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Indigenous Rights to Land

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Indigenous peoples' struggles for justice are global both in scope and in significance. Indigenous communities often span more than one state, they are subject to similar forms of human rights violations around the world, and these human rights violations are often shaped and exacerbated by global political and economic structures. Indigenous rights to land are central to understanding how and why this is so.

Indigenous rights to land are collective human rights, the recognition and realization of which are inextricably bound up with the rights of indigenous peoples to self-determination. To say that these rights are collective is to say that they are rights held and exercised collectively by indigenous peoples. To say that they are human rights is to say that indigenous peoples have these rights in virtue of basic and universal interests and capacities of human beings. As human rights, indigenous rights to land are inalienable and have moral, political, and legal priority over the interests of states.

Some have objected to characterizing indigenous rights to land as human rights of peoples on the grounds that human rights cannot be collective. However, it is an established norm of international human rights law that groups as well as individuals may be subjects of human rights violations; and most political and legal theorists agree that even though human rights are ultimately justified by interests and capacities of individual persons, any plausible list of human rights will include collective ones. From both a legal and theoretical point of view, then, the salient question is not whether there can be collective human rights, but how collective human rights should be understood and adjudicated in relation to individualistic ones. In the context of indigenous peoples' rights to land, the most pressing issues that arise from their being collectively held are: which interests and capacities of the persons who constitute an indigenous people establish that people's rights; how do a people's human rights relate to those of the persons who constitute it; and how do a people's human rights relate to the human rights of other persons and peoples, both indigenous and nonindigenous.

Insofar as indigenous peoples' rights to land are human rights, they have the same weight and normative force as other human rights. This means that they have moral, political, and legal priority over other interests, and that they form part of an interdependent set of rights, each of which must be interpreted in a way that is coherent with the others. The fact that indigenous rights to land are collective does not impact their priority over other interests and is not relevant to determining the extent to which their content limits and is limited by other human rights.

Indigenous peoples' human rights to land are ultimately justified by reference to the centrality of specific tracts of land or features of a territory in protecting or

realizing basic human interests and capacities of indigenous persons. In international human rights law, the fact that indigenous persons' basic human rights cannot adequately be protected or realized in the absence of protections for the capacities of their peoples to maintain and develop specific relationships to territory is captured by the idea that indigenous peoples have a special relationship to land. Indigenous peoples are recognized as having human rights to their traditional territories because it has been concluded that it is not possible for a state to respect the dignity of indigenous peoples, as persons or in communities, without extending these peoples decision-making authority over their traditional lands. This is why indigenous peoples' rights to land are properly described as universal: the interests and capacities that generate these rights are ones that must be protected and promoted for all human beings, everywhere. In the case of indigenous persons, this entails protecting and promoting their peoples' rights to land.

So described, the rights of indigenous peoples to have decisive say over what happens within and with regard to specific territories is not contingent on their proving that they are especially good stewards, or that any especially good consequence for the world community or for the population of the state they inhabit will follow from recognizing these rights. This is an important point to remember, as the fact that indigenous peoples around the world have often made common cause with advocates of environmental justice has sometimes been a source of confusion. Indigenous peoples' rights to land are grounded in duties to protect and promote the human rights of indigenous persons specifically; they are not – or at least, not primarily – grounded in general duties to protect the environment or to protect the interests of all people everywhere in a healthy environment. Indigenous persons have the same rights to a healthy environment as all other persons; however, these are distinct from indigenous peoples' rights to land.

The relationships to land that ground indigenous peoples' rights are ongoing, and they are neither ambiguous nor especially difficult to establish. When a people's livelihood is bound up with fishing a river, or herding through a territory, or hunting a tract of land, or employing a specific form of cultivation, then their members' rights to practice a livelihood are at stake in decisions about land. When a people has developed medical practices specific to the resources, risks and illness typical of their landscape, then their members' rights to health are at stake in decisions about land. When family members are buried in a place, when family relationships are defined, expressed and preserved in decisions about who is properly empowered to access, use, and manage land, or when a crucial element of raising and caring for children is establishing them in a relationship to the land, then members' rights to family are at stake in decisions about land. When specific sites and features in a landscape play a central role in religious practice, a people's right to practice religion is at stake in decisions about land. When specific sites and features in a landscape serve as a source and repository of a people's history and are used by a people to explain and develop their connections to one another and to other peoples, members' rights to culture, to freedom of expression, and to political participation are at stake in decisions about land. Insofar as all these connections to the land run through a people's way of organizing themselves and their relationships to one another, the rights they establish with respect to the land are properly held and exercised as a people.

When land figures in the life of a people in any of the ways described above, it becomes an element of members' social or communal selves: the selves who exist in and as part of community. All persons have social selves; for many indigenous persons, these selves are partially constituted by specific tracts of land or features of a territory. In many cases, specific territories are so extensive and inextricable an element of indigenous persons' social selves that undermining their people's relationship to land is in effect an assault on these social selves. This effect of undermining an indigenous people's relationship to the land has not been lost on states and explains why policies aimed at eradicating indigenous cultures have so often included forcible removal from land, and policies aimed at appropriating indigenous lands have so often included the destruction of indigenous cultures. One influential account of genocide argues that what distinguishes it from other harms, and what makes it an atrocity, is the aim of extinguishing social selves. If this account is correct, then there are circumstances under which attacks on the integrity of an indigenous people's land base may appropriately be described as genocidal.

So indigenous peoples' relationships to land are not difficult to identify or verify, and they establish interests in access, use, and disposition of land that are of obvious importance from both a moral point of view and for the smooth functioning of social relations. On the face of it, then, there is no practical, moral, or social reason to think that the interests at stake for an indigenous people are any less adjudicable or significant than the interests at stake for other parties in disputes over land. However, indigenous peoples' interests in their lands have been and continue to be treated as though they are ambiguous and difficult to adjudicate in Anglo-European legal and philosophical

discourses. Typical among these are Lockean theories of property. On John Locke's interpretation of natural law, it was reasonable for European colonists to treat land used and occupied by indigenous peoples as open for appropriation, and it was unreasonable and an act of aggression for indigenous peoples to resist these appropriations because indigenous peoples did not change the landscapes within which they lived in a way that any person could recognize as beneficial, and so they could not reasonably expect people new to the territory to treat the land as in use. Moreover, indigenous communities were characterized as claiming authority over too great an expanse of territory given the needs and capacity of their communities so that to accept their claims would amount to a waste of humanity's (commonly held) natural wealth. According to this argument, even if indigenous people in fact are using and occupying land, they do not count as users or occupiers for purposes of moral reasoning. Consequently, they have no right to exclude others from their traditional territories and a duty to accept and support use of that territory by others, even to the point of foregoing access and use themselves. Moreover, others who might be inclined out of sympathy or goodwill to accept an indigenous people's use as morally compelling must set that aside in the face of a claim by someone who does count as a user or occupier for purposes of moral reasoning.

Although Locke's argument is very problematic, it continues to be influential. For example, according to the legal doctrine of discovery, modern states' authority to determine what happens to and within lands traditionally occupied and used by indigenous peoples flows legally from the fact that these lands were terra nullius (literally "empty land") when the political entities from which these states descend first claimed sovereignty with respect to them. The claim in describing these areas as terra nullius is not that the lands in question were literally void of habitation at the time sovereignty was asserted by the modern state's forebears, but that prior occupation and use of these lands by indigenous peoples is irrelevant for purposes of determining whether that initial assertion was felicitous. At issue is whether an indigenous people's legal and political rights regarding land should be regarded as prior to and independent of the constitutional and judicial structures of the state within whose international jurisdiction it now appears to fall, or whether these rights should be understood as subsequent to and dependent upon that state's constitutional and judicial structures. If the former, then the indigenous people's legal and political rights operate as a constraint on the state's authority and the powers it may claim within its internationally recognized borders. If the latter, then the precedents and priorities of the state's constitutional and judicial order may properly be treated as constraints on the form and content of the indigenous people's rights.

Ironically, the international legal basis for the doctrine of discovery is the recognition of occupation as a valid mechanism for establishing sovereignty over territory. Governments seeking to establish that their territory was terra nullius at the time of the state's formation despite the presence of indigenous peoples have offered two lines of argument: that indigenous peoples within the territory over which the state now claims absolute sovereignty were not sufficiently regular or settled in their use of specific tracts of land to count as occupants; and that indigenous peoples did not have the requisite authority or control over the lands they inhabited to count as in possession of it. The plausibility of these arguments is undermined by the existence of numerous treaties between predecessors of these states' governments and the indigenous peoples whose standing as occupants in now denied. The existence of treaties is clear evidence that the new arrivals believed the people already there to have reliable and extensive governance regimes among themselves and with respect to the land; otherwise, there could have been no expectation that those with whom the agreements were undertaken would be able to deliver their part of the bargain.

Even if we accept that these terra nullius arguments are offered in good faith, they presuppose a view of when territory may be considered unoccupied under international law which has been definitively rejected by modern international courts. Despite this, legal precedents presupposing the international legitimacy of terra nullius are still treated as authoritative in many national jurisdictions. Among national jurisdictions whose legal systems have rejected terra nullius many continue to consider arguments that the indigenous rights that are acknowledged to have existed at the time of a state's formation need not be taken into account because they have since been "extinguished."

In arguments that indigenous rights have been extinguished, it is allowed that an indigenous people had rights at the time of the state's founding. However, it is claimed that at some point between then and now, these rights have disappeared or been superseded. It is not clear how this is supposed to have happened. Insofar as indigenous rights to land are human rights, they are inalienable, and so it is not within a state's power to make them go away. At most, then, extinguishment arguments may purport to establish that the state ought to be accepted as the primary authority for interpreting and adjudicating claims arising from the indigenous people's rights. Even this much more limited claim is implausible. Insofar as

the relationships to a specific territory that establish an indigenous people's rights with respect to it are acknowledged to predate the establishment of a state's constitution as a political entity, it is acknowledged that these rights are justified independently of the particular structures, priorities, or citizenship regime of that state. Consequently, there is not a plausible argument from the way indigenous rights fit into the state's larger political and legal structures to deferring to the state's judgment. Ultimately, arguments for extinguishment are confused both about the grounding of indigenous rights to land and about the circumstances under which a state could plausibly claim jurisdictional authority regarding the interpretation and adjudication of indigenous rights. The priority that the governments of states like Canada continue to place on extracting acquiescence in extinguishment in contemporary negotiations with indigenous peoples is similarly confused.

In light of this intellectual and legal history, arguments for universal duties of distributive justice that depart from the assumption that no one has any greater claim to benefit from the land and resources of a particular territory are very troubling. These arguments take as axiomatic an instrumentalist approach to the value of land and a people's living environment that, although widely accepted within a particular strand of Western liberalism, is deeply contested both within the Western intellectual tradition and outside of it. For example, it is far from obvious that none of us has any better claim to benefit from the land and resources of a particular territory than others; or that even if this were true, the benefits from land and resources that matter most from a moral point of view can be distributed in the way these theorists envision.

Such casual dismissal of the moral significance of historical, cultural, and spiritual connections as not, ultimately, of the requisite consequence or substance to compel restraint or reorientation of action should give us pause, not just for its resonance with Lockean and terra nullius arguments, but for the implicit contrast between (concrete, material) economic interests on the one hand and (ethereal, emotional) historical, cultural, and spiritual interests on the other. This contrast is false (historical, cultural, and spiritual interests in land can be highly concrete and physical, and economic interests can be highly abstract and symbolic) and misleading. In fact, for the instrumentalist approach to makes sense, we must assume that land is primarily valuable not just for how it may be used, but for how it may be used in relation to global economic markets. This tacit assumption about how land should be valued occludes the crucially important question of not just what but whose valuation ought to be determinative of how land is used.

The heart of most indigenous peoples' claims with respect to land is a claim to authority over a specific territory or resource. At the minimum, this is a claim to absolute title, including reversionary rights and rights of expropriation. However, a key element of almost all indigenous land claims is also a claim to jurisdiction over the use and disposition of land, water, minerals, wildlife, and other resources within a specified territory, including the right to refuse access and use if and as the indigenous people sees fit. The language of title does not adequately capture this feature as it focuses attention on ownership and registration with the explicit goal of facilitating transfer and alienation. In fact, one of the primary purposes of the legal concept of aboriginal title in Australia and Canada has been to facilitate third-party access to land and resources over which indigenous peoples have plausible legal claims.

Yet, even if the language of title does not fully capture the nature of most indigenous land claims, securing explicit documentation of their rights with respect to specific tracts of land is a practical priority for many peoples. In the absence of such documentation, especially with regard to the boundaries of their land and the formal relationship between their rights and other possible legal bases for rights of use and disposition, an indigenous people may have difficulty making their rights effective, especially if the state proves unwilling or incapable of acting in good faith to support them.

A common concern about indigenous rights to land is how recognizing these rights may impact nonindigenous persons who reside or work in an indigenous people's territory, or who have other important interests at stake with respect to that territory. Insofar as we acknowledge that indigenous peoples have human rights, we must allow that there will be cases in which the rights of an indigenous people will take precedence over or otherwise constrain the projects, plans, or interests of others. The concern, then, cannot be the mere possibility of nonindigenous persons' plans or interests having to give way in the face of indigenous persons' or peoples' rights. Nor can the concern be that nonindigenous persons may find themselves subject to governance by an indigenous people's institutions or by legislatures who have been selected and authorized by a predominantly indigenous population. After all, the argument against state governance of indigenous lands is not that the states in question are nonindigenous, but that they are not properly constituted as political authorities within the lands in question due to prior rights of indigenous peoples to exercise authority

over land and resources within a specific territory. Insofar as it is well motivated, then, concern about how recognizing indigenous rights to land will impact nonindigenous persons must be about how nonindigenous persons may justly be represented by and participate in indigenous peoples' governance structures. This is the difficult but familiar question of how to ensure just governance for minority groups.

Perhaps the best framework for thinking about the nature of indigenous peoples' rights to land is the framework of "permanent sovereignty over natural resources." This phrase emerged from the decolonization movement of the 1950s and 1960s. It targets one of the core assumptions of colonial administrative structures: that it is acceptable and right that the land and resources of some peoples be administered for the sake and in accordance with the priorities of others. To say that indigenous peoples' rights to land are rights to permanent sovereignty over their natural resources is to say that it is wrong and unacceptable that their land and resources be administered for the sake of and in accordance with the priorities of someone else. This captures both the insistence of many indigenous peoples that they be recognized as the ultimate source and adjudicator of rights with respect to their land, and the reality that the governance structures to which many of these peoples are subject are colonizing.

We cannot properly appreciate or engage with the injustices indigenous peoples experience without appreciating and engaging with indigenous rights to land. This requires us to reflect on the extent to which colonizing and racist assumptions may continue to inform our thinking about human rights and global distributive justice, and about the moral value of states.

Related Topics

► Group Rights
► Human Rights
► Imperialism
► Indigenous Peoples
► Self-Determination
► Sovereignty
► Zapatistas

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Inept States

► Poverty
► Rawls, John

Inequality

► Global Democracy
► Global Egalitarianism
► Global Justice

Intellectual Property Rights

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Familiar rationales for intellectual property emphasize the benefits of providing creators and inventors with exclusive monopoly rights of limited duration for promotion of longer-term public interest. Balancing interests of