRIP.

[77] See J. Gilbert, *'Indigenous Rights in the Making: The United Nations Declaration on the Rights of Indigenous Peoples', International Journal on Minority and Group Rights,* NO 14 (2007), p. 228. Available from: BrillOnline (accessed 23 April 2017).

4 Analysis: the UNDRIP applied on the Doctrine of Discovery

In this analysis, I will apply the relevant provisions of the UNDRIP on the Doctrine of Discovery, in order to examine the legitimacy of the doctrine. I will build my analysis on the elements of the doctrine that I presented in chapter 2.4.

The Discovery Doctrine maintains that "first discovery", that is, when a land is first discovered by a European country, gave the state rights over the land and limited the indigenous peoples' land rights. The doctrine maintains that the "first discovery" occurs even when indigenous people possess that land, at the time of the "discovery". However, if the land is possessed by another European Christian country, the title by discovery is already granted to that country. In other words, the doctrine recognizes possession by other European countries, but not by indigenous peoples. Article 26 of the declaration states that indigenous peoples have rights to the land that they currently possess. In accordance with Åhrén's point of view, I interpret the possession-criterium in a non-discriminatory fashion, and include indigenous forms of possession. Considering that the doctrine does not recognize indigenous peoples' possession of land, but it does recognize European countries' possession, the "first discovery-element" violates the non-discrimination right in article 2.

The right of preemption, and the respective restriction on native title to occupancy, is described above as limitations to indigenous peoples' land rights. The doctrine thus dismisses indigenous peoples' ownership to their land. Article 26(2) grants occupancy-, utilization-, and ownership rights to the land that indigenous people possess, which I translate to complete land rights. In line with my arguments above, the native people in America possessed the land they inhabited. The doctrine rejects the peoples' ownership to this land, which is incompatible with the article.

The right of the "discovering state" to preemption limits the peoples' choice of buyer of the land they inhabit, if they decide to sell it. I regard determining who to sell the land that the people possess, with full ownership, an internal question for the natives. The declaration affirms self-determination regarding internal matters. Furthermore, article 2 of the declaration guarantees indigenous people the same rights as other people. Interpreting the right to sell one's land with the preemption-limitation is discriminating, since non-indigenous people are not subjected to the same limitation. In conclusion, the right to self-determination contradicts the right of preemption which is an element of the doctrine.

The indigenous people in USA have sold land to the state, under the condition of preemption. The sold land is, consequently, not currently in the peoples' possession. The right to restitution in article 28 of the declaration is applicable when there was an absence of the indigenous people's "free, prior and informed consent". In the situations when natives sold the land, one could argue that the dispossession was consensual. The condition of preemption was, however, not the object of the native's free, prior and informed consent. Can the lack of free, prior and informed consent regarding this condition disqualify a given consent to sell? Have the natives consented to this condition by selling, as a form of contract action? These questions are mainly related to contract law, and are too complex to debate in this essay. I consequently, leave this problem open for future discussion.

The right to redress is applicable when the land has been damaged pursuant to the wording of article 28. The land that the indigenous people have not sold could still be perceived as damaged, if the word is interpreted to include other types of damages than physical. Limiting the property right is a form of financial or legal damage, since it negatively effects the value of the land and subjects it to third-party-claims (the state being a third party, with the right of preemption). Restitution, in the case of applicability, would be to discard the right of preemption. The context of the term "damage", in

other words, relating to words as “confiscated, taken, occupied [and] used”, which are more concrete than “damage”, suggests that it requires physical damage. On the other hand, the wording does not exclude the more abstract interpretations, including financial and legal damage. Considering that the meaning of “damage” is ambiguous, it is perhaps best to regard the compatibility with the doctrine in this regard as inconclusive, and submit the question to national legal systems responding to it.

Another element of the doctrine is the limitation of indigenous people’s sovereign rights, through restriction of their choice of diplomatic and commercial relationships. Although diplomacy regards international relations, I perceive it as an internal matter, since it does not concern the relationship between the indigenous people and the state in which they live. If so, it is a right that is protected by the declaration. If it would not be regarded as an internal question, it could still be a violation of the declaration, since external self-determination is not explicitly excluded in the declaration. Limiting indigenous people’s sovereign rights, by referencing to “discovery”, was undemocratic and constituted a violation of the peoples’ right to self-determination. Recognizing this past wrongdoing, I advocate granting the people these sovereign and commercial right in the present-day on the basis of remedial self-determination. To summarize, several interpretations of the right to self-determination supports the conclusion that the limitations discussed in this paragraph are incompatible with the declaration.

Lastly, I will pay attention to the fourth preambular paragraph of the declaration, in which racist doctrines are deemed invalid. The Doctrine of Discovery conceives that Europeans and Christians are superior to other people; a land was only deemed “undiscovered” if no other *European Christian* country had “discovered” it; natives in USA were not given the custom respect for their rights, because of their “savagery”; European Christian states were perceived as “civilized” which warranted the trust relationship with the indigenous peoples; civilization was seen as a form of

compensation for the lost rights. The constructed superiority of Europeans premises the doctrine, because the limitations that the doctrine provides are based on this constructed superiority. The fourth preambular paragraph invalidates the doctrine with reference to these racist elements.

5 Conclusions

My ambition with this essay was to examine the legitimacy of the Doctrine of Discovery in light of the UNDRIP. I believe such discourse is necessary if the international community is going to discuss a repudiation of the doctrine. My conclusions regarding this compliance are the following. There are elements of the doctrine that are incompatible with the provisions of the declaration: the element of first discovery, the right of preemption, the limited native title, the racist premise of the doctrine, and the limitation of sovereignty. There are other aspects that are less conclusive, namely the applicability of the right of redress to the doctrine. Considering that the rights to land and self-determination are perceived as key provisions of the UNDRIP, which are violated by the just mentioned elements of the doctrine, my overall judgement is that the doctrine is illegitimate in light of the UNDRIP. This conclusion is further justified by the fourth preambular paragraph of the declaration, which outlaws racist doctrines.

The doctrine could be repudiated for several reasons, moral ones for example, but accordance with internationally established provisions (the UNDRIP) is one possible road to travel. The implementation gap discussed by Åhrén raises concern on the efficiency of a repudiation: will the states that have relied on the doctrine in their state-building try to correct the consequences of that reliance? Justice Marshall described the indigenous people of America "[as] brave and as high spirited as they were fierce" which was proven in the over 20-year process of drafting the UNDRIP. From experience, it is probably safe to conclude that restitution will require a fight from indigenous peoples, their allies and supporters.

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